

Cornell Law School Library

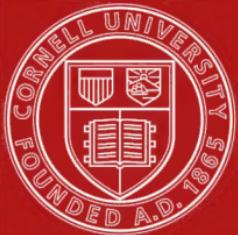
Cornell University Library
KF 5599.L67

A treatise on the law of eminent domain



3 1924 020 019 257

law



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

A TREATISE
ON THE
LAW OF EMINENT DOMAIN
IN THE
UNITED STATES.

BY
JOHN LEWIS.

CHICAGO:
CALLAGHAN & COMPANY.
1888.

M.B.H.

Entered according to Act of Congress, in the year eighteen hundred and eighty-eight,
By JOHN LEWIS,
in the office of the Librarian of Congress, at Washington, D. C.

KF
5599
L67

PREFACE.

The work, which is now offered to the Profession and the Public, was commenced fourteen years ago and has been prosecuted with as much assiduity as the increasing demands of professional life would permit. Within that time the number of reported cases upon the subject treated has doubled; and, what is of greater moment, decisions of vast importance and far-reaching consequence have been rendered, which will, if they have not already, produce radical changes in many of the legal aspects of the subject.

Great attention has been paid to the constitutional side of the question, and nearly half the book is occupied with a discussion of the proper interpretation of the words "taken," "public use" and "just compensation," as used in the constitutions of the several States. The manner in which this part of the subject has been treated will be best ascertained by an examination of the work itself, but a few words of explanation may not be improper. Very early in the preparation of the work the writer became convinced that the earlier cases as to what constitutes a taking were based upon a radically defective interpretation of the constitution, which not only denied the right to compensation in many cases where it ought to be given, but greatly embarrassed the property-owner in obtaining it in those cases in which it was conceded to be due. These early cases attacked the question wrong end first, so to speak, through the word *taken* instead of through the word *property*. It is only by having a clear and correct conception of the idea of *property* that a uniform, consistent and just application of the constitution can be made to the many complicated and varied cases which come up for adjudication. It seems to the writer that the principles elaborated in the third

chapter, and which are supported by a constantly increasing weight of authority, will enable such an application to be made.

The chapter on the meaning of the words "public use," is written upon the assumption, which accords with all the authorities, that the words import a limitation upon the power of the legislature. Conceding this to be the intent of the words, whether the conclusions reached by the author are correct must be left for the reader to judge. They have been reached after years of consideration and the gradual resolution of many doubts and questions. One doubt concerning the matter, however, remains, and that is, whether the words in question were originally intended to operate as a limitation at all. The language of the provision does not indicate it. "Private property shall not be taken for public use without just compensation." If the intent had been to make the words, *public use*, a limitation, the natural form of expression would have been: "Private property shall not be taken *except* for public use, nor without just compensation." It is certainly questionable whether anything more was intended by the provision in question than as though it read, "Private property shall not be taken *under the power of eminent domain* without just compensation." Those cases which virtually give this interpretation to the provision and at the same time hold that the words, public use, are a limitation, it seems to the author are not logically sound. In some of the States the form of the provision is such as to leave no room for doubt that a limitation was intended.

It is unnecessary to comment upon that part of the work which treats of "just compensation," or upon what has been written concerning the effect of the constitutional provision as a whole.

The author has endeavored to make the citation of authorities exhaustive, and hence numerous cases are sometimes referred to in support of propositions which are not disputed. While this may seem unnecessary, it leads to no confusion and the advantage is gained of having substantially all the authorities at hand upon a given point when desired for any purpose.

Over six thousand cases are referred to, and the comparative extent to which each State contributes to the number might be made the subject of an interesting commentary, when it is remembered that they are an indication of material progress and of

public improvements, but perhaps most can be said in the fewest words by giving the list itself and leaving the reader to his own reflections:

New York, - - -	830	Kansas, - - -	88
Massachusetts, - - -	599	Georgia, - - -	87
Pennsylvania, - - -	534	North Carolina, - - -	83
Illinois, - - -	377	Maryland, - - -	81
Indiana, - - -	366	Tennessee, - - -	67
New Jersey, - - -	338	Virginia, - - -	65
Iowa, - - -	259	Alabama, - - -	63
Missouri, - - -	232	Texas, - - -	61
Maine, - - -	215	Nebraska, - - -	54
Wisconsin,	208	Mississippi, - - -	44
New Hampshire, - - -	186	Arkansas, - - -	43
Ohio, - - -	171	South Carolina, - - -	43
Michigan, - - -	169	West Virginia, - - -	34
Minnesota, - - -	159	Rhode Island, - - -	29
Kentucky, - - -	139	Oregon, - - -	26
California, - - -	135	Delaware, - - -	19
Connecticut, - - -	133	Colorado, - - -	14
Louisiana, - - -	98	Nevada, - - -	12
Vermont, - - -	98	Florida, - - -	6

The plan has been adopted of numbering the notes of each section consecutively, and in order to prevent confusion the notes of each section are headed by the number of the section to which they belong. This plan is believed by the author to be the most convenient for citation and reference, and advantage has been taken of it to refer, in the table of cases, to the particular note or notes in which each case appears.

JOHN LEWIS.

CHICAGO, June, 1888.

TABLE OF CONTENTS.

CHAPTER I.

THE POWER DEFINED AND DISTINGUISHED.

- § 1. The power defined.
- 2. Definitions considered.
- 3. Nature of the power.
- 4. Eminent domain distinguished from taxation.
- 5. Distinguished from special assessments or betterments.
- 6. Distinguished from the police power.
- 7. Distinguished from the damaging or destruction of property in cases of necessity.
- 8. Distinguished from the war power.

CHAPTER II.

CONSTITUTIONAL PROVISIONS.

- § 9. In general.
- 10. The constitutional provision a limitation: States which have none.
- 11. The provision in the federal constitution.
- 12. Effect of a change in the constitution.
- 13. The provisions apply only to the power of eminent domain.
- 14-52. Constitutional provisions of the different States.

CHAPTER III.

WHAT CONSTITUTES A TAKING: GENERAL PRINCIPLES

- § 53. Statement of the question.
- 54. What is property?
- 55. Meaning of the word property in the constitution.
- 56. Principles which determine when there has been a taking.
- 57. Changes which the law has undergone.
- 58, 59. Leading cases.

CHAPTER IV.

WHAT CONSTITUTES A TAKING: WATERS.

- § 60. Streams defined and classified.
- 61. Rights of the riparian owners in the flow of the stream.
- 62. Abstracting or diverting the water of a stream.
- 63. Increasing the quantity of water.
- 64. Interfering with the regularity of the current.
- 65. Pollution of the water.
- 66. Changing the current by works in, across or near the channel.
- 67. Works which set back the water and cause a flooding.
- 68. Making a private stream public, or navigable, by statute.
- 69. Rights of riparian owners on private navigable streams.
- 70. An interference with such rights is a taking.
- 71. Damages by reason of improving navigation.
- 72. What streams are public.
- 73. Rights of riparian owners on public navigable streams.
- 74. Interfering with the flow of public streams.
- 75. Damage to authorized works on public streams.
- 76. Title to lakes and ponds.
- 77-83. Rights of riparian owners on public waters.
- 84. Injury to riparian rights a taking.
- 85. Miscellaneous cases in regard to public waters.
- 86. Damages from discharge of sewer.
- 87. Turning water upon land; seeping; saturating.
- 88. Rights respecting surface water.
- 89. What interference with surface water is a taking.
- 90. Subterranean waters.
- 91. Interference with natural barriers against water.

CHAPTER V.

WHAT CONSTITUTES A TAKING: STREETS AND HIGHWAYS

I. *Street Grade Cases.*

- § 92. Early English cases.
- 93. Value of English precedent in constitutional questions.
- 94. Leading cases in the United States. *Callender v. Marsh.*
- 95. Other early cases.
- 96. The general doctrine.
- 97. *Ratio decidendi* of these cases.
- 98. The Ohio cases.
- 99. The law in Kentucky.
- 100. Rights of abutting owners.

- § 101. Lowering grade: Right to support of soil.
- 102. Raising grade: Encroachment of the filling.
- 103. Damages from surface water.
- 104. Interfering with natural streams.
- 105. Unlawful change of grade.
- 106. When the work is negligently done.
- 107. Power to establish grades a continuing one.
- 108. Power of city to make compensation.
- 109. Miscellaneous cases.

II. Railroads in Streets.

- 110. In general.
- 111. Is a railroad a legitimate use of a highway?
- 112. Right to compensation.
- 113. Right to compensation: Fee in abutting owner.
- 114. Fee in public: Rights of abutting owners.
- 115. Fee in public: Right to compensation.
- 116. Authority to occupy a street, how granted and construed.
- 117. Rights of company as to manner of constructing and operating road.
- 118. Railroads across highways.
- 119. Right of municipality having the fee to receive compensation.
- 120. When the owner is estopped from claiming damages.
- 121. Measure of damages: Remedies.
- 122. Further, as to rights of abutting owners.
- 123. Right to compensation in case of elevated railways.
- 124. Horse railroads in streets.
- 125. Horse railroads: Miscellaneous points.

III. Other Uses of Streets Generally.

- 126. Uses of streets generally.
- 127. Sewers and drains.
- 128. Water pipes.
- 129. Gas pipes.
- 130. Steam, electricity, etc.
- 131. Telegraph and telephone poles.
- 132. Markets.
- 133. Miscellaneous cases.
- 134. Vacating streets.

CHAPTER VI.

OTHER CASES OF TAKING.

- § 135. Impairing franchises.
- 136. When the franchise is not exclusive.
- 137. When the franchise is exclusive.

- § 138. What is an interference with an exclusive franchise? Bridges and ferries.
- 139. Same: Other franchises.
- 140. Change of use, or an additional use.
- 141. Change of use: Instances.
- 142. Interfering with an easement.
- 143. Possessory rights in public lands.
- 144. Mapping territory into streets and blocks for future improvements.
- 145. Justifiable entries.
- 146. Injuries by blasting.
- 147. Injury to business.
- 148. Highways laid out adjacent to but not taking one's land.
- 149. Interfering with the right of exclusion.
- 150. Easement of levee in Louisiana.
- 151. Interfering with the right of support.
- 152. Polluting the atmosphere.
- 153. Miscellaneous decisions as to what constitutes a taking.
- 154. Damages from negligence.
- 155. Taking under the guise of taxation.
- 156. Taking under the guise of the police power.

CHAPTER VII.

MEANING OF THE WORDS "PUBLIC USE."¹

- § 157. Taking for private use unauthorized.
- 158. The question of public use a judicial one.
- 159. State of the authorities as to the meaning of the words "public use."
- 160. The question of public use not affected by the agency employed.
- 161. Nor by the fact that the use or benefit is local or limited.
- 162. Nor by the necessity or lack of necessity for the condemnation.
- 163. The words "public use" a limitation.
- 164. Statement of doctrines.
- 165. Proper construction of the words "public use."
- 166. Highways: Questions of public use, as affected by their character, purpose or other circumstances.
- 167. Private roads.
- 168. Toll roads, bridges and ferries.
- 169. Canals.
- 170. Railroads, their connections and appurtenances.
- 171. Lateral railroads.
- 172. Other means of transportation and communication: The telegraph, petroleum tubes, etc.
- 173. Urban improvements: Sewers, water, gas, etc.
- 174. Public buildings: Schools, markets, hospitals, etc.

§ 175 Public parks and pleasure drives.
 176. Cemeteries.
 177. Improvement of navigation.
 178. Water mills and water power.
 179. The same: Leading cases.
 180. The same: Law in the different States at the present time.
 181. The same: Review of the decisions.
 182. Massachusetts doctrine that the mill acts do not fall under the eminent domain power.
 183. The mill acts fall under the eminent domain power.
 184. Development of mines.
 185. Drains, ditches, levees, etc., for improving wet and overflowed land.
 186. Decisions referring such improvements to the police power, or power to legislate for the general welfare.
 187. These improvements referable to the eminent domain power.
 188. The question of public use.
 189-199. Decisions of the different States.
 200. Levees, dikes, etc.
 201. The public health.
 202. Irrigation.
 203. Taking for the United States.
 204. Taking all of the tract when only a part is required.
 205. Miscellaneous cases: Settling private controversies.
 206. Combination of public and private use in the same act or proceeding.

CHAPTER VIII.

MEANING OF THE WORDS "DAMAGED," "INJURED," OR "INJURIOUSLY AFFECTED."

I. *In Statutes.*

§§ 207-218. Statutes giving damages for change of grade: Decisions of the different States.
 219. Statutes giving damages for railroads in streets.
 220. Statutes giving damages in other cases.

II. *In Constitutions.*

221. Constitutional provisions.
 222. The terms "damaged," "injured" and "injuriously affected" are synonymous.
 223. Damages from change of grade.
 224. The same: Decisions in Alabama and Pennsylvania.
 225. Damages by railroads in streets.
 226. Damages by other uses of streets.

- § 227. Impeding access to premises by interfering with public ways not in front of same.
- 228. Competing ferries, bridges, etc.
- 229. Interference with water rights.
- 230. Dust, smoke, noise, vibration, etc.
- 231. Miscellaneous cases.
- 232. The words in question were intended to enlarge the right to compensation.
- 233. They include any physical injury to property not held to be a taking.
- 234. Also any interference with private rights not held to be a taking..
- 235. And, generally, any damage to property arising from an interference with a right, public or private, which does not amount to a taking.
- 236. Damages not embraced by the words in question.

CHAPTER IX.

THE STATUTORY AUTHORITY.

- § 237. Power of the legislature generally.
- 238. The necessity for exercising the power is exclusively for the legislature.
- 239. The propriety of exercising a delegated power rests with the grantee.
- 240. The authority to condemn must be expressly given.
- 241. How the authority may be given.
- 242. To whom authority may be given.
- 243. Delegation and transfer of authority: Contractors and agents.
- 244. A lease of the property and franchises at the pleasure of the legislature.
- 245. The manner of proceeding may be changed at the pleasure of the legislature.
- 246. The right to impose additional liabilities.
- 247. Effect of the repeal, amendment or expiration of statutes.
- 248. General and special laws.
- 249. Effect of a change in the form of municipal government.
- 250. Conflict of jurisdiction between different authorities having power in the same territory.
- 251. Statutes have no extra-territorial effect.
- 252. When a naked authority to condemn may be exercised according to previous statutes, and when not.
- 253. The authority must be strictly pursued.
- 254. Statutes giving authority to condemn are strictly construed.
- 255. Construction of statutes as to location.
- 256. Particular acts construed.

- § 257. Meaning of the words "to," "from," "at" or "near" a place, in statutes describing termini and location.
- 258. Change of location.
- 259. Successive appropriations.
- 260. Where the provisions of one statute are adopted by another, or extended to another jurisdiction.
- 261. Validity and effect of statutes legalizing defective proceedings.

CHAPTER X.

WHAT MAY BE TAKEN.

- § 262. All property subject to the right.
- 263. Money, choses in action and other personal property.
- 264. Public lands and lands held by grant from the State or condemning authority.
- 265. Property affected by contracts, settlements or otherwise, or held for particular uses.
- 266. Taking railroad property for highways and streets.
- 267. To what extent one railway company may take the property of another.
- 268. Railroad crossings.
- 269. Taking railroad property for other public uses.
- 270. Taking highways and streets.
- 271. Bridges, turnpikes, ferries, canals and mill property.
- 272. Property of gas and water companies, parks, cemeteries, school property, etc.
- 273. Works upon, across or over navigable waters.
- 274. Corporate property and franchises may be taken.
- 275. Exclusive rights and privileges.
- 276. General principles deducible from the foregoing decisions in respect to the taking of property already devoted to public use.
- 277. Extent of interest which the legislature may authorize to be taken.
- 278. What right, estate or interest may be taken or acquired under particular statutes.
- 279. How much may be taken.
- 280. Instances.
- 281. Construction of statutes prohibiting the taking of certain buildings and enclosures: Dwellings.
- 282. The same continued: Other buildings and structures.
- 283. The same continued: Gardens, orchards, yards and other enclosures.
- 284. Section 92 of the English land clauses consolidation act.
- 285. What may be taken under the term "land," "ground," etc.
- 286. Designating property to be taken.
- 287. What may be taken under particular statutes.

CHAPTER XI.

ACQUISITION OF PROPERTY BY AGREEMENT OR PRESCRIPTION.

- § 288. The power to obtain property by agreement.
- 289. Who are competent to agree or convey.
- 290. Sufficiency of the description in deeds and contracts.
- 291. The title conveyed, or which may be acquired.
- 292. Conveyances upon condition.
- 293. Effect of conveyance as to damages to other property of the grantor.
- 294. Release of damages.
- 295. Oral stipulations inconsistent with written contracts.
- 296. Specific performance, and other remedies.
- 297. By and against whom the agreements may be enforced.
- 298. Oral agreements and licenses.
- 299. Particular contracts construed.
- 300. Rights by prescription.

CHAPTER XII.

PRELIMINARY AND MISCELLANEOUS MATTERS PERTAINING TO PROCEEDINGS.

- § 301. Necessity of an attempt to agree.
- 302. What is a sufficient attempt to agree.
- 303. How excused or waived.
- 304. How the inability to agree should be alleged and shown.
- 305. Priority of right to appropriate specific property: Mill cases.
- 306. The same continued: Railroads and other public works.
- 307. The property must be legally designated: Plans, surveys, etc.
- 308. When an ordinance, resolution or vote of a corporate body is essential.
- 309. When a previous refusal of some other tribunal is essential to jurisdiction.
- 310. Other preliminaries.
- 311. Of the right to a common law jury.
- 312. It is sufficient, in any event, if a jury trial may be had on appeal.
- 313. What tribunal is sufficient.
- 314. Nature of the proceeding generally: Whether a "suit," "action," "special proceeding," etc.
- 315. Jurisdiction of the Federal Courts: Removals.
- 316. Venue.

CHAPTER XIII.

THE PARTIES TO PROCEEDINGS AND THE VARIOUS ESTATES AND INTERESTS TO BE CONSIDERED.

- § 317. General view.
- 318. Grantor and grantee.
- 319. In case of executory contracts.
- 320. Heirs, devisees and personal representatives.
- 321. Trust estates.
- 322. Husband and wife.
- 323. Dower.
- 324. Mortgagees.
- 325. Judgment creditors and others holding liens under statutes.
- 326. Life tenants, lessees and reversioners.
- 327. Tenants in common and joint tenants.
- 328. Infants.
- 329. Towns and public authorities as parties.
- 330. Persons in possession of public lands.
- 331. Other rights and interests which must be considered.
- 332. Claims or interests for which compensation need not be made.
- 333. The proper plaintiff in condemnation proceedings.
- 334. Proper parties where the initiative is in owner: Mill acts.
- 335. Construction of statutes in regard to parties.
- 336. Joinder of parties.
- 337. New parties, misjoinder, etc.
- 338. Death of a party, or change of title pending proceedings.
- 339. Effect of omitting a necessary party.
- 340. What constitutes making a person a party?
- 341. General conclusions and principles in regard to parties.

CHAPTER XIV.

OF THE PETITION, COMPLAINT OR OTHER FORM OF AP- PLICATION.

- § 342. Scope of the chapter.
- 343. When a petition is necessary.
- 344. When not necessary.
- 345. Addressing, signing, verifying and filing.
- 346. When the signers must include a certain proportion of the prop-
erty involved, or of the owners thereof.
- 347. When required to be signed by a certain class of persons.
- 348. General requisites as to form and substance.
- 349. Statement of parties, owners and persons interested.

§ 350. Description of the property taken, or of the location of the improvement.
 351. Descriptions held sufficient.
 352. Descriptions held insufficient.
 353. Stating the purpose of the taking.
 354. Stating the necessity for the taking.
 355. Statement of title.
 356. Stating the nature of the injury or damage.
 357. Must show inability to agree.
 358. Showing neglect or refusal of some other tribunal to make the improvement.
 359. Joinder of improvements.
 360. Cross petition.
 361. Amendments.
 362. Waiver of defects in the petition.

CHAPTER XV.

NOTICE OF PROCEEDINGS.

I. *Constitutional Requirements.*

§ 363. Cases holding that notice need not be given.
 364. Cases holding that notice must be given.
 365. "Due process of law" requires notice.
 366. What is sufficient as to the subject-matter of the notice?
 367. What is sufficient as to the manner of giving notice?
 368. Giving notice where not required by statute.

II. *Statutory Requirements.*

369. The notice required by statute is jurisdictional and must be given.
 370. Meaning of "reasonable notice" in statutes.
 371. Form of the notice generally.
 372. Specifying time and place.
 373. Signing.
 374. Describing the property taken.
 375. Stating the nature or purpose of the proposed action.
 376. Describing the location or improvement.
 377. Meaning of the terms, "owners," "occupants," etc.
 378. Serving, publishing, posting, etc.
 379. Waiver of notice by appearance or otherwise.
 380. Who is bound or affected by a particular notice.
 381. The proof of notice.
 382. The record must show a compliance with the statute as to notice.
 383. Who may take advantage of want or defect of notice.
 384. Notice of adjournments, and of other steps in the proceedings.
 385. One entitled to notice is not bound, if not notified.

CHAPTER XVI.

OBJECTIONS TO THE APPLICATION.

- § 386. General considerations.
- 387. Where the application is to a ministerial officer or board.
- 388. Where the application is to a court.
- 389. Manner of raising objections apparent upon the face of the papers.
- 390. Manner of raising other objections. Propriety of a plea or answer.
- 391. Questioning the legal incorporation of the petitioner.
- 392. Controverting a compliance with the conditions imposed by the statute.
- 393. The question of necessity.
- 394. Former proceedings for the same purpose.
- 395. Other objections.
- 396. Defences where proceedings are instituted by the owner.
- 397. Practice in hearing objections.
- 398. Amendments.
- 399. Waiver of objections by going to a hearing on the question of damages.

CHAPTER XVII.

SECURING THE TRIBUNAL TO ASSESS DAMAGES

- § 400. The case stated.
- 401. The order or warrant.
- 402. The writ of *ad quod damnum*.
- 403. Some further points as to the appointment and summoning of commissioners, etc.
- 404. Mandamus to compel the appointment of commissioners.
- 405. The qualifications of commissioners, jurors, etc.
- 406. Whether the record should show that the commissioners, jurors, etc., possessed the qualifications required by law.
- 407. Waiver of objections to commissioners, jurors, etc.
- 408. Vacancies, effect of, and how filled.
- 409. Effect of the disagreement of special juries.
- 410. The presiding officer of special juries, his qualifications, duties, etc.

CHAPTER XVIII.

PROCEEDINGS BY AND BEFORE THE CONSTITUTED TRIBUNAL.

- § 411. The oath to be taken.
- 412. The form and sufficiency of the oath.
- 413. What the record should show as to the oath taken.
- 414. Waiver of defective oath.
- 415. The time and place of meeting and of acting.
- 416. Mode of procedure before the commissioners: Evidence, etc.
- 417. What questions may be considered.
- 418. Adjournments.
- 419. Whether a majority may act or decide.
- 420. Receiving *ex parte* communications.
- 421. Receiving entertainment.
- 422. Other improprieties.
- 423. Power of commissioners to reconsider or amend their report.
- 424. View of the premises by the jury.
- 425. Effect to be given the view.
- 426. The right to open and close.
- 427. The practice as to consolidation of cases and separate trials.
- 428. Instructions.
- 429. Arbitration.

CHAPTER XIX.

EVIDENCE.

- § 430. The general rules of evidence apply.
- 431. Competency of evidence generally.
- 432. The burden of proof.
- 433. Competency of witnesses generally.
- 434. Limiting the number of witnesses.
- 435. Opinion of witness as to value.
- 436. Opinions as to the amount of damages or benefits.
- 437. Who are competent to give such opinions.
- 438. Opinions of witnesses as to other matters.
- 439. Admissions.
- 440. Whether the owner must prove his title.
- 441. Estoppel to deny title.
- 442. What is sufficient proof of title.
- 443. Proving sales of similar property.
- 444. Proving the cost of the property or of improvements thereon.

- § 445. Proving a sale of property claimed to be damaged made after the damage has been incurred.
- 446. Offers to buy or sell.
- 447. Purchases by the party condemning.
- 448. Assessment for taxation.
- 449. Reports of commissioners, etc., as evidence.
- 450. Miscellaneous points.

CHAPTER XX.

JUST COMPENSATION AND DAMAGES.

- § 451. Right to compensation when the constitution does not require it..
- 452. Statutes which authorize a taking must provide for compensation.
- 453. Exceptional cases in New Jersey and Pennsylvania.
- 454. Express constitutional provisions with reference to the time or manner of making compensation.
- 455. Questions which arise when the constitution is silent in these respects.
- 456. As to the time of making compensation.
- 457. Distinction between a taking by the public and by private parties.
- 458. What is sufficient security when the taking is by private parties.
- 459. Summary as to time of compensation.
- 460. Compensation must be made in money.
- 461. The legislature cannot fix the compensation or prescribe the rules for its computation.
- 462. Meaning of the phrase "just compensation."
- 463. Measure of damages when an entire tract is taken.
- 464. When part is taken, just compensation includes damages to the remainder.
- 465. The question of benefits.
- 466. Cases holding that benefits cannot be considered at all.
- 467. Cases holding that special benefits only may be set off against damages to the remainder, but not against the value of the land taken.
- 468. Cases holding that benefits, both general and special, may be set off against damages to the remainder, but not against the value of the part taken.
- 469. Cases holding that special benefits only may be set off against both the value of the part taken and damages to the remainder.
- 470. Cases holding that benefits, both general and special, may be set off against both damages to the remainder and the value of the part taken.
- 471. Conclusion as to the question of benefits.
- 472. Constitutional provisions as to benefits.
- 473. Statutory provisions as to benefits and measure of damages.

- § 474. Benefits or damages to a different tract.
- 475. What constitutes an entire tract.
- 476. What are special benefits?
- 477. Time with reference to which damages should be estimated.
- 478. General principles in estimating value.
- 479. Value for particular uses.
- 480. Speculative inquiries as to a possible use or improvement of the property are improper.
- 481. Whether it is proper to consider how the work is to be constructed.
- 482. Damages from improper construction or use to be excluded.
- 483. When there are different interests or estates, such as life estates, leases, etc.
- 484. Damages to franchises connected with property.
- 485. When the title is subject to restrictions, conditions, etc.
- 486. Value of trees, crops, minerals, etc.
- 487. Injury to business, loss of profits, etc.
- 488. Personal property: Fixtures: Cost of removal.
- 489. When one railroad crosses another.
- 490. When one railroad takes the use of another's tracks.
- 491. When a highway crosses a railroad.
- 492. When a railroad is laid across or along a turnpike.
- 493. Railroads in streets.
- 494. Change of grade.
- 495. In case of viaducts, causeways, and the like in streets.
- 496. Various elements of damages when part of a tract is taken.
- 497. Danger from fire.
- 498. Cost of fencing.
- 499. The question of interest.
- 500. When property is taken for a street which is subject to a public easement of way by dedication or prescription.
- 501. Enhancement caused by the work or improvement.
- 502. The right or estate acquired for the public use should be considered.
- 503. The extent of the use may be considered.
- 504. Miscellaneous items of damage held not allowable.
- 505. Reserving rights or easements, or requiring things to be done in lieu of money.
- 506. Mill cases.
- 507. Where entry is made and works constructed before obtaining title.
- 508. When the owner is estopped to claim damages.

CHAPTER XXI.

THE REPORT OR VERDICT, AND ACTION THEREON.

- § 509. Requisites generally.
- 510. Describing the property to be taken, or location of the improvement.
- 511. Description of location in case of highways.
- 512. What is a sufficient finding on the question of damages.
- 513. What is a sufficient finding on the question of necessity, public utility, etc.
- 514. Of naming and describing the owners of property taken or affected.
- 515. Whether the award of damages should be joint or several.
- 516. Conditional and alternative awards.
- 517. As to the time of making report.
- 518. Recording the report.
- 519. Confirmation of the report by non-judicial bodies.
- 520. Confirmation of the report by a court: General principles.
- 521. Defects in the proceedings prior to the appointment of commissioners.
- 522. Irregularities on the part of the commissioners, jurors, etc.
- 523. Accident, mistake or error of judgment on the part of the commissioners.
- 524. Inadequate or excessive damages.
- 525. Departure from the petition in laying out a highway.
- 526. Miscellaneous objections.
- 527. The time and manner of objecting.
- 528. The practice in hearing objections.
- 529. Power of the court to amend or modify the report, or confirm it in part.
- 530. Rehearings, recommittals, reviews, etc.
- 531. When objectors are estopped.
- 532. The order confirming the report of commissioners.
- 533. The judgment to be entered on the verdict of a jury.
- 534. Setting aside the order of confirmation.

CHAPTER XXII.

REVIEW OF THE PROCEEDINGS, BY APPEAL OR OTHERWISE.

- § 535. The subject generally.
- 536. Statutes making the decision of commissioners or of inferior tribunals final and conclusive.
- 537. Practice in taking appeals.

- § 538. Parties, and who may appeal.
- 539. Notice in case of appeals.
- 540. Practice in the appellate court.
- 541. Effect of the appeal.
- 542. Certiorari: Its nature and office generally.
- 543. When it lies, and when the proper remedy.
- 544. Application for the writ.
- 545. When granted and when refused.
- 546. Form and effect of the writ.
- 547. Return to the writ.
- 548. Proceedings on the return.
- 549. What are sufficient grounds for quashing the proceedings.
- 550. Appeals to the Supreme Court.
- 551. What is a final order.
- 552. Construction of statutes as to when an appeal will lie.
- 553. Practice in the Supreme Court.
- 554. Writs of error.
- 555. Limitations as to the time in taking an appeal or certiorari.
- 556. Estoppel to prosecute an appeal or certiorari.
- 557. When an appeal or certiorari is the proper remedy.
- 558. Statutes opening proceedings for review after final judgment.

CHAPTER XXIII.

COSTS.

- § 559. General principles in regard to costs in condemnation cases.
- 560. Costs in the absence of special statutory provisions relating to eminent domain proceedings.
- 661. Costs under particular statutes.
- 562. Costs in case of appeals, reviews, etc.
- 563. Miscellaneous cases.

CHAPTER XXIV.

DAMAGES PRESUMED TO BE INCLUDED IN THE AWARD OR JUDGMENT.

- § 564. Statement of the question.
- 565. General doctrine of the decisions.
- 566. The doctrine of the cases criticised.
- 567. Damages arising from construction of the works.

§ 568 Damages from works on land to which the assessment does not relate.

569. By interfering with the support of the adjacent soil.

570. By bringing a street to grade.

571. By interfering with running streams.

572. By interfering with surface or subterranean waters.

573. Damages by blasting, trespass and the like.

574. The assessment does not include damages resulting from the improper construction or negligent use of the works.

575. Claims based upon changes in the plan of construction.

576. Mistake in making the assessment.

577. Statutes giving a remedy for damages not foreseen and estimated.

CHAPTER XXV.

RIGHTS OF THE RESPECTIVE PARTIES IN THE PROPERTY CONDEMNED.

§ 578. General principles as to obtaining possession.

579. Statutes permitting possession upon a tender or deposit of the damages awarded.

580. Possession pending an appeal upon depositing the damages awarded.

581. Right of the owner to the damages deposited in such cases.

582. Possession upon giving security for the compensation.

583. What constitutes an entry.

584. Rights of the parties in land taken for railroad right of way.

585. The company an adjoining proprietor, and limited by the maxim, *sic utere tuo ut alienum non laedas.*

586. Whether the company's possession is exclusive.

587. Right to trees, herbage, materials, etc.

588. Property taken for other railroad uses.

589. Property taken for highways and streets.

590. Right to trees, herbage and materials, etc.

591. Property taken for turnpikes.

592. Property taken for other uses.

593. When a fee is taken for public use.

594. Transfers by the party condemning.

595. Effect of forced sales.

596. Reversion of lands taken for public use.

597. What amounts to an abandonment of the public use.

598. Right to improvements when land reverts.

599. No rights are acquired beyond the limits of the land condemned

CHAPTER XXVI.

OF THE RECORD AND PROCEEDINGS WHEN CALLED IN QUESTION COLLATERALLY.

§ 600. In general.
601. When jurisdiction exists, the proceedings are good collaterally, though erroneous.
602. What is essential to jurisdiction.
603. What irregularities, subsequent to jurisdiction, will vitiate the proceedings.
604. What the record should show.
605. Parol evidence to aid or contradict the record.
606. Estoppel to question proceedings collaterally.

CHAPTER XXVII.

OF THE REMEDIES AND PROCEEDINGS TO RECOVER THE DAMAGES AWARDED, OR WHICH SHOULD BE PAID, FOR PROPERTY TAKEN OR AFFECTED.

§ 607. When the statutory remedy is exclusive.
608. When not exclusive.
609. Action on the award or judgment.
610. Defences thereto.
611. When the damages are payable from an assessment of benefits.
612. When there has been no entry, or when the taking has been abandoned.
613. Mandamus to compel payment.
614. Mandamus to compel an assessment of damages.
615. Bill in equity for the same purpose.
616. Proceedings to obtain damages which have been deposited.
617. The remedy upon bonds given for security of damages.
618. Enjoining use and possession until damages are paid.
619. Suit to abate dam unless the damages are paid.
620. Enforcing the claim for damages as a vendor's lien.
621. The right to damages, as against those claiming under the party condemning.
622. Of a personal remedy against those claiming under the party condemning.
623. Common law suits for the value of land appropriated without proceedings.
624. The remedy for property damaged, injured or injuriously affected.

- § 625. The measure of damages in such cases.
- 626. When no damages are awarded, the only remedy is by appeal.
- 627. Conflicting claims to the damages awarded.
- 628. Remedy of mortgagees of the land taken.
- 629. Remedies open to the owners of other liens and interests in the land taken.
- 630. Rights of an assignee of the damages awarded.

CHAPTER XXVIII.

THE REMEDY FOR A WRONGFUL INTERFERENCE WITH PROPERTY UNDER COLOR OF EMINENT DOMAIN.

- § 631. Injunction to prevent entry or construction of works before complying with the law.
- 632. The grounds of jurisdiction in such cases.
- 633. When the relief will be refused.
- 634. Injunction to prevent the use of property until the damages are paid.
- 635. To prevent the laying or operating of steam railroads in streets.
- 636. To prevent the laying or operating of horse railroads in streets.
- 637. To prevent other uses of streets.
- 638. To prevent changing the grade of a street.
- 639. To prevent the construction of works in a particular manner.
- 640. To prevent the occupation or use of adjacent property not included in the condemnation.
- 641. To prevent an interference with water rights.
- 642. To prevent the infringement of a franchise or exclusive right.
- 643. To prevent the taking of property already devoted to public use.
- 644. To prevent one railroad from crossing another.
- 645. To prevent injury or damage to property not taken.
- 646. Enjoining condemnation proceedings.
- 647. Ejectment: When it lies.
- 648. When the owner is estopped to maintain the action.
- 649. Trespass.
- 650. Mandamus.
- 651. Remedy for damages arising from the negligent or improper construction of works.
- 652. Relief in equity on account of error, mistake, new evidence, etc.
- 653. Compelling a railroad company to construct a highway crossing.
- 654. Other remedies.

CHAPTER XXIX.

THE DISCONTINUANCE AND ABANDONMENT OF PROCEEDINGS.

- § 655. The right to discontinue proceedings before completion.
- 656. The right to abandon after the proceedings are completed.
- 657. What constitutes an abandonment.
- 658. The owner's right to recover for damages occasioned by proceedings which have been abandoned.
- 659. Statutes giving a right to recover for damages occasioned by proceedings.
- 660. Notice to treat under the English statutes.
- 661. New proceedings for the same purpose as former proceedings which have been abandoned.
- 662. When entry is to be made or taken in a specified time, what is sufficient.
- 663. Improvements pending proceedings.

CHAPTER XXX.

LIMITATIONS TO ACTIONS AND PROCEEDINGS.

- § 664. When compensation need not be first made, the owner may be required to present his claim for damages within a time limited.
- 665. When the statutory remedy accrues.
- 666. When an action accrues for consequential damages.
- 667. For change of street grade.

TABLE OF CASES CITED.

A.

Abbott v. Board of Suprs., 36 Ia. 354: §371 n. 1.
v. Cottage City, 143 Mass. 521: §476 n. 3.
v. County of Penobscot, 52 Me. 584: §562 n. 14.
v. Kansas City etc. R. R. Co., 83 Mo. 271: §§67 n. 11, 89 n. 1.
v. New York etc. R. R. Co., 145 Mass. 450: §242 n. 5.
v. Stewartstown, 47 N. H. 228: §500 n. 4.
v. Upham, 13 Met. 172: §609 n. 1.
Abendroth v. Manhattan El. R. R. Co., 19 Abb. N. C. 247: §§123 n. 9, 152 n. 3.
v. Manhattan Ry. Co., 52 N. Y. Supr. Ct. 274: §114 n. 1.
Abrahams v. London, 37 L. J. Ch. 732: §427 n. 1.
Ackerman v. Horicon Iron Manf. Co., 16 Wis. 150: §619 n. 1.
Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366: §§ 62 n. 1, 65 n. 2, 641 n. 2.
Acton v. York County, 77 Me. 128: §§351 n. 2, 419 n. 5.
Adams v. Clarksburg, 23 W. Va. 203: §§253 n. 1, 403 n. 1.
v. Emerson, 6 Pick. 57: §§589 n. 4, 590 n. 1.
v. Hastings etc. R. R. Co., 18 Minn. 260: §§113 n. 3, 493 n. 9.
v. London etc. Ry. Co., 18 L. J. Ch. N. S. 357, 2 McN. & G. 118: §615 n. 1.
v. Pease, 2 Conn. 481: §72 n. 8.
v. Saratoga etc. R. R. Co., 11 Barb. 414: §§109 n. 6, 111 n. 5.
v. Saratoga etc. R. R. Co., 10 N. Y. 328: §§301 n. 1, 7; 605 n. 2, 647 n. 2.
v. Slater, 8 Ill. App. 72: §63 n. 17.
v. St. Johnsbury etc. R. R. Co., 57 Vt. 240: §§324 n. 1, 469 n. 11, 621 n. 1, 622 n. 6, 628 n. 5.
v. Walker, 34 Conn. 466: §§83 n. 1, 2.

Adden v. Railroad Co., 55 N. H. 413: §§469 n. 7, 497 n. 2.
Addis v. Priest, 3 N. J. L. 378: §530 n. 11.
Ætna Mills v. Brookline, 127 Mass. 69: §62 n. 1, 10.
v. Waltham, 126 Mass. 422: §§62 n. 1, 10, 18, 301 n. 8.
Afee v. Kennedy, 1 Litt. 92: §178 n. 2.
Ahern v. Dubuque Lead etc. Co., 48 Ia. 140: §184 n. 8.
Aken v. Parfrey, 35 Wis. 249: §§509 n. 7, 609 n. 2.
Akers v. Philadelphia, 4 Phila. 56: §§609 n. 3, 610 n. 4.
v. United New Jersey R. R. Co., 43 N. J. L. 110: §256 n. 17.
Akin v. Commissioners, 36 Kan. 170: §379 n. 1.
Akron v. Chamberlain Company, 34 Ohio St. 328: §98 n. 19.
v. McComb, 18 Ohio, 229: §98 n. 10.
Alabama etc. R. R. Co. v. Burkett, 42 Ala. 83: §§436 n. 12, 470 n. 1, 502 n. 3.
v. Burkett, 46 Ala. 569: §§470 n. 1, 498 n. 1.
v. Gilbert, 71 Ga. 591: §§254 n. 1, 283 n. 4.
v. Kenney, 39 Ala. 307: §§262 n. 2, 265 n. 3.
Albany v. Watervliet etc. R. R. Co., 45 Hun, 442: §156 n. 34.
Albany etc. R. R. Co. v. Brownell, 24 N. Y. 345: §§156 n. 28, 266 n. 1, 4; 282 n. 8, 283 n. 1, 491 n. 1.
v. Dayton, 10 Abb. Pr. N. S. 182: §464 n. 1.
v. Lansing, 16 Barb. 68: §§416 n. 2, 473 n. 3.
Albany St. 11 Wend. 149: §§157 n. 2, 3; 204 n. 1, 485 n. 3.
Albany St. Opening, 6 Abb. Pr. 273: §376 n. 5.
Albany Water Works Co. v. Albany etc., 12 Wend. 292: §544 n. 4.
Albertson v. State, 95 Ind. 370: §604 n. 4.
Alcorn v. Hamor, 38 Miss. 652: §200 n. 6.

Alcott *v.* Acheson, 49 Ia. 569: §§385
n. 1, 631 n. 3.

Alden *v.* Minneapolis, 24 Minn.
254: §103 n. 4.

Aldrich *v.* Cheshire R. R. Co., 21
N. H. 359: §§90 n. 3, 607 n. 2.

v. Drury, 8 R. I. 554: §587 n.
2, 3, 5.

v. Providence, 12 R. I. 241: §§215
n. 1, 614 n. 2.

Aldridge *v.* Tuscumbia etc. R. R.
Co., 2 Stew. & Por. 199: §§164
n. 1, 4; 170 n. 1, 312 n. 1.

Alexander *v.* Baltimore, 5 G. & J.
383: §5 n. 4.

v. Columbia, 3 Mackey, 192:
§649 n. 2.

v. Milwaukee, 16 Wis. 247:
§91 n. 4.

v. West London etc Ry. Co., L. J.
Ch. N. S. 500: §284 n. 2.

Alexandria R. R. Co. *v.* Alexandria
etc. R. R. Co., 75 Va.
780: §267 n. 1.

Allard *v.* Loban, 3 Martin N. S.
293: §§143 n. 1, 330 n. 1.

Allegheny *v.* Black's Heirs, 99 Pa.
S. 152: §476 n. 2.

Allen *v.* Androscoggin R. R. Co.,
60 Me. 494: 410 n. 5.

v. Boston, 137 Mass. 319: §485
n. 2.

v. Charlestown, 109 Mass. 243:
§§469 n. 5, 476 n. 2.

v. Chippewa Falls, 52 Wis. 430:
§103 n. 4.

v. Drew, 44 Vt. 174: §5 n. 4
155 n. 3.

v. Jones, 47 Ind. 438: §240 n. 1.

v. Levee Comrs., 57 Miss. 163:
§543 n. 5.

v. Northville, 39 Hun, 240: §310
n. 3.

v. Paris, 1 Tex. App. Civil Cas.
506: §103 n. 8.

v. Utica etc. R. R. Co., 15 Hun, 80:
§§601 n. 1, 603 n. 1.

v. Wabash etc. R. R. Co., 84 Mo.
646: §623 n. 1.

Allison *v.* Cincinnati, 2 Cinn. Supr.
Ct. 462: §127 n. 1.

v. Comrs., 54 Ills. 170: §§418 n.
3, 517 n. 1, 541 n. 2.

v. Delaware etc. Canal Co., 5
Whart. 482: §524 n. 1.

v. Taylor, 3 T. B. Monroe, 7:
§551 n. 9.

Allyn *v.* Providence etc. R. R. Co.,
4 R. I. 457: §441 n. 1.

Altee *v.* Packet Co., 21 Wall. 389:
§69 n. 8.

Althen *v.* Kelly, 32 Minn. 280:
§§590 n. 4, 637 n. 9.

Alton etc. R. R. Co. *v.* Baugh, 14
Ills. 211: §498 n. 1.

v. Carpenter, 14 Ills. 190: §§462 n.
2, 470 n. 4, 14.

American etc. Soc. *v.* Brooklyn El.
R. R. Co., 46 Hun, 530: §123
n. 8.

American Print Works *v.* Law-
rence, 21 N. J. L. 248: §7 n.
3, 4, 5.

v. Lawrence, 21 N. J. L. 714:
§7 n. 3.

v. Lawrence, 23 N. J. L. 590: §7
n. 3, 4, 5.

Ames *v.* Lake Superior etc. R. R.
Co., 21 Minn. 241: §311 n. 2;
313 n. 1, 2.

Amoskeag Mfg. Co. *v.* Goodale, 46
N. H. 53: §67 n. 2.

v. Head, 56 N. H. 386: §180 n. 4.

v. Worcester, 60 N. H. 522: §180
n. 4, 256 n. 10, 447 n. 1.

Anders *v.* Anders, 4 Jones L. 243:
§541 n. 8.

Anderson *v.* Baker, 98 Ind. 587:
§190 n. 3.

v. Caldwell, 91 Ind. 451: §§311
n. 2, 314 n. 9.

v. Comrs., 12 Ohio St. 635: §604 n.
3, 605 n. 2, 631 n. 3.

v. Endicott, 101 Ind. 539: § 250
n. 2.

v. Kern's Draining Co., 14 Ind.
199: §§188 n. 4, 190 n. 1.

v. McKinney, 24 Ohio St. 467:
§664 n. 1, 7.

v. Pemberton, 89 Mo. 61: §§331 n.
2, 415 n. 4, 510 n. 1, 517 n. 3.

v. St. Louis, 47 Mo. 479: §§ 301
n. 1, 7; 384 n. 5, 632 n. 2.

v. Turbeville, 6 Coldw. 150:
§§100 n. 2, 114 n. 4, 134 n. 1, 2;
158 n. 1, 162 n. 3, 238 n. 1, 311
n. 2, 364 n. 1, 366 n. 1, 456 n. 2.

v. Wood, 80 Ills. 15: §359 n. 5.

Anderson etc. R. R. Co. *v.* Kernode,
54 Ind. 314: §649 n. 2.

Andover *v.* County Comrs., 5 Gray,
393: §510 n. 5.

Andrews *v.* Farmers' Loan & T.
Co., 22 Wis. 288: §634 n. 9.

v. Johnson, 1 Law Repos. N. C.
272: §540 n. 8.

v. Marion, 23 Minn. 372: §539
n. 8.

Anness v. Providence, 13 R. I. 17: §215 n. 3.
Anniston etc. R. R. Co. v. Jacksonville etc. R. R. Co., 82 Ala. 297: §376 n. 5.
Anthony v. County Comrs., 14 Pick. 189: §529 n. 3.
v. South Kingstown, 13 R. I. 129: §405 n. 3.
Anthony St., 20 Wend. 618: §655 n. 2, 3.
Antoinette St., 8 Phila. 461: §504 n. 4.
Application of Cooper etc. 93 N. Y. 507: §531 n. 5.
Application for Drainage, 35 N. J. L. 497: §§193 n. 7, 469 n. 8.
Application of Woolsey, 95 N. Y. 135: §531 n. 1.
Arbrush v. Oakdale, 28 Minn. 61: §§469 n. 4, 473 n. 4.
Arcata etc. R. R. Co. v. Murphy, 71 Cal. 122: §477 n. 5.
Argo v. Barthand, 80 Ind. 63: §601 n. 1.
Arimond v. Green Bay etc. Co., 31 Wis. 316: §§59 n. 1, 67 n. 2, 71 n. 2, 87 n. 2, 91 n. 5, 396 n. 7.
Armington v. Barnett, 15 Vt. 745: §§271 n. 2, 274 n. 1.
Armstrong v. St. Paul, 30 Minn. 299: §§101 n. 3, 151 n. 7, 569 n. 2.
Arn v. City of Kansas, 4 McCrary, 558: §89 n. 4.
Arnold v. Covington etc. Bridge Co., 1 Duvall, 372: §§168 n. 1, 477 n. 9, 579 n. 2, 580 n. 1.
v. Decatur, 29 Mich. 77: §301 n. 1, 393 n. 2, 513 n. 1.
v. Elmore, 16 Wis. 509: §72 n. 16.
v. Hudson Riv. R. R. Co., 55 N. Y. 661: §142 n. 3.
v. Klipper, 24 Mo. 273: §641 n. 3.
Ash v. Cummings, 50 N. H. 591: §§180 n. 4, 242 n. 3, 456 n. 2, 607 n. 12.
Ashby v. Eastern R. R. Co., 5 Met. 368: §336 n. 2.
Ashley v. Port Huron, 35 Mich. 296: §103 n. 3.
v. Woolcott, 11 Cush. 192: §88 n. 5.
Aspinwall v. C. & N. W. Ry. Co., 41 Wis. 474: §§324 n. 1, 5; 477 n. 11.
Astor v. Hoyt, 5 Wend. 603: §324 n. 1, 4.
v. New York, 62 N. Y. 580: §§407 n. 1, 419 n. 12, 18.
Astor v. New York, 37 N. Y. Supr. Ct. 539: §419 n. 3.
v. New York, 5 Jones & S. 539: §5 n. 3.
Atchison etc. R. R. Co. v. Blackshire, 10 Kan. 477: §472 n. 4.
v. Garside, 10 Kan. 552: §§115 n. 2, 4, 117 n. 11.
v. Gough, 29 Kan. 94: §§475 n. 2, 496 n. 5.
v. Hammer, 22 Kan. 763: §89 n. 5.
v. Lyon, 24 Kan. 745: §§496 n. 5, 562 n. 1.
v. Patch, 28 Kan. 470: §379 n. 6, §546 n. 1.
v. Weaver, 10 Kan. 344: §§454 n. 2, 608 n. 1, 649 n. 2.
Atkinson v. Marietta R. R. Co., 15 Ohio St. 21: §§243 n. 2, 258 n. 4, 391 n. 3.
Atlanta v. Central R. R. Co., 53 Ga. 120: §§266 n. 7, 312 n. 1, 468 n. 1.
v. Green, 67 Ga. 386: §§223 n. 1, 136 n. 1, 2.
Atlanta etc. R. R. Co. v. St. Louis, 66 Mo. 228: §247 n. 1.
Atlantic etc. R. R. Co. v. Campbell, 4 Ohio St. 583: §436 n. 18, 20.
v. Cumberland Co. Comrs., 51 Me. 36: §364 n. 1.
v. Fuller, 48 Ga. 423: §607 n. 2.
v. Koblenz, 21 Ohio St. 334: §499 n. 5.
v. Sullivant, 5 Ohio St. 276: §§314 n. 7, 391 n. 3.
Atlantic etc. Tel. Co. v. Chicago etc. R. R. Co., 6 Bis. 158: §141 n. 14.
Attorney General v. Conservators etc., 1 H. & M. 1: §82 n. 3.
v. Eau Claire, 37 Wis. 400: §§180 n. 12, 206 n. 1.
v. Leeds, 5 L. R. Ch. App. 583: §65 n. 3.
v. Lonsdale, 7 L. R. Eq. Cas. 390: §227 n. 8.
v. Met. R. R. Co., 125 Mass. 515: §124 n. 1.
v. Morris etc. R. R. Co., 19 N. J. Eq. 386: §635 n. 13.
v. Tomline, 12 L. R. Ch. Div. 214, 14 *Ibid.* 58: §91 n. 1.
v. Turpin, 3 H. & M. 548: §§499 n. 12, 656 n. 23.
Atwater v. Mayer, 29 Alb. L. J. 483: §637 n. 7.
Auburn v. Roberts, 11 N. H. 293: §324 n. 1.
Augusta v. Marks, 50 Ga. 612: §468 n. 1.

Aurora *v.* Fox, 78 Ind. 1: §§101 n. 3, 151 n. 7, 569 n. 2.
v. Gillette, 56 Ills. 132: §103 n. 2.
v. Love, 93 Ills. 521: §89 n. 4.
v. Reed, 57 Ills. 29: §103 n. 2.
v. West, 9 Ind. 74: §§4 n. 3, 13 n. 3, 155 n. 5.

Aurora & C. R. R. Co. *v.* Miller, 56 Ind. 88: §§390 n. 1, 391 n. 5.

Austin *v.* Allen, 6 Wis. 134: §§347 n. 3, 375 n. 1, 605 n. 4.
v. Helms, 65 N. C. 560: §419 n. 5.
v. Rutland R. R. Co., 45 Vt. 215: §§76 n. 1, 289 n. 2.

Avery *v.* Fox, 1 Abb. U. S. 246: §§61 n. 2, 62 n. 5, 456 n. 1, 641 n. 2.
v. Groton, 36 Conn. 304: §419 n. 21.
v. Vandusen, 5 Pick. 182: §469 n. 5.

Ayres *v.* Richards, 38 Mich. 214: §§167 n. 25, 367 n. 1, 368 n. 1, 8, 11; 354 n. 3, 500 n. 5, 549 n. 2.

B.

Babb *v.* Carver, 7 Wis. 124: §375 n. 2.
v. Mackey, 10 Wis. 371: §§180 n. 12, 607 n. 2.

Babcock *v.* Welsh, 71 Cal. 400: §610 n. 3.
v. Western R. R. Co., 9 Met. 553: §599 n. 8.

Bachelor *v.* New Hampton, 60 N. H. 207: §§362 n. 1, 525 n. 1.

Bachler's Appeal, 90 Pa. S. 207: §337 n. 4.

Bachman's Road, 1 Watts, 400: §530 n. 8, 9.

Backus *v.* Lebanon, 11 N. H. 19: §§271 n. 2, 274 n. 1, 311 n. 3.

Badgely *v.* Hamilton Co., 1 Disney, 316: §607 n. 8, 11.

Bagnall *v.* London etc. Ry. Co., 1 H. & C. (Exch.) 544: §651 n. 1.

Bailey *v.* Carrollton, 28 La. An. 171: §623 n. 1.
v. Culver, 12 Mo. App. 175: §134 n. 4.
v. McCain, 92 Ills. 277: §§601 n. 1, 602 n. 1.
v. New Orleans, 19 La. An. 271: §623 n. 1.
v. Philadelphia etc. R. R. Co., 4 Harr. 389: §§74 n. 4, 75 n. 1, 246 n. 1, 311 n. 2.
v. Woburn, 126 Mass. 416: §§62 n. 1, 10, 14; 503 n. 3, 565 n. 1.

Baird *v.* Hunter, 12 Pick. 556: §654 n. 1.

Baker *v.* Ashland, 50 N. H. 27: §359 n. 1.
v. Boston, 12 Pick. 184: §§6 n. 2, 156 n. 10.
v. Chicago etc. R. R. Co., 57 Mo. 265: §648 n. 1.
v. Holderness, 26 N. H. 110: §311 n. 2.
v. Johnson, 2 Hill, 342: §593 n. 1.
v. Met. Ry. Co., 31 Beav. 504: §299 n. 6.
v. Runnels, 12 Me. 235: §§542 n. 5, 601 n. 1.
v. Shepard, 24 N. H. 208: §§589 n. 4, 590 n. 3.
v. Taunton, 119 Mass. 392: §667 n. 3.
v. Windham, 25 Conn. 597: §§538 n. 14, 601 n. 1, 604 n. 4.

Balch *v.* County Comrs., 103 Mass. 106: §§176 n. 1, 272 n. 7, 303 n. 1.

Baldwin *v.* Bangor, 36 Me. 518: §§239 n. 2, 664 n. 3.
v. Buffalo, 35 N. Y. 376: §§500 n. 1, 543 n. 5, 631 n. 3.
v. Buffalo, 29 Barb. 396: §§576 n. 1, 631 n. 7.
v. Calkins, 10 Wend. 167: §§406 n. 1, 407 n. 3.
v. Chicago etc. Ry. Co., 35 Minn. 354: §625 n. 2.
v. Newark, 38 N. J. L. 158: §§457 n. 8, 469 n. 8, 610 n. 11.

Baldwin etc. Road, 3 Grant's Cas. 62: §517 n. 3, 5.

Balfour *v.* Louisville etc. R. R. Co., 62 Miss. 508: §466 n. 2.

Ball *v.* Herbert, 3 T. R. 253: §145 n. 1.
v. Slack, 2 Whart. Pa. 538: §82 n. 3.

Ballard *v.* Ballard Vale Co., 5 Gray, 468: §324 n. 3.
v. Tomlinson, 76 L. R. Ch. Div. 194; 29 *Ibid.* 115: §90 n. 6.

Ballou *v.* Ballou, 78 N. Y. 325: §338 n. 1.

Baltimore *v.* Apphold, 42 Md. 442: §§61 n. 2, 63 n. 2, 641 n. 4.
v. Clunet, 23 Md. 449: §204 n. 4.
v. Grand Lodge, 44 Md. 436: §308 n. 2.
v. Greenmount Cemetery, 7 Md. 517: §5 n. 4.
v. Hook, 62 Md. 371: §454 n. 2.
v. Musgrave, 48 Md. 272: §§656 n. 1, 658 n. 9.
v. Warren Manufacturing Co., 59 Md. 69: §§65 n. 6, 641 n. 5.

Baltimore etc. R. R. Co. v. Algire, 63 Md. 319: §§298 n. 1, 4; 649 n. 11.
v. Boyd, 63 Md. 325: §§454 n. 2, 649 n. 2.
v. Chase, 43 Md. 23: §§82 n. 3, 83 n. 2, 3, 4; 84 n. 1.
v. Fifth Bapt. Church, 108 U. S. 317: §152 n. 3.
v. Johnson, 84 Ind. 420: §§556 n. 1, 580 n. 1.
v. Lansing, 53 Ind. 229: §§496 n. 1, 4; 498 n. 1.
v. Magruder, 34 Md. 79: §§66 n. 6, 57; n. 4, 585 n. 5.
v. Nesbit, 10 How. 395: §§245 n. 1, 538 n. 1, 656 n. 1.
v. North, 103 Ind. 486: §§269 n. 3, 273 n. 10, 276 n. 9, 367 n. 1, 643 n. 3.
v. Pittsburgh etc. R. R. Co., 17 W. Va. 812: §§3 n. 7, 10 n. 4, 237 n. 1, 238 n. 1, 242 n. 11, 267 n. 5, 364 n. 1, 365 n. 4, 366 n. 1, 2, 7; 367 n. 1, 368 n. 1, 2; 388 n. 1, 390 n. 1, 393 n. 4, 397 n. 1, 6; 464 n. 1, 552 n. 1.
v. Straus, 37 Md. 237: §635 n. 17.
v. Thompson, 10 Md. 76: §§326 n. 2, 335 n. 1, 2; 438 n. 3, 649 n. 4.
v. Van Ness, 4 Cranch, 595: §170 n. 1.

Baltimore etc. Tel. Co. v. Morgan's Louisiana etc. R. R. Co., 37 La. An. 883: §§269 n. 5, 275 n. 4.
v. Western U. Tel. Co., 24 Fed. R. 319: §137 n. 8.

Baltimore etc. Turnpike Co. v. Northern Cent. R. R. Co., 15 Md. 193: §550 n. 1.
v. Union R. R. Co., 35 Md. 224: §§136 n. 3, 4; 271 n. 6, 643 n. 8.

Bancroft v. Boston, 115 Mass. 377: §469 n. 5.
v. Cambridge, 126 Mass. 438: §§156 n. 11, 188 n. 1, 201 n. 7, 324 n. 1.

Bangor v. Lansil, 51 Me. 521: §88 n. 5.

Bangor etc. R. R. Co. v. McComb, 60 Me. 290: §§157 n. 2, 462 n. 2, 3; 464 n. 1, 469 n. 3, 497 n. 2, 499 n. 1.

Banigan v. Worcester, 30 Fed. R. 392: §§251 n. 8, 314 n. 3, 315 n. 3.

Bank of Auburn v. Roberts, 44 N. Y. 192: §§324 n. 1, 4; 628 n. 4.

Bankhead v. Brown, 25 Ia. 540: §§157 n. 2, 3; 158 n. 1, 167 n. 2, 8, 9, 23; 238 n. 1.

Bannon v. Augier, 2 Al'en, 128: §290 n. 7.

Barbadoes Street, 8 Phila. 468: §§425 n. 2, 487 n. 4.

Barber v. Andover, 8 N. H. 398: §271 n. 4.

Barbour v. Barbour, 46 Me. 9: §323 n. 4.

Barclay v. Howell, 6 Pet. 498: §589 n. 4.

v. Lebanon, 11 N. H. 19: §140 n. 3.

v. Pickles, 38 Mo. 143: §483 n. 7.

Barclay R. R. etc. Co. v. Ingham, 36 Pa. S. 194: §§67 n. 2, 6; 72 n. 17.

Barker v. Taunton, 119 Mass. 392: §508 n. 1.

Barlow v. Chicago etc. R. R. Co., 29 Ia. 276: §§290 n. 4, 297 n. 1, 594 n. 1, 597 n. 5.

v. Highway Comrs., 59 Mich. 443: 415 n. 1.

Barnard v. Fitch, 7 Met. 605: §348 n. 1.

v. Haworth, 9 Ind. 103: §511 n. 1.

Barnes v. Fox, 61 Ia. 18: §§369 n. 2, 631 n. 3.

v. Hannibal, 71 Mo. 449: §67 n. 2, 7.

v. New York, 27 Hun, 236: §499 n. 12.

v. Springfield, 4 Allen, 488: §252 n. 2.

Barnet v. Passumpsic T. Co., 15 Vt. 757: §141 n. 5.

Barnett v. Johnson, 15 N. J. Eq. 481: §122 n. 3.

v. State, 15 Ala. 829: §§369 n. 1, 382 n. 1, 3; 543 n. 4.

Barney v. Keokuk, 94 U. S. 324: §§72 n. 20, 21; 76 n. 7, 117 n. 6, 637 n. 1.

v. Keokuk, 4 Dill. 593: §§117 n. 6, 637 n. 1.

Barnum v. Minn. Trans. Co., 33 Minn. 365: §118 n. 6.

Barr v. Flynn, 20 Mo. App. 383: §354 n. 3.

v. Stevens, 1 Bibb, 292: §538 n. 6.

Barre Turnpike Co. v. Appleton, 2 Pick. 430: §§879 n. 1, 403 n. 5.

Barrett v. Bangor, 70 Me. 335: §67 n. 2.

Barrickman v. Comrs., 11 G & J. 50: §505 n. 7.

Barron v. Baltimore, 7 Peters, 243: §11 n. 1.

Barrow v. Paige, 5 Haywood, 97: §8 n. 8.

Barry *v.* Lowell, 8 Allen, 127: §86 n. 7.
 Barter *v.* Commonwealth, 3 Penn. & Watts, 253: §133 n. 1.
 Bartleson *v.* Minneapolis, 33 Minn. 468: §647 n. 3, 17.
 Bartlett *v.* Bangor, 67 Me. 460: §500 n. 1.
 Bartram *v.* Central Turnpike Co., 25 Cal. 283: §136 n. 3.
 Bass *v.* Elliott, 105 Ind. 517: §§314 n. 11, 513 n. 1.
v. State, 34 La. An. 494: §150 n. 1.
 Bassett *v.* Clement, 17 N. J. L. 166: §419 n. 7.
v. Denn, 17 N. J. L. 432: §412 n. 1.
 Bastable *v.* Syracuse, 8 Hun, 587: §103 n. 3.
 Bates *v.* Cooper, 5 Ohio, 115: §§256 n. 28, 456 n. 2, 3.
v. Ray, 102 Mass. 458: §496 n. 2.
v. Weymouth Iron Co., 8 Cush. 548: §182 n. 1, 7.
 Battles *v.* Braintree, 14 Vt. 348: §609 n. 4.
 Beach *v.* Elmira, 22 Hun, 158: §§86 n. 1, 645 n. 2.
 Beal *v.* New York Cent. etc. R. R. Co., 41 Hun, 172: §596 n. 7.
 Beale *v.* Penna. R. R. Co., 86 Pa. S. 509: §656 n. 21.
 Beale Street, 39 Cal. 495: §667 n. 2.
 Bean *v.* Hinman, 33 Me. 480: §334 n. 2.
v. Kulp, 7 Phila. 650: §325 n. 1.
v. Warren, 28 N. H. 247: §338 n. 5.
 Bean's Road, 35 Pa. S. 280: §511 n. 15.
 Beard *v.* Murphy, 37 Vt. 99: §88 n. 1.
 Beardsley *v.* Washington, 39 Conn. 265: §421 n. 3.
 Beck *v.* Ingram, 1 Bush, (Ky.) 355: §8 n. 1.
 Beckett *v.* Midland Ry. Co., 1 L. R. C. P. 241: §§22; n. 4, 225 n. 1, 523 n. 4.
v. Midland Ry. Co., 3 L. R. C. P. 82: §§228 n. 4, 225 n. 1.
 Beckwith *v.* Beckwith, 22 Ohio St. 180: §256 n. 22.
 Beebe *v.* Scheidt, 13 Ohio St. 406: §§367 n. 1, 601 n. 1.
 Beech & Page Sts. 91 Pa. S. 354: §359 n. 1.
 Beekman *v.* Saratoga etc. R. R. Co., 3 Paige, 45: §§3 n. 1, 157 n. 2, 164 n. 2, 170 n. 1, 238 n. 1, 264 n. 1, 311 n. 2.
 Beekman St., 20 Johns. 269: §655 n. 5.
 Beer Co. *v.* Massachusetts, 97 U. S. 25: §§6 n. 2, 156 n. 13, 20.
 Belcher Sugar etc. Co. *v.* St. Louis etc. Co. 10 Mo. App. 401: §177 n. 4.
v. St. Louis etc. Co., 82 Mo. 121: §254 n. 1..
 Belchertown *v.* County Comrs., 11 Cush. 189: §309 n. 1.
 Belfast Academy *v.* Salmon, 11 Me. 109: §265 n. 2.
 Belfast, Appellant, 53 Me. 431: §§252 n. 3, 517 n. 2.
 Belknap *v.* Belknap, 2 Johns. Ch. 463: §254 n. 1.
 Bell *v.* Boston, 101 Mass. 506: §297 n. 8.
v. Louisville R. R. Co., 1 Bush, 404: §8 n. 2.
 Bellinger *v.* New York Central R. R. Co., 23 N. Y. 42: §§66 n. 10, 67 n. 10, 154 n. 1.
 Bellona Co.'s Case, 3 Bland Ch. 442: §§160 n. 2; 164 n. 5, 170 n. 1, 254 n. 3, 274 n. 2.
 Belt Line St. Ry. Co. *v.* Crabtree, 2 Tex. App. Civil Cas. p. 579: §§225 n. 1, 493 n. 4.
 Bemis *v.* Springfield, 122 Mass. 110 §209 n. 7.
 Benedict *v.* Goit, 3 Barb. 459: §140 n. 2, 4.
v. Heineberg, 43 Vt. 231: §§595 n. 2, 596 n. 3.
 Benham *v.* Dunbar, 103 Mass. 365: §443 n. 3, 11.
v. Potter, 52 Conn. 248: §596 n. 1.
 Benjamin *v.* Wheeler, 8 Gray, 409: §109 n. 1.
 Bennett *v.* Boyle, 40 Barb. 551: §§157 n. 2, 204 n. 1.
v. Camden etc. R. R. Co., 14 N. J. L. 145: §520 n. 5, 8.
v. Clemence, 6 Allen, 10: §185 n. 1, 2.
v. Comrs., 4 Gray, 359: §§555 n. 1.
v. Cutler, 44 N. H. 69: §§348 n. 1, 525 n. 2, 603 n. 3.
v. Drain Comrs., 56 Mich. 634: §§352 n. 11, 382 n. 1, 549 n. 2.
 Bennington *v.* Smith, 29 Vt. 254: §250 n. 3.
 Bensley *v.* Mountain Lake Co., 13 Cal. 306: §§253 n. 1, 441 n. 1, 456 n. 1, 656 n. 1, 3, 4.
 Benson *v.* Chicago etc. R. R. Co., 78 Mo. 504: §§89 n. 3, 293 n. 3.

Benson *v.* Morrow, 61 Mo. 345: §72 n. 19.
v. Sproule, 32 Me. 39: §440 n. 1.
Bent *v.* Brigham, 117 Mass. 307: §388 n. 1.
Bentinck *v.* Norfolk Estuary Co., 8 De G. McN. & G. 714: §256 n. 26.
Bentley *v.* Wabash etc. Ry. Co., 61 Ia. 229: §618 n. 5.
Benton *v.* Milwaukee, 50 Wis. 368: §§442 n. 1, 624 n. 5.
Bentonville R. R. Co. *v.* Baker, 45 Ark. 252: §§89 n. 1, 289 n. 2, 326 n. 1, 3; 496 n. 3, 607 n. 5, 623 n. 1.
v. Stroud, 45 Ark. 278: §331 n. 4, 390 n. 3, 440 n. 6, 441 n. 1.
Bergman *v.* St. Paul etc. R. R. Co., 21 Minn. 533: §658 n. 11.
Berlin Road, 3 Yeates, 263: §530 n. 8.
Bernard *v.* Brewer, 2 Wash. Va. 76: §§369 n. 1, 379 n. 3, 382 n. 1.
Berry *v.* Carle, 3 Greenl. 269: §72 n. 5.
Berryman *v.* Little, 49 N. J. L. 182: §544 n. 5.
Bethel *v.* County Comrs., 42 Me. 478: §358 n. 3.
Bethlehem etc. Co. *v.* Yoder, 112 Pa. S. 136: §507 n. 11, 16; 654 n. 3.
Bethum *v.* Turner, 1 Me. 111: §237 n. 3.
Bettis *v.* Geddes, 54 Mich. 608: §§369 n. 1, 385 n. 1, 549 n. 3.
Betts *v.* Williamsburgh, 15 Barb. 255: §§378 n. 7, 470 n. 6.
Beveridge *v.* West Park Comrs., 7 Ills. App. 460: §499 n. 10, 12.
Bevier *v.* Dillingham, 18 Wis. 529: §§314 n. 1, 473 n. 8.
Beyer *v.* Tanner, 29 Ills. 135: §§599 n. 1, 649 n. 8.
Beynon *v.* Brandywine etc. Co., 30 Ind. 129: §419 n. 3.
Bibb *v.* Mountjoy, 2 Bibb, 1: §§178 n. 2, 410 n. 2, 509 n. 5.
Biddle *v.* Dancer, 20 N. J. L. 633: §351 n. 3.
v. Hussman, 23 Mo. 579 and 602: §483 n. 9.
Bigelow *v.* Cambridge etc. Turnpike Co., 7 Mass. 202: §609 n. 3.
v. Miss. etc. R. R. Co., 2 Head, 624: §301 n. 8.
v. Newell, 10 Pick. 384: §305 n. 1.
v. West Wis. Ry. Co., 27 Wis. 478: §§462 n. 2, 3; 467 n. 6, 473 n. 3.
Bills *v.* Belknap, 36 Ia. 583: §§589 n. 12, 637 n. 10.
Binghampton Bridge, 3 Wall. 51: §§135 n. 2, 187 n. 4, 5; 138 n. 2.
Binney's Case, 2 Bland Ch. (Md.) 99: §254 n. 1.
Bird *v.* Great Eastern Ry. Co., 34 L. J. C. P. 366: §§142 n. 5, 333 n. 1.
v. W. & M. R. R. Co., 8 Rich. Eq. S. C. 46: §256 n. 12.
Birdsall *v.* Cary, 66 How. Pr. 358: §§278 n. 4, 596 n. 3.
Birge *v.* Chicago etc. Ry. Co., 65 Ia. 440: §§377 n. 1, 607 n. 11, 649 n. 2.
Birmingham etc. Ry. Co. *v.* Queen, 20 L. J. Q. B. 304: §614 n. 3.
Bishop *v.* Macon, 7 Ga. 200: §7 n. 2.
v. Medway, 12 Met. 125: §656 n. 23.
Bissell *v.* Collins, 28 Mich. 277: §590 n. 3.
Bixby *v.* Goss, 54 Mich. 551: §§323 n. 1, 369 n. 1, 385 n. 1, 543 n. 3, 549 n. 3.
Bizer *v.* Ottumwa etc. Co., 70 Ia. 145: §625 n. 7.
Black *v.* Baltimore, 50 Md. 235: §§656 n. 1, 658 n. 10.
v. Baltimore, 56 Md. 333: §658 n. 10.
v. Campbell, 112 Ind. 122: §346 n. 10.
v. Chicago etc. Ry. Co., 18 Wis. 208: §539 n. 5.
v. Phila. etc. R. R. Co., 58 Pa. S. 249: §115 n. 4.
v. Thompson, 107 Ind. 162: §415 n. 3.
Blackman *v.* Halves, 72 Ind. 515: §166 n. 12.
Black River Improvement Co. *v.* La Crosse Booming & Trans. Co., 54 Wis. 639: §71 n. 4.
Blackshire *v.* Atchison etc. R. R. Co., 13 Kan. 514: §647 n. 3, 11.
Blackwell *v.* Old Colony R. R. Co., 122 Mass. 1: §85 n. 7.
v. Phinney, 126 Mass. 458: §396 n. 8.
Blair *v.* Claxton, 18 N. Y. 529: §483 n. 11.
v. St. Louis etc. R.R. Co., 24 Fed. R. 539: §300 n. 1.
Blaisdell *v.* Portsmouth etc. R. R. Co., 51 N. H. 483: §298 n. 1.
v. Winthrop, 118 Mass. 138: §519 n. 5.

Blake v. Chicago etc. R. R. Co., 57 Mo. 265: §298 n. 1.
v. County Comrs., 114 Mass. 583: §§420 n. 5, 421 n. 2.
v. Dubuque, 13 Ia. 66: §§623 n. 1, 656 n. 6.
v. People, 109 Ills. 504: §199 n. 2.
v. Rich, 34 N. H. 282: §587 n. 3, 5, 7, 8.
Blanchard v. Kansas City, 5 McCrary, 217: §§223 n. 1, 454 n. 2, 624 n. 1.
v. Maysville etc. Turnpike Co., 1 Dana, 86: §609 n. 3.
Bland v. Hixenbaugh, 39 Ia. 532: §472 n. 10.
Blane v. Khimpke, 29 Cal. 156: §227 n. 8.
Blesch v. C. & N. W. Ry. Co., 48 Wis. 168: §§113 n. 3, 121 n. 1, 493 n. 9, 12.
v. C. & N. W. Ry. Co., 43 Wis. 183: §§121 n. 1, 493 n. 9, 12; 649 n. 5.
Bliss v. Hosmer, 15 Ohio, 44: §243 n. 7.
Blize v. Castlio, 8 Mo. App. 290: §§347 n. 1, 4; 540 n. 2.
Blodgett v. Utica etc. R. R. Co., 64 Barb. 580: §507 n. 15.
v. Whaley, 47 Mich. 469: §511 n. 22.
Blood v. Nashua etc. R. R. Co., 2 Gray, 137: §154 n. 1.
Bloodgood v. Mohawk etc. R. R. Co., 14 Wend. 51: §170 n. 1.
v. Mohawk etc. R. R. Co., 18 Wend. 9: §§3 n. 5, 7; 157 n. 2, 3, 5; 160 n. 2, 165 n. 5, 170 n. 1, 242 n. 3, 452 n. 1, 456 n. 2, 458 n. 9.
Bloomfield etc. Gas Co. v. Calkins, 62 N. Y. 385: §29 n. 2.
v. Calkins, 1 N. Y. Supr. Ct. 549: §496 n. 3.
v. Richardson, 63 Barb. 437: §§161 n. 1, 162 n. 3, 173 n. 3.
Bloomfield R. R. Co. v. Van Slicker, 107 Ind. 480: §647 n. 9.
Bloomington v. Brokaw, 77 Ills. 194: 223 n. 1.
v. Miller, 84 Ills. 631: §§360 n. 3, 470 n. 20, 510 n. 3, 533 n. 3.
Blue Earth Co. v. St. Paul etc. R. R. Co., 28 Minn. 503: §§435 n. 1, 4; 469 n. 4.
Blunt v. Aiken, 15 Wend. 522: §334 n. 4.
Blythe v. Pratt, 62 Miss. 707: §483 n. 21.
Board of Comrs. v. Labore, 37 Kan. 480: §335 n. 1.
Board of Levee Comrs. v. Harkelroads, 62 Miss. 807: §466 n. 2.
Board of Suprs. v. Magoon, 109 Ills. 142: §379 n. 1.
v. McFadden, 57 Miss. 618: §643 n. 5.
Board of Trade Tel. Co. v. Barnett, 107 Ills. 507: §§131 n. 1, 649 n. 6.
Bohman v. Green Bay etc. Ry. Co., 30 Wis. 105: §631 n. 2.
v. Green Bay etc. Ry. Co., 40 Wis. 157: §§245 n. 1, 247 n. 5, 253 n. 1, 411 n. 1, 412 n. 6, 631 n. 2.
Bolling v. Petersburg, 3 Rand. 563: §589 n. 3.
Bolton v. McShane, 67 Ia. 207: §§631 n. 1, 632 n. 3, 4.
Bonapart v. Camden etc. R. R. Co., 1 Bald. 205: §§145 n. 3, 170 n. 1, 311 n. 2, 452 n. 4, 456 n. 1, 631 n. 1, 2; 632 n. 1.
Booker v. Venice etc. Ry. Co., 101 Ills. 333: §§280 n. 7, 304 n. 1.
Boom Co. v. Patterson, 3 Dillon, 465: §315 n. 3.
v. Patterson, 98 U. S. 403: §§238 n. 2, 242 n. 3, 315 n. 3, 479 n. 1, 4.
Boonville v. Ormrod's Admr., 26 Mo. 193: §§320 n. 2, 364 n. 1, 3; 368 n. 1, 3.
Booraem v. North Hudson Co. R. R. Co., 40 N. J. Eq. 557: §635 n. 8.
v. Wood, 27 N. J. Eq. 371: §324 n. 1.
Boorman v. Sunnucks, 42 Wis. 233: §§76 n. 2, 81 n. 3, 82 n. 3.
Booth v. Woodbury, 32 Conn. 118: §155 n. 4.
Boothby v. Androscoggin & K. R. R. Co., 51 Me. 318: §§151 n. 4, 569 n. 1.
Borden v. Vincent, 24 Pick. 301: §300 n. 2.
Bordentown etc. Turnpike Co. v. Camden etc. R. R. Co., 17 N. J. L. 314: §139 n. 2.
Boro v. Phillips, 4 Dill. 216: §200 n. 6.
Borough of Easton's Appeal, 47 Pa. S. 255: §621 n. 1, 3.
Borough of Verona, 108 Pa. S. 83: §§631 n. 2, 634 n. 11.
Boston v. Richardson, 13 Allen 146: §§127 n. 1, 129 n. 1.
v. Robbins, 121 Mass. 453: § 483 n. 4.

Boston Gas L. Co. v. Old Colony etc. Ry. Co., 14 Allen, 444: §§142 n. 4, 584 n. 7.

Boston etc. Mill Corp. v. Gardner, 2 Pick. 33: §220 n. 9.

v. Newman, 12 Pick. 467: §§1 n. 1, 178 n. 1, 179 n. 1, 180 n. 3, 181 n. 4, 592 n. 1.

Boston Road, Matter of, 27 Hun, 409: §524 n. 1.

Boston etc. R. R. Co., Matter of, 10 Abb. N. C. 104: §307 n. 4.

Matter of, 22 Hun, 176: §478 n. 7.

Matter of, 31 Hun, 461: §§475 n. 4, 496 n. 3, 4.

Matter of, 53 N. Y. 574: §276 n. 3, 9.

Matter of, 79 N. Y. 64: §§268 n. 1, 345 n. 7.

Boston etc. R. R. Co. v. Boston, 140 Mass. 87: §§166 n. 1, 256 n. 7.

v. Cilley, 44 N. H. 578: §247 n. 5.

v. County Comrs., 79 Me. 386: §491 n. 3, 5.

v. County of Middlesex, 1 Allen, Allen, 324: §491 n. 4.

v. Folsom, 46 N. H. 64: §§379 n. 1, 543 n. 1, 545 n. 1, 2, 10.

v. Greenbush, 52 N. Y. 510: §§156 n. 28, 491 n. 1.

v. Lawrence, 2 Allen, 107: §266 n. 2.

v. Lowell etc. R. R. Co., 124 Mass. 368: §§267 n. 1, 276 n. 1, 3; 643 n. 1.

v. Old Colony etc. R. R. Co., 3 Allen, 142: §§437 n. 3, 487 n. 3.

v. Old Colony R. R. Co., 12 Cush. 605: §§77 n. 1, 84 n. 2.

v. Salem etc. R. R. Co., 2 Gray, 1: §§137 n. 1, 4, 139 n. 3, 642 n. 3.

Boston Rolling Mills v. Cambridge, 117 Mass. 396: §86 n. 2.

Boston Water Power Co. v. Boston etc. R. R. Co., 16 Pick. 512: §85 n. 10.

v. Boston etc. R. R. Co., 23 Pick. 360: §§135 n. 4, 137 n. 1, 170 n. 1, 271 n. 11, 274 n. 1, 276 n. 3, 286 n. 3.

Bostwick v. Isbell, 41 Conn. 305: §368 n. 2.

Bosworth v. Pittsburgh etc. Ry. Co., 1 Ohio Cir. Ct. 69: §297 n. 7.

Bothe v. Railway Co., 37 Ohio St. 147: §647 n. 2.

Bottamly v. Chism, 102 Mass. 463: §305 n. 5.

Botto v. Mo. Pac. R. R. Co., 11 Mo. App. 589: §115 n. 4.

Bottoms v. Brewer, 54 Ala. 288: §§61 n. 2, 67 n. 2, 180 n. 13, 353 n. 1.

Boughuer v. Clarksburg, 15 W. Va. 394: §631 n. 1.

Boulat v. Municipality No. 1, 5 La. An. 363: §204 n. 4.

Boulton v. Crowther, 2 B. & C. 703: §§92 n. 4, 5.

Bounds v. Kirven, 63 Tex. 159: §141 n. 19.

Bourgeois v. Mills, 60 Tex. 76: §§470 n. 12, 523 n. 1.

Bourne v. Liverpool, 32 L. J. Q. B. 15: §453 n. 13.

Bowditch v. Boston, 4 Clifford, 323: §7 n. 3, 4.

Bowen v. Atlantic etc. R. R. Co., 17 S. C. 574: §473 n. 8.

v. Snyder, 66 Ind. 340: §527 n. 9.

Bowers v. Bears, 12 Wis. 213: §180, n. 12.

Bowman v. Carondelet Ry. Co., 102 Ills. 459: §427 n. 1.

v. New Orleans, 27 La. An. 501: §89 n. 2.

v. Venice etc. Ry. Co., 102 Ills. 459: §§280 n. 7, 304 n. 1.

Bowler v. Drain Comrs., 47 Mich. 154: §§411 n. 1, 413 n. 3, 549 n. 6.

Boyd v. Alabama, 94 U. S. 645: §156 n. 20.

v. Negley, 40 Pa. S. 377: §§ 171 n. 4, 349 n. 10, 531 n. 4.

Boyer's Road, 37 Pa. S. 257: §§270 n. 3, 382 n. 1, 525 n. 10.

Boyfield v. Porter, 13 East, 200: §607 n. 2.

Boynton v. Peterborough etc. R. R. Co., 4 Cush. 467: §§220 n. 2, 320 n. 3.

Bradbury v. Cumberland Co., 52 Me. 27: §§609 n. 8, 610 n. 5.

Bradford v. Cole, 8 Fla. 263: §§167 n. 3, 347 n. 1.

Bradley v. Frankfort, 99 Ind. 417: §§405 n. 12, 407 n. 1.

v. Missouri Pacific R. R. Co., 91 Mo. 493: §§289 n. 2, 647 n. 8.

v. New York etc. R. R. Co., 21 Conn. 294: §220 n. 1, 2, 3.

v. Rice, 13 Me. 198: §76 n. 2.

Bradshaw v. Omaha, 1 Neb. 16: §155 n. 10.

v. Rodgers, 20 Johns. 103, 735: §10 n. 2.

Bradstreet v. Erskine, 50 Me. 407: §441 n. 3.

Bradt v. Albany, 5 Hun, 591: §86 n. 1.

Bradwell *v.* City of Kansas, 75 Mo. 213: §§102 n. 1, 3.

Brady *v.* Bronson, 45 Cal. 640: §§456 n. 1, 649 n. 8.

- v.* Fall River, 121 Mass. 262: §209 n. 3.
- v.* Northwestern Ins. Co., 11 Mich. 425: §§156 n. 1, 156 n. 2.
- v.* Shinkle, 40 Ia. 576: §134 n. 7.

Brainard *v.* Boston etc. R. R. Co., 12 Gray, 407: §440 n. 2.

- v.* Clapp, 10 Cush. 6: §§584 n. 1, 586 n. 1, 587 n. 4.
- v.* Conn. R. R. R. Co., 7 Cush. 506: §653 n. 3.
- v.* Missisquoi R. R. Co., 48 Vt. 107: §§135 n. 3, 141 n. 9, 271 n. 7, 597 n. 2.

Brakebill *v.* Leonard, 40 Ga. 60: §8 n. 8.

Brakken *v.* Minn. & St. L. Ry. Co., 32 Minn. 425, 31 Minn. 45, 29 Minn. 41: §§118 n. 5, 6; 493 n. 9.

Brand *v.* Hammersmith C. Ry. Co., L. R. 1 Q. B. 130, 2 *Ibid.* 223: §230 n. 4.

- v.* Hammersmith C. Ry. Co., L. R. 4 Eng. & Irish App. 171: §230 n. 4.

Braxton *v.* Bressler, 64 Ills. 488: §72 n. 13.

Brayton *v.* Fall River, 113 Mass. 218: §86 n. 4.

Braze *v.* Raymond, 59 Mich. 548: §§369 n. 1, 382 n. 1, 3.

Breckenridge *v.* Ward, 1 T. B. Mon. 57: §§411 n. 1, 413 n. 1.

Breed *v.* Eastern R. R. Co., 5 Gray, 470: §324 n. 1.

- v.* Lynn, 126 Mass. 367: §§86 n. 4, 641 n. 8.

Breitweiser *v.* Fahrman, 88 Ind. 28: §§527 n. 12, 540 n. 4.

Brennan *v.* Mecklenberg, 49 Cal. 672: §525 n. 1.

Bresler *v.* Ellis, 46 Mich. 335: §545 n. 7.

Brewer *v.* Boston etc. R. R. Co., 113 Mass. 52: §§117 n. 10, 651 n. 1.

- v.* Bowman, 9 Ga. 37: §§167 n. 1, 16; 452 n. 1, 6.

Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394: §§251 n. 9, 458 n. 7, 607 n. 2.

Briesen *v.* Long Island R. R. Co., 31 Hun, 112: §152 n. 3.

Bridge *v.* New Hampton, 47 N. H. 151: §535 n. 2.

Bridge Co. *v.* Hoboken Land etc. Co., 13 N. J. Eq. 81, 13 N. J. Eq. 503, 1 Wall. 116: §138 n. 1.

- v.* Union Ferry Co., 29 Conn. 210: §138 n. 3.

Bridgeport *v.* Giddings, 43 Conn. 304: §§405 n. 5, 406 n. 1.

- v.* New York etc. R. R. Co., 36 Conn. 255: §266 n. 5.

Bridgers *v.* Purcell, 1 Ired. L. 232: §506 n. 1.

- v.* Purcell, 1 Dev. & B. 492: §298 n. 1.

Bridgman *v.* St. Johnsbury etc. R.R. Co., 58 Vt. 198: §621 n. 1, 3.

Bridport, Matter of, 24 Vt. 176: §§255 n. 5, 309 n. 6.

Brigham *v.* Agricultural Branch R. R. Co., 1 Allen, 316: §§599 n. 3, 649 n. 9.

- v.* Edmonds, 7 Gray, 359: §149 n. 3.
- v.* Holmes, 14 Allen, 184: §396 n. 6.
- v.* Wheeler, 12 Allen, 89: §607 n. 6.

Briggs *v.* Cape Cod Ship Canal Co., 137 Mass. 71: §§456 n. 2, 656 n. 24.

- v.* Lewiston etc. R. R. Co., 79 Me. 363: §§96 n. 1, 124 n. 1.

Brimmer *v.* Boston, 102 Mass. 19: §§264 n. 7, 8; 601 n. 1.

Brink *v.* Kansas City etc. R. R. Co., 17 Mo. App. 177: §66 n. 9.

Brinkeroff *v.* Wemple, 1 Wend. 470: §627 n. 4.

Brisbane *v.* St. Paul etc. R. R. Co., 28 Minn. 114: §§82 n. 3, 83 n. 2, 3; 84 n. 3, 355 n. 2.

Briscoe *v.* Great Eastern Ry. Co., L. R. 16 Eq. Cas. 633: §639 n. 3.

Britton *v.* DesMoines etc. R. R. Co., 59 Ia. 540: §472 n. 9, 10.

Broad St. Road, 7 S. & R. 444: §411 n. 1, 4.

Broadbent *v.* Ramsbothan, 11 Exch. 602: §88 n. 3.

Broadway, Matter of, 49 N. Y. 150: §§558 n. 1.

- Matter of, 61 Barb. 483: §§153 n. 3, 558 n. 1.
- Matter of, 63 Barb. 572: §§384 n. 6, 517 n. 1.

Broadway etc. Ry. Co., Matter of, 23 Hun, 693: §310 n. 6.

- Matter of, 34 Hun, 414: §310 n. 6.

Broadwell *v.* City of Kansas, 75 Mo. 213: §59 n. 1.

Brochlebank *v.* Whitehaven etc. Ry. Co., 15 Sim. 632: §247 n. 3.

Brock *v.* Barnet, 57 Vt. 172: §§167 n. 1, 379 n. 1.

Brock v. Hishen, 40 Wis. 674: §§457 n. 5, 613 n. 1.
Brocket v. Ohio etc. R. R. Co., 14 Pa. S. 241: §285 n. 1.
Brokaw v. Terre Haute, 97 Ind. 451: §§655 n. 8, 656 n. 3.
Bronson v. Wallingford, 54 Conn. 513: §103 n. 4.
Brookline v. Comrs., 114 Mass. 548: §665 n. 1.
Brooklyn v. Messerole, 26 Wend. 182: §681.
Brooklyn, Matter of, 73 N. Y. 179: §500 n. 1.
n. 1.
Brooklyn etc. R. R. Co. v. Brooklyn R. R. Co., 32 Barb. 358: §258 n. 1.
v. Brooklyn City R. R. Co., 33 Barb. 420: §268 n. 3.
v. Coney Island etc. R. R. Co., 35 Barb. 364: §186 n. 3.
Brooklyn etc. Ry. Co., Matter of, 55 How. Pr. 14: §391 n. 6.
Matter of, 72 N. Y. 245: §391 n. 1, 6.
Brooklyn Heights, Matter of, 48 Barb. 288: §500 n. 3.
Brooklyn Park Co. v. Armstrong, 45 N. Y. 231: §§175 n. 1, 606 n. 1.
Brooklyn Rapid Transit Co., Matter of, 62 How. Pr. 404: §123 n. 2.
Brooklyn S. T. Co. v. Brooklyn, 78 N. Y. 524: §635 n. 14.
Brooks v. Boston, 19 Pick. 174: §§483 n. 21, 487 n. 4.
v. Davenport etc. R. R. Co., 37 Ia. 99: §§472 n. 9, 496 n. 1.
v. Kirby, 19 Ala. 72: §549 n. 14.
Broome v. N. Y. & N. J. Tel. Co., 42 N. J. Eq. 141: §§181 n. 1, 637 n. 4.
Brow v. Corey, 43 Pa. 495: §171 n. 1.
Brown v. Atlanta, 66 Ga. 71: §64 n. 2.
v. Beatty, 34 Miss. 227: §§157 n. 2, 160 n. 2, 170 n. 1, 466 n. 1, 557 n. 1, 607 n. 2.
v. Bridges, 31 Ia. 138: §599 n. 5.
v. Brown, 50 N. H. 538: §§601 n. 1, 603 n. 1.
v. Cayuga etc. R. R. Co., 12 N. Y. 486: §91 n. 3.
v. Chadbourne, 31 Me. 9: §72 n. 5.
v. Cincinnati, 14 Ohio 541: §470 n. 7.
v. County Comrs., 12 Met. 208: §§318 n. 12, 508 n. 5.
v. Corey, 43 Pa. S. 495: §§171 n. 5, 278 n. 15, 469 n. 10, 541 n. 7.
Brown v. Duplessis, 14 La. An. 842: §124 n. 1.
v. Ellis, 26 Ia. 85: §427 n. 1.
v. Gardner, 8 Harr. Ch. (Mich.) 291: §§631 n. 5, 632 n. 2.
v. Grant, 116 U. S. 207: §297 n. 3.
v. Illius, 25 Conn. 583: §90 n. 4, 5, 6.
v. Kennedy, 5 H. & J. 195: §72 n. 9.
v. Lowell, 8 Met. 172: §§209 n. 9, 329 n. 1, 366 n. 7, 667 n. 5.
v. Merrill, 3 Chand. 46: §467 n. 6.
v. Phila. etc. R. R. Co., 58 Md. 539: §259 n. 7.
v. Powell, 25 Pa. S. 229: §§326 n. 2, 335 n. 2, 649 n. 4.
v. Preston, 38 Conn. 219: §273 n. 3.
v. Providence etc. R. R. Co., 12 R. I. 238: §§436 n. 19, 437 n. 7.
v. Providence etc. R. R. Co., 5 Gray, 35: §§146 n. 1, 448 n. 1.
v. Watrous, 47 Me. 161: §227 n. 8.
v. Worcester, 13 Gray, 31: §505 n. 3.
Browne v. McCord, 20 Ind. 270: §347 n. 3.
Browning v. Camden etc. R. R. Co., 4 N. J. Eq. 47: §§580 n. 2, 632 n. 3.
Brown's Petition, 57 N. H. 367: §549 n. 11.
Bruce v. Canal Co., 19 Barb. 371: §645 n. 3.
Bruggerman v. True, 25 Minn. 123: §§311 n. 2, 313 n. 2.
Brunswick etc. R. R. Co. v. McLaren, 47 Ga. 546: §§436 n. 13, 447 n. 3, 496 n. 2.
Brush v. Detroit, 32 Mich. 43: §§378 n. 6, 549 n. 3.
Bryan v. Branford, 50 Conn. 246: §175 n. 4.
v. Moore, 81 Ind. 9: §350 n. 4.
Bryant v. County Comrs., 79 Me. 128: §§351 n. 5, 525 n. 1.
v. Glidden, 36 Me. 36: §§314 n. 5, 348 n. 1, 509 n. 5.
v. Knox etc. R. R. Co., 61 Me. 300: §527 n. 3.
Bryson's Road, 2 P. & W. 207: §411 n. 1.
Bryzblowicz v. Missouri R. R. R. Co., 3 McCrary, 586: §648 n. 2.
Buckleuch v. Met. Board of Works, 5 L. R. Ex. 221; 5 L. R. E. & I. App. 418: §229 n. 1.
Buck v. Conn. etc. R. R. Co., 42 Vt. 370: §§118 n. 4, 653 n. 3.
Buckingham v. Smith, 10 Ohio 288: §169 n. 2.

Buckles *v.* Northern Bank, 63 Ills. 268: §478 n. 6.
 Buckley *v.* Drake, 41 Hun, 384: §§405 n. 3, 557 n. 1.
 Buckner *v.* Chicago etc. Ry. Co., 56 Wis. 403: §§113 n. 3, 118 n. 3, 645 n. 3.
v. Chicago etc. Ry. Co., 60 Wis. 264: §§100 n. 3, 118 n. 3.
 Buckwalter *v.* Black Rock Bridge Co., 38 Pa. S. 281: §220 n. 12.
 Buckwalter's Road, 3 S. & R. 236: §530 n. 9.
 Budd *v.* New Jersey R. R. Co., 14 N. J. L. 467: §§545 n. 11, 614 n. 7.
 Buel *v.* Trustees, 3 N. Y. 197: §610 n. 3.
 Buell *v.* Ball, 20 Ia. 282: §155 n. 9.
v. Worcester, 119 Mass. 372: §494 n. 3.
 Buffalo, Matter of, 64 N. Y. 547: §269 n. 1.
 Matter of, 68 N. Y. 167: §§269 n. 1, 276 n. 5, 6.
 Buffalo etc. R. R. Co., Matter of, 32 Hun, 289: §§421 n. 6, 422 n. 4, 520 n. 3.
 Buffalo Bayou etc. R. R. Co. *v.* Ferris, 26 Tex. 588: §§170 n. 1, 311 n. 2, 456 n. 1, 458 n. 2, 8; 468 n. 4, 649 n. 2.
 Buffalo etc. R. R. Co. *v.* Brainard, 9 N. Y. 100: §§162 n. 3, 170 n. 1, 238 n. 1, 241 n. 1, 242 n. 3.
v. Harvey, 107 Pa. S. 319: §§621 n. 1, 3; 622 n. 4.
v. Overton, 35 Hun, 157: §265 n. 7.
v. Reynolds, 6 How. Pr. 96: §397 n. 3, 397 n. 5.
 Buffum *v.* Harris, 5 R.I. 243: §88 n. 3.
v. New York etc. R. R. Co., 4 R.I. 221: §437 n. 7.
 Burbank *v.* Fay, 65 N. Y. 57: §62 n. 16.
 Burbridge *v.* New Albany etc. R.R. Co., 9 Ind. 546: §483 n. 21.
 Burchard *v.* Wausau Boom Co., 54 Wis. 107: §67 n. 10.
 Burden *v.* Stein, 27 Ala. 104: §§62 n. 1, 173 n. 2.
v. Stein, 24 Ala. 130: §379 n. 1.
 Burgess *v.* Clark, 13 Ired. L. 109: §507 n. 7.
v. Georgia, 11 Vt. 134: §348 n. 1.
v. Grafton, 10 Vt. 321: §528 n. 4.
 Burgett *v.* Norris, 25 Ohio St. 308: §261 n. 1.
 Burgwyn *v.* Lockhart, Winston Law. 269: §167 n. 2.
 Burk *v.* Ayers, 19 Hun, 17: §§185 n. 1, 194 n. 1.
v. Simonson, 104 Ind. 173: §62 n. 16.
 Burlington *v.* Gilbert, 31 Ia. 356: §§96 n. 1, 624 n. 4.
 Burlington etc. R. R. Co. *v.* Beebe, 14 Neb. 463: §§436 n. 17, 442 n. 2.
v. Reinhacke, 15 Neb. 279: §§100 n. 2, 115 n. 4, 624 n. 1, 2.
v. Sater, 1 Ia. 421: §655 n. 1.
v. Schlantz, 14 Neb. 421: §§436 n. 17, 437 n. 7.
 Burnett *v.* Meehan, 83 Ind. 566: §438 n. 2.
v. N. & C. R. R. Co., 4 Sneed, 528: §593 n. 1.
v. Sacramento, 12 Cal. 76: §§5 n. 4, 263 n. 2, 456 n. 1.
 Burnham *v.* Goffstown, 50 N. H. 560: §407 n. 1.
v. Story, 3 Allen, 378: §607 n. 2.
v. Thompson, 35 Ia. 421: §§180 n. 7, 384 n. 7.
 Burns *v.* Dodge, 9 Wis. 458: §606 n. 1.
v. Milwaukee etc. R. R. Co., 9 Wis. 450: §606 n. 1.
v. Multnomah Ry. Co., 8 Sawyer, 543: §§261 n. 1, 364 n. 1, 518 n. 1.
v. Spring Green, 56 Wis. 239: §539 n. 1.
 Burr *v.* Leichester, 121 Mass. 241: §209 n. 6.
 Burrill *v.* Martin, 12 Me. 345: §562 n. 4.
 Burritt *v.* New Haven, 42 Conn. 174: §§96 n. 1, 220 n. 3.
 Burrow *v.* Terre Haute etc. R. R. Co., 107 Ind. 432: §§290 n. 3, 297 n. 8.
 Burrows *v.* Vandevier, 3 Ohio, 383: §247 n. 3.
 Burt *v.* Brigham, 117 Mass. 307: §301 n. 8.
v. Comrs., 32 Mich. 190: §545 n. 11.
v. Merchants' Ins. Co., 106 Mass. 356: §§174 n. 5, 203 n. 1, 242 n. 7.
v. Merchants' Ins. Co., 109 Mass. 1: §483 n. 1.
v. Merchants' Ins. Co., 115 Mass. 1: §477 n. 4, 7.
v. Wigglesworth, 117 Mass. 302: §§426 n. 1, 6; 427 n. 2, 435 n. 5, 477 n. 4, 478 n. 1, 480 n. 6.
 Burtiss *v.* Parker, 65 Me. 559: §382 n. 3.
 Burwell *v.* Comrs., 93 N. C. 73: §56 n. 1.

Bush v. Peru Bridge Co., 3 Ind. 21: §§136 n. 3, 138 n. 3.
Bushwick Ave., Matter of, 48 Barb. 9: §175 n. 3.
Butcher's Union Co. v. Crescent City Co., 111 U. S. 746, 4 Wood, 96; §§156 n. 19, 20.
Butis v. Geddes, 54 Mich. 608: §322 n. 1.
Butler v. Peck, 16 Ohio St. 334: §§88 n. 1.
v. Sewer Comrs., 39 N. J. L. 665: §460 n. 5.
v. Thomasville, 74 Ga. 570: §§65 n. 5, 240 n. 1, 631 n. 5.
Butman v. Fowler, 17 Ohio, 101: §§418 n. 1, 428 n. 1.
v. Vt. Cent. R. R. Co., 27 Vt. 500: §§575 n. 2, 576 n. 1.
Butte Co. v. Boydston, 64 Cal. 110: §§167 n. 1, 498 n. 1, 6.
v. Boydston, 68 Cal. 189: §539 n. 1.
Byles [In re], 25 L. J. Ex. 53: §417 n. 1.
Byrnes v. Cohoes, 67 N. Y. 204: §103 n. 3.
v. Cohoes, 5 Hun, 602: §86 n. 1.
Byron v. Blount, 97 Ills. 62: §§348 n. 2, 389 n. 2, 390 n. 3.

C.

Cadle v. Muscatine etc. R. R. Co., 44 Ia. 11: §§115 n. 4, 117 n. 10.
Cage v. Tragar, 60 Miss. 563: §§406 n. 2, 604 n. 4.
Cairo etc. R. R. Co. v. Stevens, 73 Ind. 278: §89 n. 5.
v. Trout, 32 Ark. 17: §§12 n. 5, 311 n. 2.
v. Turner, 31 Ark. 494: §§10 n. 2, 11 n. 1, 170 n. 1, 456 n. 2, 458 n. 3.
Calais v. Dyer, 7 Me. 155: §329 n. 4.
Caledonian Ry. Co. v. Ogilry, 2 Macy, Sc. App. 229: §227 n. 3.
v. Walker's Trustees, 7 Appeal Cas. 259: §§227 n. 2, 6; 235 n. 1, 236 n. 1.
Calhoun v. Palmer, 8 Gratt. 88: §577 n. 1.
California etc. R. R. Co. v. Armstrong, 46 Cal. 85: §§470 n. 2, 507 n. 7.
v. Cent. P. R. R. Co., 47 Cal. 528: §§145 n. 5, 267 n. 1, 456 n. 1.
v. Frisbie, 41 Cal. 356: §513 n. 3.
v. Gould, 21 Cal. 254: §§143 n. 1, 330 n. 1.
v. Kimball, 61 Cal. 90: §§395 n. 1, 477 n. 5.

California etc. R. R. Co. v. Southern etc. R. R. Co., 65 Cal. 295: §§551 n. 11.
v. Southern etc. R. R. Co., 67 Cal. 59: §507 n. 2.
Calking v. Baldwin, 4 Wend. 667: §§177 n. 2, 607 n. 2.
Call v. Comrs., 2 Gray, 232: §665 n. 4.
Callaman v. Port Huron etc. Ry. Co., 61 Mich. 15: §507 n. 15.
Callendar v. Marsh, 1 Pick. 418: §§94, 96 n. 1, 97 n. 1, 2, 3, 101 n. 2, 559 n. 1.
Callison v. Hedrick, 15 Gratt. 244: §664 n. 14.
Cambria St. 75 Pa. S. 357: §§379 n. 1, 411 n. 1, 412 n. 4, 419 n. 17, 530 n. 6.
Cambridge v. Comrs., 6 Allen, 134: §555 n. 7.
v. County Comrs., 117 Mass. 79: §512 n. 4.
v. County Comrs., 125 Mass. 529: §209 n. 4.
Camden etc. Land Co. v. Lippincott, 45 N. J. L. 405: §§83 n. 4.
Camden etc. R. R. Co. v. Citizens' Coach Co., 28 N. J. Eq. 145: §139 n. 8.
Cameron v. Board of Suprs., 47 Miss. 264: §631 n. 2.
v. Charing Cross Ry. Co., 16 C. B. n. s. 430, 33 L. J. C. P. 313: §227 n. 3.
Campau v. Detroit, 14 Mich. 276: §247 n. 6.
Campbell v. Indianapolis etc. R. R. Co., 110 Ind. 490: §298 n. 1.
v. Phila., 108 Pa. S. 300: §§214 n. 2, 667 n. 6.
v. Race, 7 Cush. 408: §145 n. 1.
Canal Appraisers v. People, 17 Wend. 603: §67 n. 4.
Canal Bank v. Albany, 9 Wend. 244: §§504 n. 2, 528 n. 3, 7.
Canal Comrs. v. Kempshall, 26 Wend. 404: §§69 n. 5, 70 n. 2, 77 n. 22.
v. People, 5 Wend. 423: §§72 n. 22, 73 n. 2, 76 n. 1, 77 n. 1, 614 n. 4.
v. People, 13 Wend. 355: §§72 n. 22, 73 n. 2, 77 n. 1.
v. People, 17 Wend. 570: §§72 n. 22, 73 n. 2, 77 n. 1.
Canal etc. Sts., Matter of, 12 N. Y. 406: §536 n. 1.
Canal St., Matter of, 11 Wend. 154: §655 n. 2.

Canal Trustees *v.* Chicago, 12 Ills. 406: §5 n. 1.

Canniff *v.* San Francisco, 67 Cal. 45: §572 n. 2.

Canyonville etc. Co. *v.* Douglass Co., 5 Or. 280: §§352 n. 6, 538 n. 6.

Cape Elizabeth *v.* Comrs., 64 Me. 456: §273 n. 4.

Cape Girardeau etc. R. Co. *v.* Dennis, 67 Mo. 438: §§258 n. 6, 528 n. 5.

v. Renfroe, 58 Mo. 265: §§116 n. 3, 140 n. 2, 298 n. 1.

Capers *v.* Augusta etc. R. R. Co., 76 Ga. 90: §649 n. 2.

Carbon etc. Co. *v.* Drake, 26 Kan. 345: §§452 n. 6, 631 n. 4.

Carl *v.* Sheboygan etc. R. R. Co., 46 Wis. 625: §§111 n. 2, 113 n. 3, 442 n. 1, 439 n. 9, 625 n. 3.

Carli *v.* Stillwater etc. R. R. Co., 16 Minn. 260: §§338 n. 5, 469 n. 4, 477 n. 8.

v. Stillwater etc. Co., 28 Minn. 373: §§82 n. 3, 83 n. 2, 3; 84 n. 2, 130 n. 1.

v. Union Depot etc. Co., 32 Minn. 101: §§115 n. 4, 493 n. 9.

Carlton *v.* State, 8 Blackf. 208: §511 n. 1.

Carlton St. Matter of, 78 N. Y. 362, 16 Hun, 479: §308 n. 4.

Carman *v.* Steubenville etc. R. R. Co., 4 Ohio St. 399: §§146 n. 2, 3; 573 n. 1.

Carmody *v.* C. & A. R. R. Co., 111 Ills. 69: §280 n. 1.

Caro *v.* Metropolitan El. R. R. Co., 46 N. Y. Supr. Ct. 138: §§54 n. 4, 123 n. 9, 152 n. 3.

Carolina Central R. R. Co. *v.* Love, 81 N. C. 434: §393 n. 4.

v. McCaskill, 94 N. C. 746: §§597 n. 6, 607 n. 2, 664 n. 1, 4.

Carondelet Canal etc. Co. *v.* New Orleans, 38 La. An. 308: §109 n. 1.

Carpender *v.* Oswego etc. R. R. Co., 24 N. Y. 655: §§113 n. 3, 116 n. 5, 647 n. 14.

Carpenter *v.* County Comrs., 21 Pick. 258: §§387 n. 2, 404 n. 1, 650 n. 10.

v. Easton etc. R. R. Co., 24 N. J. Eq. 249, 408; 26 N. J. Eq. 168: §§481 n. 5, 639 n. 5.

v. Grisham, 59 Mo. 247: §§631 n. 3, 682 n. 1.

Carpenter *v.* Jennings, 77 Ills. 250: §470 n. 16.

v. Landaff, 42 N. H. 218: §469 n. 7.

v. Sims, 3 Leigh. 675: §§353 n. 2, 399 n. 2.

Carr *v.* Berkley, 145 Mass. 539: §517 n. 13.

v. Boone, 108 Ind. 241: §§379 n. 1, 381 n. 2, 656 n. 3.

v. Fayette Co. 37 Ia. 608: §381 n. 7.

v. Northern Liberties, 35 Pa. S. 324: §86 n. 5.

v. State, 103 Ind. 548: §§320 n. 6, 349 n. 5, 367 n. 1, 382 n. 2.

Carriger *v.* Railroad Co., 7 Lea, 388: §§89 n. 6, 572 n. 2.

Carris *v.* Comrs., 2 Hill, 443: §282 n. 5.

Carroll *v.* Atlanta, 74 Ga. 386: §64 n. 2.

Carson *v.* Blazer, 2 Binn. 475: §72 n. 17.

v. Central R. R. Co., 35 Cal. 325: §§113 n. 3, 115 n. 4, 124 n. 1, 125 n. 9.

v. Coleman, 11 N. J. Eq. 106: §469 n. 8.

v. Hartford, 48 Conn. 68: §§656 n. 1, 658 n. 4.

Carter *v.* Chicago, 57 Ills. 283: §§109 n. 10, 114 n. 2.

Cary *v.* Daniels, 8 Met. 466: §182 n. 1.

Cascades R. R. Co. *v.* Sohns, 1 Wash. Ter. U. S. 558: §248 n. 3.

Case *v.* Meyers, 6 Dana, 330: §369 n. 1.

v. Thompson, 6 Wend. 634: §§456 n. 2, 457 n. 4.

Case of Road, 2 S. & R. 277: §§512 n. 4, 516 n. 4, 543 n. 9.

9 S. & R. 35: §351 n. 7.

Casey *v.* Kilgore, 14 Kan. 478: §§316 n. 1, 351 n. 6.

Cash *v.* Whitworth, 13 La. An. 401: §§150 n. 2, 150 n. 4.

Caskey *v.* Greensburg, 78 Ind. 233: §633 n. 1.

Cassidy *v.* Kennebec etc. R. R. Co., 45 Me. 263: §401 n. 8.

v. Old Colony R. R. Co., 141 Mass. 174: §§89 n. 5, 575 n. 2, 584 n. 4.

v. Smith, 13 Minn. 129: §605 n. 2.

Castle *v.* County of Berkshire, 11 Gray, 26: §134 n. 4.

Castleberry *v.* Atlanta, 74 Ga. 164: §223 n. 1.

Cates *v.* Waddington, 1 McCord 580: §72 n. 19.

Cator *v.* Board of Works etc., 34 L. J. Q. B. 74: §607 n. 7.

Cauldwell *v.* Curry, 93 Ind. 363: §601 n. 1.

Cavanaugh v. Boston, 139 Mass. 426: §156 n. 12.

Cave's Exr. v. Colmes, 3 A.K.Marsh. 36: §656 n. 1, 3.

Cedar Rapids etc. R. R. Co. v. Chicago etc. Ry. Co., 60 Ia. 35: §538 n. 8.

v. **Ryan**, 37 Minn. 546: §475 n. 1.

v. **Whelan**, 64 Ia. 694: §§543 n. 1.

Central Branch U. P. R. R. Co. v. Andrews, 26 Kan. 702: §§115 n. 4, 477 n. 13, 478 n. 1, 3; 625 n. 2.

v. **Andrews**, 30 Kan. 590: §§115 n. 4, 493 n. 5.

v. **Andrews**, 37 Kan. 162: §§435 n. 1, 437 n. 4, 439 n. 1, 4.

v. **Atchison etc. R. R. Co.**, 26 Kan. 669: §259 n. 3.

v. **Atchison etc. R. R. Co.**, 28 Kan. 453: §§237 n. 4, 311 n. 2, 580 n. 1, 581 n. 1.

v. **Twine**, 23 Kan. 585: §§114 n. 4, 115 n. 1, 4.

Central Bridge Co. v. Lowell, 4 Gray, 474: §§271 n. 1, 274 n. 1, 4; 276 n. 1.

Central City H. Ry. Co. v. Fort Clark H. Ry. Co., 81 Ills. 523: §§269 n. 9, 646 n. 2.

Central Mills Co. v. New York etc. R. R. Co., 127 Mass. 537: §289 n. 11.

Central Park, Matter of, 16 Abb. Pr. 56: §323 n. 4.

Central Park, Matter of, 63 Barb. 282: §§175 n. 1, 269 n. 4.

Central R. R. Co., Appeal of, 102 Pa. S. 38: §§369 n. 1, 381 n. 3, 382 n. 3.

Central R. R. Co. v. English, 73 Ga. 366: §152 n. 6.

v. **Hetfield**, 29 N. J. L. 206: §§10 n. 2, 649 n. 2.

v. **Hudson Terminal Co.**, 46 N. J. L. 289: §§254 n. 1, 393 n. 10.

v. **Merkel**, 32 Tex. 723: §318 n. 4.

v. **Penn. R. R. Co.**, 31 N. J. Eq. 475: §§241 n. 1, 257 n. 1, 265 n. 5, 391 n. 2.

Central etc. R. R. Co. v. Pearson, 35 Cal. 247: §§416 n. 11, 435 n. 1, 6; 446 n. 1, 480 n. 1, 487 n. 1, 488 n. 4.

v. **Royalton**, 58 Vt. 234: §266 n. 2.

v. **Woodstock R.R. Co.**, 50 Vt. 452: §644 n. 3.

Central Turnpike Corporation, 7 Pick. 13: §366 n. 7.

Centreville etc. T. Co. v. Jarrett, 4 Ind. 213: §406 n. 2.

Chace v. Fall River, 2 Allen, 533: §512 n. 4.

Chadbourne v. Zilsdorf, 34 Minn. 43: §631 n. 1, 7.

Chaffee's Appeal, 56 Mich. 244: §240 n. 5.

Chagrin Falls etc. Co. v. Cane, 2 Ohio St. 419: §140 n. 2.

Challis v. Atchison etc. R. R. Co., 16 Kan. 117: §§10 n. 4, 162 n. 3, 238 n. 1, 277 n. 1, 606 n. 1.

Chamberlain v. Elizabethport etc. Co., 41 N. J. Eq. 43: §§111 n. 2, 113 n. 3, 116 n. 2, 240 n. 2.

v. **London etc. Ry. Co.**, 2 Best & Smith, 605: §227 n. 3.

v. **Morgan**, 68 Pa. S. 168: §§174 n. 1, 457 n. 6.

Chambers v. Cincinnati etc. Ry. Co., 69 Ga. 320: §§454 n. 2, 631 n. 2.

v. **Ferry**, 1 Yates, 167: §§141 n. 6, 590 n. 7.

v. **Lewis**, 9 Ia. 583: §544 n. 2.

v. **Saterlee**, 40 Cal. 497: §5 n. 4.

Champion v. Sessions Co. Comrs., 1 Nev. 478: §§454 n. 2, 631 n. 2, 632 n. 1.

v. **Sessions Co. Comrs.**, 2 Nev. 271: §§454 n. 2, 631 n. 2, 634 n. 12.

Champlin v. Morgan, 18 Ills. 293: §631 n. 7.

v. **New York**, 3 Paige, 573: §631 n. 3.

Chandler v. Jamaica etc. Co., 122 Mass. 305: §443 n. 3, 10, 18.

v. **Jamaica etc. Co.**, 125 Mass. 544: §§437 n. 11, 438 n. 4, 485 n. 1, 499 n. 1.

Chapin v. Boston etc. R. R. Co., 6 Cush. 422: §§447 n. 1, 449 n. 1.

v. **Sullivan R. R. Co.**, 39 N. H. 564: §587 n. 2.

Chapman v. Albany etc. R. R. Co., 10 Barb. 360: 111 n. 2, 5.

v. **Clark**, 49 Mich. 305: §412 n. 9.

v. **Gates**, 54 N. Y. 132: §§456 n. 2, 457 n. 8, 458 n. 9.

v. **Groves**, 8 Blackf. 308: §§520 n. 6, 524 n. 1.

v. **Kimball**, 9 Conn. 38: §72 n. 8.

v. **Monmouthshire etc. Co.**, 27 L. J. N. S. Ex. 97; 2 H. & N. 267: §610 n. 12.

v. **Oshkosh etc. R. R. Co.**, 33 Wis. 629: §§74 n. 2, 113 n. 3.

v. **Swan**, 65 Barb. 210: §§419 n. 2, 11; 605 n. 3.

Charles v. Monson etc. Co., 17 Pick. 70: §334 n. 2.

Charles Riv. Bridge Co. v. Warren Bridge, 6 Pick. 376: §§642 n. 6.
v. Warren Bridge, 7 Pick. 344: §136 n. 2.

Charles River etc. R. R. Co. v. Comrs., 7 Gray, 389: §§664 n. 13.

Charles Street Ave. Co. v. Merryman, 10 Md. 536: §255 n. 4.

Charleston Road, 2 Grant's Cas. 467: §409 n. 3.

Charlestown v. Comrs., 3 Met. 202: §273 n. 2.

Charlestown etc. R. R. Co. v. Blake, 12 Rich. 634: §§278 n. 13, 426 n. 1.
v. Comrs., 7 Met. 78: §665 n. 12.

Charlton v. Alleghany City, 1 Grant's Cases, 208: §§88 n. 1.

Chase v. Hatheway, 14 Mass. 222: §§365 n. 1, 368 n. 2.
v. New York Central R. R. Co., 24 Barb. 273: §§99 n. 4.

v. Rutland, 47 Vt. 393: §405 n. 13.

v. Sullivan R. R. Co., 20 N. H. 195: §538 n. 14.

v. Sutton Manf. Co., 4 Cush. 152: §§141 n. 11, 594 n. 1.

v. Worcester, 108 Mass. 60: §§439 n. 7, 469 n. 5.

Chasemore v. Richards, 7 H. L. Cas. 349; 5 H & N. 982: §90 n. 1.

Chattanooga v. Geiler, 13 Lea, 611: §§216 n. 2, 467 n. 3, 494 n. 8.

Chatterton v. Parrott, 46 Mich. 432: §606 n. 1.

Cheaney v. Hooser, 9 B. Mon. 330: §§13 n. 2, 155 n. 8.

Cheesbrough, Petition of, 78 N. Y. 232: §§6 n. 3, 156 n. 2.

Cheesbrough, Matter of, 17 Hun, 561: §156 n. 12, 452 n. 5.

Cheever v. Shedd, 13 Blatch. 258: §§101 n. 2, 569 n. 1.

Chenango Bridge Co. v. Paige, 83 N. Y. 178: §§69 n. 4, 70 n. 1.

Cherokee v. S. C. & I. F. etc. Co., 52 Ia. 279: §§238 n. 1, 437 n. 7, 443 n. 2, 560 n. 2, 6.

Chesapeake etc. Canal Co. v. Baltimore etc. R. R. Co., 4 G. & J. 1: §306 n. 1.
v. Binney, 4 Cranch, C. C. 68: §§405 n. 23, 510 n. 4.

v. Grove, 11 G. & J. 398: §565 n. 1.

v. Hoye, 2 Gratt. 511: §515 n. 5.

v. Key, 3 Cranch, C. C. 599: §§169 n. 5, 255 n. 1, 401 n. 7, 462 n. 2, 470 n. 13.

v. Mason, 4 Cranch, C. C. 123: §§279 n. 5, 528 n. 5.

Chesapeake etc. Canal Co. v. Patton, 6 W. Va. 147: §505 n. 5.
v. Tyree, 7 W. Va. 693: §477 n. 8.

v. Union Bank, 4 Cranch, C. C. 75: §§364 n. 1, 366 n. 6, 368 n. 1, 510 n. 1.

v. Union Bank, 5 Cranch, C. C. 509: §84 n. 3.

v. Young, 3 Md. 480: §633 n. 2.

Chesapeake etc. R. R. Co. v. Bradford, 6 W. Va. 220: §§533 n. 2, 655 n. 1, 656 n. 1.

v. Halstead, 7 W. Va. 301: §505 n. 2.

v. Pack, 6 W. Va. 397: §§281 n. 9, 531 n. 5.

v. Patton, 5 W. Va. 234: §682 n. 2.

v. Patton, 9 W. Va. 648: §§245 n. 2, 406 n. 2.

Chesbrough v. Comrs., 37 Ohio St. 508: §196 n. 7.

Chesemore v. Richards, 2 H. & N. 168: §90 n. 1.

Cheshire v. Adams etc. Reservoir Co., 119 Mass. 356: §329 n. 4.

Chess v. Manown, 3 Wait, 219: §141 n. 6.

Chicago v. Barbier, 80 Ills. 482: §§533 n. 3, 656 n. 1, 4, 13; 657 n. 3.

v. Colby, 20 Ills. 614: §5 n. 1.

v. Crosby, 111 Ills. 538: §156 n. 34.

v. Garrity, 7 Ills. App. 474: §483 n. 6.

v. Laflin, 49 Ills. 172: §§6 n. 3, 80 n. 1, 156 n. 7.

v. Larned, 34 Ills. 203: §5 n. 1.

v. McDonough, 112 Ills. 85: §§436 n. 2, 495 n. 1.

v. O'Brien, 111 Ills. 532: §156 n. 34.

v. Rumsey, 87 Ills. 348: §§12 n. 6, 109 n. 7, 226 n. 1.

v. Shepard, 8 Ills. App. 602: §656 n. 1, 5.

v. Taylor, 125 U. S. 161: §§223 n. 1, 226 n. 2, 235 n. 3.

v. Union Building Assn., 102 Ills. 379: §§100 n. 2, 114 n. 4, 134 n. 4.

v. Wheeler, 25 Ills. 478: §498 n. 11, 609 n. 4, 610 n. 2, 611 n. 2.

v. Wright, 69 Ills. 318: §§109 n. 10, 114 n. 2, 634 n. 11.

Chicago etc. Bridge Co. v. Pacific etc. Tel. Co., 36 Kan. 113: §631 n. 1.

Chicago Dock etc. Co. v. Garrity, 115 Ills. 155: §170 n. 8.

Chicago etc. R. R. Co. v. Ayers, 106 Ills. 511: §§225 n. 1, 236 n. 1.

v. Berg, 10 Ills. App. 607: §§225 n. 1, 493 n. 4.

Chicago etc. R. R. Co. v. Blake, 116 Ills. 163: §§435 n. 1, 437 n. 8, 470 n. 20, 480 n. 7, 524 n. 4.
v. Bull, 20 Ills. 218: §561 n. 7.
v. Carey, 90 Ills. 514: §89 n. 1.
v. Catholic Bishop, 119 Ills. 525: §§439 n. 9, 446 n. 7, 447 n. 4, 483 n. 18, 485 n. 3.
x. Chamberlain, 84 Ills. 333: §§304 n. 1, 382 n. 2, 406 n. 2, 604 n. 4.
v. Chicago etc. R. R. Co., 112 Ills. 589: §§257 n. 1, 267 n. 6, 276 n. 8, 389 n. 1, 391 n. 2, 481 n. 4.
v. Dressel, 110 Ills. 89: §§475 n. 9, 487 n. 1.
v. Dunbar, 100 Ills. 110: §895 n. 2.
v. Englewood Con. R. R. Co., 17 Ills. App. 141: §644 n. 2.
v. Englewood etc. Ry. Co., 115 Ills. 375: §§54 n. 4, 489 n. 4, 5.
v. Francis, 70 Ills. 238: §§225 n. 1, 470 n. 20, 635 n. 5.
v. Gates, 120 Ills. 86: §§337 n. 3, 456 n. 1, 647 n. 5, 655 n. 1.
v. George, 10 Ills. App. 646: §§225 n. 1, 493 n. 4.
v. Glenney, 118 Ills. 487: §89 n. 3.
v. Goodwin, 111 Ills. 273: §§289 n. 2, 3; 507 n. 2, 4, 7.
v. Hall, 90 Ills. 42; 8 Ills. App. 621: §§225 n. 1.
v. Hoag, 90 Ills. 339: §87 n. 4.
v. Hock, 118 Ills. 587: §§311 n. 4, 487 n. 2, 488 n. 4.
v. Hopkins, 90 Ills. 316: §§360 n. 4, 390 n. 3, 425 n. 1, 496 n. 2.
v. Hough, 61 Mich. 507: §491 n. 4.
v. Hurst, 30 Ia. 73: §538 n. 10.
v. Ills. Cent. R. R. Co., 113 Ills. 156: §§259 n. 2, 268 n. 5.
v. Iowa, 94 U. S. 155: §§6 n. 2, 156 n. 32.
v. Jacobs, 110 Ills. 414: §§425 n. 1, 479 n. 2, 6.
v. Jefferson, 14 Ills. App. 615: §124 n. 6.
v. Joliet etc. R. R. Co., 105 Ills. 388: §§489 n. 4, 5, 6; 505 n. 15.
v. Jones, 103 Ind. 386: §§307 n. 9, 398 n. 1, 532 n. 8.
v. Knox College, 34 Ills. 195: §648 n. 1.
v. Loeb, 118 Ills. 203: §§318 n. 8, 625 n. 2, 5; 667 n. 6.
v. Loeb, 8 Ills. App. 627: §§318 n. 2, 8; 225 n. 1.
v. Maher, 91 Ills. 312: §§229 n. 3, 318 n. 8, 625 n. 2, 5.
v. Melville, 66 Ills. 329: §505 n. 5.

Chicago etc. R. R. Co. v. McGinnis, 79 Ills. 269: §115 n. 4.
v. Moffitt, 75 Ills. 524: §66 n. 4.
v. Newton, 36 Ia. 299: §§115 n. 4, 119 n. 1.
v. Patchin, 16 Ills. 198: §§593 n. 1.
v. Phillips, 10 Ills. App. 648: §§225 n. 1, 493 n. 4.
v. Ritter, 1 Tex. App. Civ. Cas. 107: §473 n. 8.
v. Sanford, 23 Mich. 418: §313 n. 8.
v. Smith, 78 Ills. 96: §§253 n. 1, 363 n. 2, 377 n. 1, 380 n. 2.
v. Smith, 111 Ills. 363: §293 n. 3.
v. Springfield etc. R. R. Co., 67 Ills. 142; 96 Ills. 274: §489 n. 3.
v. Stein, 75 Ills. 41: §229 n. 3.
v. St. Louis etc. R. R. Co., 15 Ills. App. 587: §§124 n. 6, 644 n. 4.
v. Swinney, 38 Ia. 182: §§289 n. 5, 296 n. 10, 646 n. 2.
v. Town of Lake, 71 Ills. 233: §§238 n. 1, 266 n. 8, 643 n. 2.
v. Wilson, 17 Ills. 123: §§170 n. 7, 259 n. 6, 387 n. 1, 404 n. 1.
v. Wiltse, 116 Ills. 449: §§171 n. 11, 238 n. 2, 254 n. 1.
Child v. Boston, 4 Allen, 41: §86 n. 7.
Childs v. Central R. R. Co., 33 N. J. L. 323: §259 n. 11.
v. Franklin Co., 128 Mass. 97: §512 n. 4.
v. New Haven etc. R. R. Co., 133 Mass. 253: §§476 n. 10, 562 n. 4.
Chope v. Detroit etc. Plank Road Co., 37 Mich. 195: §257 n. 2.
Chouteau v. St. Louis, 8 Mo. App. 48: §§223 n. 2, 495 n. 1.
Christy v. Newton, 60 Barb. 332: §419 n. 2, 11.
Church v. Grand Rapids etc. R. R. Co., 70 Ind. 161: §320 n. 1.
v. Milwaukee, 31 Wis. 512: §§217 n. 6, 494 n. 2, 3, 8.
v. Milwaukee, 34 Wis. 66: §217 n. 6.
v. Northern Cent. Ry. Co., 45 Pa. S. 339: §548 n. 2.
Church Road, 5 W. & S. 200: §348 n. 1.
Church Street, Matter of, 49 Barb. 455: §329 n. 2.
Churchman v. Martin, 54 Ind. 380: §10 n. 3.
Cincinnati v. Combs, 16 Ohio, 181: §623 n. 1.
v. Penny, 21 Ohio St. 499: §§98 n. 17, 127 n. 1.
Cincinnati etc. R. R. Co. v. Comrs., 1 Ohio St. 77: §§4 n. 3, 155 n. 5.

Cincinnati etc. R. R. Co. v. Cumminsville, 14 Ohio St. 523: §§113 n. 3, 636 n. 3.

v. Danville etc. R. R. Co., 75 Ills. 113: §391 n. 2.

v. Haas, 42 Ohio St. 239: §661 n. 7.

v. Longworth, 30 Ohio St. 108: §472 n. 3, 479 n. 10.

v. Mims, 71 Ga. 240: §435 n. 1.

v. Zian, 18 Ohio St. 417: §492 n. 1.

City of Kansas v. Butterfield, 89 Mo 646: §425 n. 2.

v. Kansas City etc. R. R. Co., 84 Mo. 410: §524 n. 3.

v. Kansas P. Ry. Co., 18 Kan. 331: §§541 n. 3, 656 n. 1.

Clack v. White, 2 Swan, 540: §§157 n. 2, 167 n. 2.

Clairborne St., Matter of, 4 La. An. 7: §529 n. 1.

Clapp v. Boston, 133 Mass 367: §504 n. 1.

v. Manter, 78 Me. 358: §607 n. 7.

Clapper, *Ex parte* 3 Hill, 458: §281 n. 1.

Clark v. Blackmar, 47 N. Y. 150: §255 n. 4.

v. Boston etc. R. R. Co., 24 N. H. 118: §167 n. 1.

v. Close, 43 Ia. 92: §319 n. 3.

v. Dasso, 34 Mich. 86: §§587 n. 6, 590 n. 8.

v. Drain Comrs., 50 Mich. 618: §601 n. 1.

v. Elizabeth, 37 N. J. L. 120: §§144 n. 2, 3; 500 n. 1.

v. Hannibal etc. R. R. Co., 36 Mo. 202: §89 n. 5.

v. Lawrence, 6 Jones Eq. 83: §90 n. 5.

v. Miller, 54 N. Y. 528: §313 n. 10.

v. Phelps, 4 Cow. 190: §283 n. 6.

v. Rochester, 24 Barb. 446: §155 n. 5.

v. Rochester, 43 Hun, 271: §103 n. 7.

v. Saybrook, 21 Conn. 313: §85 n. 8.

v. Second etc. St. R. R. Co., 3 Phila. 259: §125 n. 10.

v. Syracuse, 13 Barb. 32: §156 n. 34.

v. Utica, 18 Barb. 451: §§311 n. 8, 313 n. 8.

v. Wilmington, 5 Harr. 243: §103 n. 8.

v. Worcester, 125 Mass. 226: §§278 n. 1, 469 n. 5.

Clarke v. Blackmar, 47 N. Y. 150: §170 n. 8.

Clarke v. Gilmanton, 12 N. H. 515: §§328 n. 2, 3.

v. Manchester, 56 N. H. 502: §§655 n. 1, 4; 658 n. 1.

v. Newport, 5 R. I. 333: §519 n. 8.

v. White, 5 Bush, 353: §141 n. 7.

Clark's Admx. v. Hannibal etc. R. R. Co., 36 Mo. 202: §§567 n. 1, 2; 572 n. 2.

Clarksville etc. Turnpike Co. v. Atkinson, 1 Sneed, 426: §§416 n. 3, 524 n. 1, 528 n. 5.

Clay v. Rennoyer Creek etc. Co., 34 Mich. 204: §§348 n. 1, 543 n. 10.

Claybaugh v. Baltimore etc. R. R. Co., 108 Ind. 262: §517 n. 3.

Clayton v. Chicago etc. R. R. Co., 67 Ia. 288: §424 n. 3.

Clear Lake Water Co., Matter of, 48 Cal. 586: §527 n. 1.

Clement v. Burns, 43 N. H. 609: §§343 n. 1, 352 n. 7.

Cleveland v. Wick, 18 Ohio St. 303: §472 n. 7.

Cleveland etc. R. R. Co. v. Ball, 5 Ohio St. 563: §§435 n. 1, 436 n. 18, 474 n. 1.

v. Coburn, 91 Ind. 557: §292 n. 2.

v. Speer, 56 Pa. S. 325: §115 n. 4.

Clifford v. Eagle, 35 Ills. 444: §512 n. 4.

Clifford *et al*, Appellants, 52 Me. 262: §405 n. 10.

Clift v. Brown, 95 Ind. 53: §350 n. 6.

Clinton v. Cedar Rapids R. R. Co., 24 Ia. 455: §§115 n. 4, 119 n. 1.

v. Clinton etc. H. R. R. Co., 37 Ia. 61: §§124 n. 1, 125 n. 5.

Close v. Swamm, 27 Ia. 503: §425 n. 4, 5.

Clothier v. Webster, 12 C. B. N. S. 790; 31 L. J. C. P. 316: §574 n. 1.

Clough v. Unity, 18 N. H. 75: §656 n. 23.

Clowe's Private Road, 31 Pa. S. 12: §456 n. 2.

Clowe's Road, 2 Grant's Cas. 129: §532 n. 4, 6.

Clute v. Carr, 20 Wis. 531: §298 n. 1.

Coalter v. Hunter, 4 Rand. 58: §256 n. 24.

Coates v. Dubuque, 68 Ia. 550: §208 n. 4.

v. New York, 7 Cow. 585: §6 n. 1.

Coats v. Clarence Ry. Co., 1 Russ. & Myl. 181: §639 n. 2.

Cobb v. Boston, 109 Mass. 438: §§435 n. 9, 477 n. 1, 477 n. 1.

Cobb *v.* Boston, 112 Mass. 181: §§447 n. 1, 2; 477 n. 1.
v. Illinois etc. R. R. Co., 63 Ills. 233: §§631 n. 2, 632 n. 3.
v. Smith, 16 Wis. 661: §619 n. 3.
Coburn *v.* Pacific etc. Co., 46 Cal. 31: §§578 n. 4, 647 n. 5.
Codman *v.* Evans, 5 Allen, 308: §122 n. 2.
Coe *v.* Columbus etc. R. R. Co., 10 Ohio St. 372: §634 n. 5.
v. New Jersey etc. Ry. Co., 30 N. J. Eq. 21: §297 n. 5.
v. New Jersey Midland Ry. Co., 31 N. J. Eq. 105: §306 n. 12.
Cogswell *v.* Essex Mill Corp., 6 Pick. 94: §§178 n. 2, 452 n. 7, 607 n. 3.
v. New York etc. R. R. Co., 103 N. Y. 10: §§59 n. 1, 95 n. 3, 152 n. 3.
Cohen *v.* St. Louis etc. R. R. Co., 34 Kan. 158: §§479 n. 5, 499 n. 2, 507 n. 2, 6.
Cohn *v.* Wausau Boom Co., 47 Wis. 314: §71 n. 8.
Colburn *v.* Kittridge, 131 Mass. 470: §505 n. 3.
Colcough *v.* Nashville etc. R. R. Co., 2 Head, 171: §§326 n. 2, 335 n. 1, 2; 336 n. 2, 3; 607 n. 2.
Colden *v.* Botts, 12 Wend. 234: §544 n. 5.
Cole *v.* Canaan, 29 N. H. 88: §525 n. 1.
v. County Comrs., 78 Me. 532: §394 n. 4, 7.
v. Drew, 44 Vt. 49: §§133 n. 6, 590 n. 1, 2.
v. La Grange, 113 U. S. 1: §181 n. 2.
v. Muscatine, 14 Ia. 296: §§96 n. 1, 208 n. 7, 624 n. 4.
v. Peoria, 18 Ills. 301: §528 n. 3.
v. West London etc. Ry. Co., 27 Beav. 242: §284 n. 2.
Coleman *v.* Andrews, 48 Me. 562: §§369 n. 1, 382 n. 1, 530 n. 1.
v. Moody, 4 H. & M. Va. 1: §§379 n. 1, 421 n. 2.
Coles *v.* Williamsburg, 10 Wend. 659: §456 n. 2, 457 n. 4, 8; 519 n. 7.
Collins *v.* Philadelphia, 93 Pa. S. 272: §104 n. 2.
v. Rupe, 109 Ind. 340: §§350 n. 8, 351 n. 6.
v. South Staffordshire Ry. Co., 21 L. J. Ex. N. S. 247: §429 n. 1.
Colony *v.* Dublin, 32 N. H. 432: §247 n. 5.
Colorado Midland Ry. Co. *v.* Jones, 29 Fed. R. 193: §§314 n. 3, 315 n. 3.
Colton *v.* Rossi, 9 Cal. 595: §456 n. 1.
Columbia etc. Bridge Co. *v.* Geisse, 34 N. J. L. 268: §327 n. 2.
v. Geisse, 35 N. J. L. 474; 36 N. J. L. 537: §416 n. 5.
v. Geisse, 35 N. J. L. 558: §222 n. 4.
v. Geisse, 38 N. J. L. 39: §336 n. 10.
Colville *v.* St. Paul etc. Ry. Co., 19 Minn. 288: §§435 n. 1, 436 n. 5, 469 n. 4, 473 n. 3, 497 n. 1, 524 n. 3.
v. Judy, 73 Mo. 651: §354 n. 3.
v. Langdon, 22 Minn. 565: §580 n. 2.
Columbus *v.* Columbus etc R. R. Co., 37 Ind. 294: §597 n. 3.
v. Hydraulic etc. Co., 33 Ind. 435: §638 n. 2.
v. Storey, 33 Ind. 195: §§96 n. 1, 638 n. 1.
Columbus etc. Ry. Co. *v.* Braden, 110 Ind. 558: §596 n. 8.
v. Simpson, 5 Ohio St. 251: §470 n. 7.
v. Withrow, 82 Ala. 190: §§225 n. 1, 339 n. 1, 635 n. 2.
Combs *v.* Smith, 78 Mo. 32: §469 n. 6.
Comins *v.* Bradbury, 10 Me. 447: §452 n. 7.
Commett *v.* Pearson, 18 Me. 344: §419 n. 4.
Commissioners *v.* Allen, 25 Kan. 616: §664 n. 16.
v. Barry, 66 Ills. 496: §415 n. 2.
v. Beckwith, 10 Kan. 603: §§278 n. 1, 498 n. 14.
v. Bisby, 37 Kan. 253: §441 n. 3.
v. Bowie, 34 Ala. 461: §§239 n. 2, 407 n. 4, 456 n. 2.
v. Carter, 30 Kan. 581: §377 n. 8.
v. Claw, 15 Johns. 537: §§368 n. 1, 2; 539 n. 3.
v. Cook, 86 N. C. 18: §551 n. 4.
v. Durham, 43 Ills. 86: §512 n. 5.
v. Espen, 12 Kan. 531: §§369 n. 2, 601 n. 1, 602 n. 1, 633 n. 1.
v. Fickinger, 51 Pa. S. 48: §548 n. 2.
v. Harper, 38 Ills. 103: §§369 n. 382 n. 1, 415 n. 2, 543 n. 6.
v. Harris, 71 Ga. 250: §256 n. 3.
v. Harrison, 108 Ills. 398: §631 n. 8.
v. Heed, 33 Kan. 34: §379 n. 1.

Commissioners *v.* Hoblit, 19 Ills. App. 259: §§372 n. 2, 543 n. 3.
v. Holyoke Water Power Co., 104 Mass. 446: §156 n. 21.
v. Johnston, 71 N. C. 398: §469 n. 9.
v. Judges, 7 Wend. 264: §839 n. 2.
v. Kiser, 26 Kan. 279: §428 n. 4.
v. Labore, 37 Kan. 480: §475 n. 16.
v. Meserole, 10 Wend. 122: §347 n. 11.
v. Miller, 82 Ind. 572: §649 n. 2.
v. Muhlenbacker, 18 Kan. 129: §347 n. 1, 4.
v. Murray, 1 Rich. L. 335: §§369 n. 1, 379 n. 1.
v. O'Sullivan, 17 Kan. 58: §§469 n. 2, 472 n. 6.
v. People, 38 Ills. 347: §650 n. 2.
v. People, 2 Ills. App. 24: §382 n. 1.
v. People, 4 Ills. App. 391: §650 n. 5.
v. Snyder, 15 Ills. App. 645: §613 n. 4.
v. Supervisors, 27 Ills. 140: §§542 n. 3, 549 n. 15.
v. Tarver, 25 Ala. 480: §§316 n. 1, 549 n. 1.
v. Thompson, 15 Ala. 134: §§369 n. 1, 382 n. 1, 3; 543 n. 4.
v. Venard, 10 Kan. 95: §134 n. 4.
v. Withers, 29 Miss. 21: §§62 n. 7, 71 n. 5.
v. Wood, 10 Pa. S. 93: §442 n. 2.
 Commissioners etc., Matter of, 39 N. J. L. 433: §193 n. 8.
 Commissioners' Court *v.* Thompson, 18 Ala. 694: §§316 n. 1, 604 n. 4.
 Commissioners of Central Park, 50 N. Y. 493: §536 n. 1.
 51 Barb. 277: §§376 n. 6, 524 n. 1.
 54 How. Pr. 313: §500 n. 2.
 61 Barb. 40: §530 n. 5.
 Commissioners of State Reservation, 37 Hun, 537; 15 Abb. N. C. 159: §73 n. 2.
 Commissioners of State Reservation etc. 102 N. Y. 734; 16 Abb. N. C. 159, 395; §516 n. 1.
 Comrs. of Washington Park, 52 N. Y. 131: §349 n. 7.
 56 N. Y. 144, 2 N. Y. Supr. Ct. 637: §655 n. 2.
 Commonwealth *v.* Alger, 7 Cush. 53: §§6 n. 1, 156 n. 6, 182.
v. Bacon, 13 Bush. 210: §§6 n. 3, 156 n. 18.
 Commonwealth *v.* Beatty, 1 Watts, 382: §247 n. 3.
v. Blue Hill Turnpike, 5 Mass. 420: §§533 n. 3, 549 n. 17.
v. Boston, 2 Met. 220: §369 n. 1.
v. Boston etc. R. R. Co., 3 Cush. 25: §§74 n. 2, 5; 562 n. 5.
v. Cambridge, 4 Mass. 627: §§329 n. 1, 364 n. 1.
v. Cambridge, 7 Mass. 158: §384 n. 9.
v. Carpenter, 3 Mass. 268: §560 n. 1.
v. Chapin, 5 Pick. 199: §72 n. 7.
v. Chase, 2 Mass. 170: §§329 n. 1, 364 n. 1, 369 n. 1.
v. Combs, 2 Mass. 489: §§329 n. 1, 343 n. 1, 364 n. 1, 469 n. 5. 514 n. 1.
v. Comrs., 2 Mass. 489: §498 n. 1.
v. Comrs., 2 Whart. 286: §613 n. 8.
v. County Comrs., 8 Pick. 343: §350 n. 3.
v. Dudley, 5 T. B. Mon. 22: §554 n. 3.
v. Eastern R. R. Co., 103 Mass. 254: §156 n. 21.
v. Egremont, 6 Mass. 491: §§329 n. 1, 393 n. 2.
v. Ellis, 11 Mass. 462: §350 n. 9.
v. Erie etc. R. R. Co., 27 Pa. S. 339: §257 n. 2.
v. Favis, 5 Rand. 691: §577 n. 1.
v. Fisher, 5 J. J. Marsh. 220: §510 n. 1.
v. Fisher, 1 P. & W. 462: §453 n. 1, 4.
v. Fitchburg R. R. Co., 8 Cush. 240: §255 n. 3.
v. Great Barrington, 6 Mass. 492: §514 n. 1, 2.
v. Hall, 8 Pick. 440: §§369 n. 1, 556 n. 6.
v. Hartford etc. R. R. Co., 14 Gray, 379: §118 n. 2.
v. Haverhill, 7 Allen, 523: §584 n. 2, 3.
v. Hauck, 103 Pa. S. 536: §589 n. 11, 12.
v. Ipswich, 2 Pick. 70: §419 n. 2.
v. McAllister, 2 Watts, 190: §453 n. 1, 4.
v. Merrick, 2 Mass. 529: §518 n. 1, 519 n. 5.
v. Metcalf, 2 Mass. 118: §369 n. 1.
v. Norfolk, 5 Mass. 435: §§614 n. 6, 650 n. 1.
v. Noxon, 121 Mass. 42: §505 n. 3.

Cón monwealth *v.* Penn. Canal Co., 68 Pa. S. 41: §§6 n. 3, 156 n. 22.
v. Peters, 2 Mass. 125: §505 n. 7.
v. Peters, 3 Mass. 229: §§329 n. 1, 343 n. 1, 364 n. 1, 368 n. 1.
v. Pittsburgh etc. R. R. Co., 58 Pa. S. 26: §461 n. 2.
v. Sessions of Middlesex, 9 Mass. 388: §469 n. 5.
v. Sheldon, 3 Mass. 188: §369 n. 1.
v. Stevens, 10 Pick. 247: §270 n. 7.
v. Tewksbury, 11 Met. 55: §§6 n. 2, 156 n. 8.
v. Weiner, 3 Met. 445: §383 n. 2.
v. West Boston Bridge, 13 Pick. 195: §549 n. 17.
v. Westborough, 3 Mass. 406: §§379 n. 1, 412 n. 9.
Compton *v.* Susquehanna R. R. Co., 3 Bland, ch. 386: §456 n. 2, 3.
Concord, Petition of, 50 N. H. 530: §134 n. 4.
Concord R. R. Co. *v.* Greeley, 17 N. H. 47: §§11 n. 1, 157 n. 2, 3, 5, 6; 158 n. 1, 160 n. 2, 165 n. 1, 170 n. 1, 172 n. 3, 242 n. 3, 379 n. 1.
v. Greeley, 20 N. H. 157: §555 n. 5.
v. Greeley, 23 N. H. 237: §§443 n. 4, 446 n. 3.
Cone *v.* Hartford, 28 Conn. 363: §127 n. 1.
Conger *v.* Burlington etc. R. R. Co., 41 Ia. 419: §647 n. 1, 16.
v. Hudson etc. R. R. Co., 12 N. Y. 190: §419 n. 12.
Conklin *v.* New York etc. Ry. Co., 102 N. Y. 107: §§96 n. 1, 118 n. 4.
Connable *v.* Chicago etc. Ry. Co., Connally *v.* Griswold, 7 Ia. 416: §626 n. 1.
60 Ia. 27: §538 n. 8.
Connecticut etc. R. R. Co. *v.* Clapp, 1 Cush. 559: §§426 n. 1, 7; 509 n. 8.
v. County Comrs., 127 Mass. 50: §457 n. 10.
v. Holton, 32 Vt. 43: §§586 n. 1, 587 n. 9.
Conniff *v.* San Francisco, 67 Cal. 45: §§59 n. 1, 89 n. 2.
Conrad *v.* Smith, 32 Mich. 429: §§589 n. 7, 637 n. 5.
Consolidated Channel Co. *v.* Cent. Pacific R. R. Co., 51 Cal. 269: §§158 n. 1, 184 n. 5.
Conter *v.* St. Paul etc. R. R. Co., 22 Minn. 342: §47 n. 8.
Contra Costa R. R. Co. *v.* Moss, 23 Cal. 323: §§267 n. 1, 357 n. 2.
Converse *v.* Grand Rapids etc. R.R. Co., 18 Mich. 459: §§307 n. 4, 314 n. 17.
Conwell *v.* Emrie, 2 Ind. 35: §7 n. 2.
v. Emrie, 4 Ind. 209: §103 n. 4.
v. Hagerstown Canal Co., 2 Ind. 588: §607 n. 2.
v. Springfield etc. R. R. Co., 81 Ills. 232: §§290 n. 5, 508 n. 2.
v. Tate, 107 Ind. 171: §528 n. 1.
Cook *v.* Burlington, 36 Ia. 357: §111 n. 2.
v. South Park Comrs., 61 Ills. 115: §§428 n. 1, 456 n. 1, 477 n. 4, 499 n. 9, 533 n. 2.
Cool *v.* Crommet, 13 Me. 250: §§318 n. 11, 324 n. 1, 3; 382 n. 1.
Coolman *v.* Fleming, 82 Ind. 117: §§361 n. 4, 379 n. 1.
Coon *v.* Mason, 22 Ills. 666: §536 n. 4.
Cooper *v.* Alden, Harr. Mich. 72: §§116 n. 1, 117 n. 6, 9.
v. Board of Works, 108 E. C. L. R. 181: §368 n. 2.
v. Chester R. R. Co., 19 N. J. Eq. 199: §580 n. 1.
v. Hall, 5 Ohio 320: §67 n. 4.
v. Williams, 4 Ohio 253: §62 n. 16.
v. Williams, 5 Ohio 391: §169 n. 2.
Cooper etc., Application of, 93 N. Y. 507: §531 n. 5.
Cooper, Matter of, 28 Hun, 515: §174 n. 2.
Coovert *v.* O'Connor, 8 Watts. 470: §72 n. 17.
Copeland v. Packard, 16 Pick. 217: §§166 n. 11, 379 n. 1.
Corbin *v.* Cedar Rapids etc. R. R. Co., 63 Ia. 73: §§390 n. 3, 655 n. 1, 661 n. 1.
Corey *v.* Probate Judge, 56 Mich. 524: §§369 n. 1, 385 n. 1, 549 n. 3.
v. Swagger, 74 Ind. 211: §§350 n. 2, 354 n. 2, 449 n. 1, 540 n. 1.
Corley *v.* Kennedy, 28 Ills. 143: §369 n. 1.
Cornelius *v.* Glenn, 7 Jones L. 512: §§6 n. 3, 156 n. 22.
Cornell *v.* Crawford Co., 11 Ark. 604: §543 n. 4.
Cornochan *v.* Norwich etc. Ry. Co., 26 Beav. 169: §618 n. 5.
Cornville *v.* County Comrs., 33 Me. 237: §517 n. 1.
Corporation *v.* Manhattan Co., 1 Caines' R. 507: §§372 n. 1, 405 n. 4, 524 n. 1.

Corporation of New York etc., 18 Johns. 506: §655 n. 2.

Corrigal *v.* London etc. Ry. Co., 5 M. & G. 219: §379 n. 1.

Cortland etc. R. R. Co., Matter of, 98 N. Y. 336: §§489 n. 7, 561 n. 2.

Corwin *v.* Cowan, 12 Ohio St. 629: §§278 n. 3, 598 n. 1.

Corwith *v.* Hyde Park, 14 Ills. App. 635: §§609 n. 3, 610 n. 1, 656 n. 3.

Cosby *v.* Lynn, 4 Bibb, 249: §538 n. 5.

v. Owensboro etc. R. R. Co., 10 Bush, 288: §115 n. 4.

Costello *v.* Burke, 63 Ia. 361: §§314 n. 2, 440 n. 2, 442 n. 1.

Coster *v.* Albany, 52 Barb. 276: §220 n. 12.

v. Mayor, 43 N. Y. 399: §134 n. 5.

v. New Jersey R. R. Co., 23 N. J. L. 227: §§301 n. 1, 374 n. 3, 382 n. 2.

v. New Jersey etc. R. R. Co., 24 N. J. L. 730: §§265 n. 6, 416 n. 3, 507 n. 2.

v. Tide Water Co., 18 N. J. Eq., 54: §§5 n. 4, 157 n. 1, 158 n. 1, 161 n. 1, 2; 185 n. 2, 186 n. 6, 188 n. 5, 193 n. 11, 200 n. 1, 2; 238 n. 1.

v. Tide Water Co., 18 N. J. Eq., 518: §§5 n. 4, 238 n. 1.

Cosenes *v.* Bogner Ry. Co., 36 L. J. Eq., 104: §618 n. 1.

Cotes *v.* Davenport, 9 Ia. 227: §§103 n. 7, 208 n. 8.

Cother *v.* Midland Ry. Co., 2 Phillips, 469: §256 n. 15.

Cott *v.* Lewiston R. R. Co., 36 N. Y. 214: §§62 n. 8, 88 n. 3.

Cotton *v.* Mississippi etc. Boom Co., 19 Minn. 497: §71 n. 3.

v. Mississippi etc. Boom Co., 22 Minn. 372: §§71 n. 9, 177 n. 3, 239 n. 1.

Cottrill *v.* Myrick, 12 Me. 222: §160 n. 2.

Couch, *Ex parte*, 14 Ark. 337: §543 n. 4.

County *v.* Lattermer, 31 Minn. 239: §322 n. 5.

County Comrs. *v.* Humphrey, 47 Ga. 565: §631 n. 1.

County Court etc. *v.* Griswold, 58 Mo. 175: §§158 n. 1, 175 n. 1, 2; 238 n. 2, 389 n. 1.

County of Blue Earth *v.* St. Paul etc. R. R. Co., 28 Minn. 503: §§477 n. 10, 496 n. 7.

County of Sangamon *v.* Brown, 13 Ills. 207: §656 n. 1.

Coutant *v.* Catlin, 3 Sandf. 485: §483 n. 1.

Covey *v.* Buffalo etc. R. R. Co., 23 Barb. 482: §111 n. 5.

v. Probate Judge, 56 Mich. 524: §322 n. 1.

Covington *v.* Southgate, 15 B. Mon. 491: §155 n. 8.

Covington St. Ry. Co. *v.* Covington, 9 Bush, 127: §§116 n. 2, 125 n. 1.

Cowan *v.* Glover, 3 A. K. Marsh. 356: §405 n. 26.

v. Penobscott R. R. Co., 44 Me. 140: §245 n. 1.

Cowan's Case, 1 Overton 310: §250 n. 1.

Cowdrey *v.* Woburn, 136 Mass. 409: §62 n. 10.

Cowell *v.* Thayer, 5 Met. 253: §67 n. 9.

Cox *v.* Buie, 12 Ired. L. 139: §371 n. 3.

v. Cummings, 33 Ga. 549: §§8 n. 9.

v. Louisville etc. R. R. Co., 48 Ind. 178: §§111 n. 2, 113 n. 3, 115 n. 4, 116 n. 6, 635 n. 2.

v. State, 3 Blackf. 193: §72 n. 12.

v. Tifton, 18 Mo. App. 450: §254 n. 1.

Coyer *v.* Boyd, 55 Ind. 166: §§424 n. 3, 449 n. 1, 540 n. 1.

Craig *v.* Allegheny, 53 Pa. S. 477: §596 n. 3.

v. Lewis, 110 Mass. 377: §298 n. 1.

v. North, 3 Met. (Ky.) 187: §511 n. 23.

v. Rochester City etc. R. R. Co., 39 Barb. 494; 39 N. Y. 404: §124 n. 3, 5; 636 n. 3.

Crandall *v.* Taunton, 110 Mass. 421: §542 n. 3.

Crane *v.* Camp, 12 Conn. 463: §370 n. 3.

Crater *v.* Fritts, 44 N. J. L. 374: §§473 n. 5, 523 n. 4.

Craugh *v.* Harrisburg, 1 Pa. S. 132: §483 n. 5.

Crawford *v.* Comrs., 32 Kan. 555: §§369 n. 1, 382 n. 2.

v. Delaware, 7 Ohio St. 459: §93 n. 1, 98 n. 4, 13, 22; 100 n. 2, 114 n. 4.

v. Rutland, 52 Vt. 412: §§388 n. 1, 390 n. 1.

v. Snowden, 3 Litt. 223: §§369 n. 1, 379 n. 5.

Crawford *v.* Valley R. R. Co., 25
Gratt. 467: §§28 n. 1.

Crawfordsville *v.* Bond, 96 Ind. 236:
§§89 n. 4, 103 n. 3.

Crawfordsville R. R. Co. *v.* Wright,
5 Ind. 252: §649 n. 2.

Creal *v.* Keokuk, 4 G. Greene, 47:
§§96 n. 1, 107 n. 2.

Crear *v.* Crossly, 40 Ills. 175: §167
n. 2, 24.

Crenshaw *v.* Slate River Co., 6
Rand. Va. 245: §§75 n. 3, 178
n. 2.

Crescent City etc. Co. *v.* Butchers'
Union etc. Co., 4 Wood C. C.
96: §6 n. 3.

Crill *v.* Rome, 47 How. Pr. 398:
§§73 n. 1, 85 n. 1.

Crise *v.* Auditor, 17 Ark. 572: §§601
n. 1, 613 n. 2, 6.

Crittenden *v.* Wilson, 5 Cow. 165:
§§67 n. 2, 607 n. 2.

Crockett *v.* Boston, 5 Cush. 182:
§§298 n. 5, 396 n. 4.

Croft *v.* London etc. Ry. Co., 2 Best
& Smith, 436: §293 n. 3.

Crolley *v.* Minneapolis etc. Ry. Co.,
30 Minn. 541: §§594 n. 1, 2;
597 n. 1.

Cromie *v.* Trustees, 71 Ind. 208:
§278 n. 4.

Crompton Carpet Co. *v.* Worcester,
123 Mass. 498: §318 n. 14.

Crooke *v.* Flatbush Water Works
Co., 29 Hun, 245; 27 Hun, 72:
§128 n. 1.

Crosbie *v.* Chicago etc. Ry. Co., 62
Ia. 189: §292 n. 3.

Crosby *v.* Dracut, 109 Mass. 206:
§648 n. 5.
v. Hanover, 36 N. H. 404: §§166
n. 5, 251 n. 1, 271 n. 1, 274 n. 1.

v. Owensboro etc. R. R. Co., 10
Bush, 285: §115 n. 2.

v. Smith, 19 Wis. 449: §619 n. 3.

Cross *v.* Plymouth, 125 Mass. 557:
§§428 n. 3, 469 n. 5, 476 n. 3.
v. St. Louis etc. Ry. Co., 77 Mo.
318: §§115 n. 4, 117 n. 2.

Crossly *v.* O'Brien, 24 Ind. 325:
§274 n. 1.

Crossett *v.* Janesville, 28 Wis. 420:
§105 n. 2.
v. Owens, 110 Ills. 378: §§411 n. 1,
413 n. 3.

Crowell *v.* Londonderry, 63 N. H.
42: §§256 n. 13, 281 n. 8, 407
n. 1.

Crownier *v.* Watertown etc. R. R.
Co., 9 How. Pr. 457: §655 n. 5.

Cruger *v.* Hudson River R. R. Co.,
12 N. Y. 190: §§313 n. 9, 369 n.
2, 379 n. 1, 419 n. 3.

Crume *v.* Wilson, 104 Ind. 583:
§655 n. 6.

Cubit *v.* O'Dett, 51 Mich. 347: §§89
n. 4, 103 n. 3.

Cuckfield Burial Board. *In re*, 24
L. J. Ch. n. s. 585: §265 n. 4.

Culbertson etc. Co. *v.* Chicago, 111
Ills. 651: §§425 n. 1, 443 n. 1,
625 n. 7.

Cumberland *v.* Willison, 50 Md.
138: §103 n. 4.

Cumberland Valley R. R. Co. *v.*
McLanahan, 59 Pa. S. 23: §§170
n. 3, 607 n. 2.
v. Rhoadarmer, 107 Pa. S. 214:
§220 n. 13.

Cuming *v.* Prang, 24 Mich. 514:
§590 n. 4.

Cummings *v.* Peters, 56 Cal. 593:
§§169 n. 4, 173 n. 2, 202 n. 1.
v. Seymour, 79 Ind. 491: §103 n. 4.
v. Williamsport, 84 Pa. S. 472:
§§469 n. 10, 478 n. 1, 588
n. 14.

Cummins *v.* Des Moines etc. Ry.
Co., 63 Ia. 397: §§443 n. 2, 475
n. 9, 481 n. 1, 503 n. 2.
v. Shields, 34 Ind. 154: §§283 n.
10, 540 n. 4.

Cunningham *v.* Campbell, 33 Ga.
625: §8 n. 9.
v. Pacific R. R. Co., 61 Mo. 33:
§30 n. 1, 7.

Cupp *v.* Comrs., 19 Ohio St. 178:
§§367 n. 1, 419 n. 4, 664 n. 9.

Curran *v.* Louisville, 83 Ky. 628:
§597 n. 6.
v. Shattuck, 24 Cal. 427: §§253 n.
1, 338 n. 5, 369 n. 2, 452 n. 6,
456 n. 1, 631 n. 2, 634 n. 11.

Currie *v.* Natchez etc. R. R. Co.,
61 Miss. 725; 62 Miss. 506:
§§298 n. 1, 649 n. 11.

Currier *v.* Grafton, 28 N. H. 73:
§560 n. 5.
v. Marietta etc. R. R. Co., 11 Ohio
St. 228: §278 n. 10, 14.

Curry *v.* Jones, 4 Del. Ch. 559: §§419
n. 2, 631 n. 3.
v. Mount Sterling, 15 Ills. 320:
§§239 n. 2, 470 n. 4.

Curtis *v.* Eastern R. R. Co., 14
Allen, 55: §89 n. 3.

Curtis v. Pocahontas Co., 72 Ia. 151: §353 n. 4.
v. St. Paul etc. R. R. Co., 20 Minn. 28: §§435 n. 1, 3; 436 n. 5, 437 n. 7, 496 n. 7, 497 n. 1, 584 n. 1.
v. St. Paul etc. R. R. Co., 21 Minn. 497: §533 n. 2.
Curtiss v. Ayrault, 47 N. Y. 73: §88 n. 3.
v. Smith, 35 Conn. 156: §305 n. 3.
Curtiss St., Matter of, 1 Sheldon (N. Y.) 425: §§416 n. 8, 534 n. 3.
Cushing v. Boston, 144 Mass. 317: §504 n. 4.
v. Gay, 23 Me. 9: §§393 n. 2, 513 n. 5, 514 n. 2.
Cushman v. Smith, 34 Me. 247: §§57 n. 2, 145 n. 3, 5; 456 n. 2, 649 n. 3.
Cuthvert v. Kuhn, 3 Whart. 357: §483 n. 9.
Cutter v. New York, 92 N. Y. 106: §499 n. 13.
Cuyler v. Rochester, 12 Wend. 165: §281 n. 1.
Cypress Pond etc. Co. v. Hooper, 2 Met. (Ky.) 350: §§188 n. 4, 199 n. 1.
Cyr v. Dupour, 68 Me. 492: §347 n. 17.

D.

Daggy v. Coats, 19 Ind. 259: §540 n. 4.
v. Green, 12 Ind. 303: §§348 n. 1, 405 n. 16.
Daily v. Swope, 47 Miss. 367: §200 n. 6.
Daley v. St. Paul, 7 Minn. 390: §656 n. 18.
Dalton v. Northampton, 19 N. H. 362: §311 n. 2.
v. Water Comrs., 49 Cal. 222: 249 n. 3.
Dalzell v. Davenport, 12 Ia. 437: §§208 n. 2, 436 n. 15, 20.
Damour v. Lyons City, 44 Ia. 276: §103 n. 7.
Damp v. Dane, 29 Wis. 419: §347 n. 1, 11.
Damrell v. Supervisors etc. 40 Cal. 154: §§253 n. 1, 316 n. 1, 509 n. 5.
Danforth v. Suydam, 4 N. Y. 66: §324 n. 4.
Daniels v. Chicago etc. R. R. Co., 35 Ia. 129: §647 n. 1.
v. Chicago etc. R. R. Co., 41 Ia. 52: §507 n. 7, 12.
Daniels v. Smith, 38 Mich. 660: §382 n. 3.
Danvers v. County Comrs., 2 Met. 185: §405 n. 6.
Danville etc. Road Co. v. Campbell, 87 Ind. 57: §140 n. 2.
v. Comth., 73 Pa. S. 29: §115 n. 4.
Darling v. Blackstone Manf. Co., 16 Gray, 187: §§396 n. 1, 338 n. 2.
Darlington v. United States, 2 Pa. S. 382: §§237 n. 1, 307 n. 1, 357 n. 2.
Dartmouth College v. Woodward, 4 Wheat. 625: §137 n. 4.
Daton Mining Co. v. Sewell, 11 Nev. 394: §184 n. 1.
Daugherty v. Brown, 91 Mo. 26: §§373 n. 1, 469 n. 6.
Davenport v. Stevenson, 34 Ia. 225: §115 n. 4.
Davidson v. Boston etc. R. R. Co., 3 Cush. 91: §318 n. 2.
v. New Orleans, 96 U. S. 97: §§5 n. 4, 365 n. 1.
Daviess v. County Court, 1 Bibb, 453: §§411 n. 1, 513 n. 8.
Davis v. Brigham, 29 Me. 391: §334 n. 1.
v. Charles River etc. R. R. Co., 11 Cush. 506: §§321 n. 1, 446 n. 3.
v. C. & N. W. Ry. Co., 46 Ia. 389: §§115 n. 4, 117 n. 4.
v. East Tenn. etc. R. R. Co., 1 Sneed, 94: §143 n. 3.
v. La Crosse etc. R. R. Co., 12 Wis. 16: §§607 n. 2, 618 n. 1, 634 n. 7.
v. Londgreen, 8 Neb. 43: §88 n. 1.
v. New Bedford, 133 Mass. 549: §665 n. 9.
v. New York, 14 N. Y. 506: §§116 n. 1, 124 n. 2, 125 n. 1, 4; 636 n. 4.
v. North Penna. R. R. Co., 2 Phila. 146: §§499 n. 9, 532 n. 10.
v. Russell, 47 Me. 443: §§456 n. 2, 607 n. 2, 649 n. 3.
v. Sacramento, 59 Cal. 596: §67 n. 2.
v. San Lorenzo R. R. Co., 47 Cal. 317: §§145 n. 5, 456 n. 1.
v. Smith, 180 Mass. 113: §167 n. 1.
v. Stevens, 57 Me. 593: §§327 n. 3, 336 n. 2.
v. T. C. & D. R. R. Co., 4 Stew. & Por. 421: §170 n. 1.
v. Titusville etc. Ry. Co., 114 Pa. S. 308: §§306 n. 5, 318 n. 4.

Davison *v.* Otis, 24 Mich. 23: §549 n. 12.

Day *v.* New Orleans Pac. Ry. Co., 37 La. An. 131: §625 n. 7.

v. Railroad Co., 41 Ohio St. 392: §297 n. 8.

v. Railroad Co., 44 Ohio St. 406: §596 n. 1.

v. Stetson, 8 Me. 365: §§136 n. 3, 168 n. 1.

Dayton Mining Co. *v.* Seawell, 11 Nev. 394: §§157 n. 2, 158 n. 1, 159 n. 1, 162 n. 1, 2; 165 n. 6.

Dayton etc. R. R. Co. *v.* Lewton, 20 Ohio St. 401: §§620 n. 3, 621 n. 1, 2.

v. Marshall, 10 Ohio St. 497: §655 n. 1.

Dean *v.* Colt, 99 Mass. 486: §607 n. 2, 6.

Deansville Cem. Ass. Matter of, 66 N. Y. 569: §§158 n. 1, 176 n. 2. Matter of, 5 Hun, 482: §§238 n. 1, 242 n. 2.

Dearborn *v.* Boston etc. R. R. Co., 24 N. H. 179: §§433 n. 2, 464 n. 1, 565 n. 1, 3; 567 n. 2.

Deaton *v.* Polk Co., 9 Ia. 594: §§538 n. 13, 590 n. 7.

De Ben *v.* Gerard, 4 La. An. 30: §590 n. 4.

De Buol *v.* Freeport etc. Ry. Co., 111 Ills. 499: §§417 n. 1, 487 n. 1.

De Camp *v.* Hibernia etc. R. R. Co., 47 N. J. L. 43: §§171 n. 10, 265 n. 6, 278 n. 10, 15; 285 n. 5.

v. Hibernia etc. R. R. Co., 47 N. J. L. 518: §§171 n. 10, 278 n. 10, 15; 285 n. 5.

Deer *v.* Comrs., 109 Ills. 379: §525 n. 13.

Deere *v.* Cole, 118 Ills. 165: §640 n. 2.

v. Guest, 1 Myl. & C. 516: §618 n. 5.

Deering *v.* York etc. R. R. Co., 31 Me. 172: §631 n. 1.

Deinmick *v.* Broadhead, 75 Pa. S. 464: §582 n. 5.

Deisner *v.* Simpson, 72 Ind. 435: §324 n. 1.

Deitrichs *v.* Lincoln etc. R. R. Co., 12 Neb. 225: §523 n. 1, 444 n. 3.

v. Lincoln etc. R. R. Co., 13 Neb. 361: §§244 n. 3, 259 n. 4.

Deitrick *v.* Highway Comrs., 6 Ills. App. 70: §470 n. 17.

Delaplaine *v.* C. & N. W. Ry. Co., 42 Wis. 214: §§76 n. 2, 7; 81 n. 2, 82 n. 3, 83 n. 1, 3; 84 n. 2.

Delaware etc. Canal Co. *v.* Lee, 22 N. J. L. 243: §§66 n. 4, 8; 67 n. 2, 154 n. 1, 568 n. 1.

v. McKeen, 52 Pa. S. 117: §220 n. 12.

Delaware etc. R. R. Co. *v.* Burson, 61 Pa. S. 369: §§289 n. 6, 294 n. 6, 469 n. 10, 498 n. 5, 499 n. 1.

De Long *v.* Schimmel, 58 Ind. 64: §511 n. 18.

Delphi *v.* Evans, 36 Ind. 90: §101 n. 2.

Dempsey *v.* Burlington, 66 Ia. 687: §184 n. 4.

Den *v.* Morris Canal Co., 24 N. J. L. 587: §§10 n. 2, 12 n. 6, 456 n. 2.

Denham *v.* County Comrs., 108 Mass. 202: §167 n. 1, 6.

Dennison *v.* Taylor, 15 Abb. (N. C.) 439: §318 n. 15.

Denny *v.* Bush, 95 Ind. 315: §540 n. 4.

Denslow *v.* New Haven etc. Co., 16 Conn. 98: §§59 n. 1, 62 n. 2.

Denton *v.* Nanny, 8 Barb. 618: §323 n. 11.

Denver *v.* Bayer, 7 Col. 113: §§54 n. 4, 100 n. 2, 115 n. 4, 225 n. 1, 232 n. 2, 236 n. 1, 493 n. 4.

v. Verna, 8 Col. 399: §223 n. 8.

Denver etc. R. R. Co. *v.* Denver City Ry. Co., 2 Col. 673: §§139 n. 6, 642 n. 7.

v. Denver etc. R. R. Co., 17 Fed. R. 867: §276 n. 5.

v. Jackson, 6 Col. 340: §551 n. 11.

v. Lamborn, 8 Cal. 380: §656 n. 1, 3.

v. Otis, 7 Col. 198: §563 n. 2.

v. Schmitt, (Col.) 16 P. R. 842: §444 n. 4.

Department of Parks, Matter of, 73 N. Y. 560: §616 n. 3.

Department of Public Works, 2 Hun, 374: §655 n. 2.

Matter of, 6 Hun, 436: §500 n. 1.

De Peyster *v.* Mali, 27 Hun, 439: §627 n. 1.

Derby *v.* Gage, 60 Mich. 1: §§533 n. 3, 656 n. 26.

Detmold *v.* Drake, 46 N. Y. 318: §488 n. 21.

Detroit *v.* Detroit etc. Co., 43 Mich. 140: §139 n. 18.

Detroit etc. R. R. Co. *v.* Detroit, 49 Mich. 47: §339 n. 1.

v. Graham, 46 Mich. 642: §549 n. 10.

Detroit etc. R. R., Matter of, 2 Doug. (Mich.) 367: §408 n. 4.

Detroit etc. Transit Co. v. Backus, 48 Mich. 582: §543 n. 9.

Detroit Sharpshooters' Ass. v. Highway Comrs., 34 Mich. 36: §§253 n. 1, 382 n. 3, 549 n. 3.

De Varaigne v. Fox, 2 Blatch. 95: §§277 n. 1, 596 n. 3, 4.

De Vaux v. Detroit, Harr. ch. (Mich.) 98: §631 n. 1, 7.

De Wint, Matter of, 2 Cow. 498: §616 n. 8.

De Witt v. Duncan, 46 Cal. 342: §§241 n. 1, 286 n. 3.

Dexter v. Broat, 16 Barb. 337: §109 n. 2.

Dickenson v. Fitchburg, 13 Gray, 546: §§435 n. 7, 437 n. 11, 446 n. 1, 478 n. 8.

Dickerson v. Comrs., 18 Ills. App. 88: §646 n. 2.

Dickey v. Tennison, 27 Mo. 373: §§157 n. 2, 158 n. 1, 167 n. 2, 8; 238 n. 1, 364 n. 1, 368 n. 1, 4.

Dickinson v. Amherst Water Co., 139 Mass. 210: §560 n. 1, 2.

v. Grand Junction Canal Co., 7 Exch. 282: §90 n. 4.

v. Highway Comrs., 41 Mich. 638: §369 n. 1.

v. Van Wormer, 39 Mich. 141: §§301 n. 1, 6; 369 n. 1, 549 n. 3.

v. Worcester, 7 Allen, 19: §103 n. 6.

Dickson v. Baltimore etc. R. R. Co., 3 McArthur, 362: §624 n. 5.

v. Chicago etc. R. R. Co., 71 Mo. 575: §§66 n. 4, 625 n. 3.

Diedrich v. N. W. Ry. Co., 42 Wis. 248: §§76 n. 1, 81 n. 1, 82 n. 3, 84 n. 1, 2.

Diedrichs v. N. W. Union Co., 33 Wis. 219: §631 n. 2.

Dietrich v. Murdock, 42 Mo. 279: §§171 n. 6, 507 n. 8.

Dietrick v. Highway Comrs., 6 Ills. App. 70: §543 n. 4.

Diets v. Frazier, 50 Mich. 227: §543 n. 1.

Dillard v. Webb, 55 Ala. 468: §156 n. 16.

Dillenbach v. Xenia, 41 Ohio St. 207: §625 n. 6.

Dillman v. Crooks, 91 Ind. 158: §438 n. 1.

Dills v. Hatcher, 6 Bush (Ky.) 606: §8 n. 5.

Dimmick v. Council Bluffs etc. R. R. Co., 58 Ia. 637: §583 n. 2.

Dingley v. Boston, 100 Mass. 544: §§188 n. 1, 201 n. 5, 277 n. 1.

v. Gardiner, 73 Me. 63: §607 n. 2.

Dinsmore v. Auburn, 26 N. H. 356: §358 n. 2, 6.

Dinwiddie v. Roberts, 1 G. Greene, 363: §631: n. 2.

Directors of Poor v. Railroad Co., 7 W. & S. 236: §§247 n. 8, 440 n. 2.

Dissoway v. Winant, 34 Barb. 538: §562 n. 11.

District of Pittsburgh, 2 W. & S. 320: §144 n. 1, 2.

Dix v. Shaver, 14 Hun, 392: §299 n. 3.

Dixon v. Baker, 65 Ills. 518: §§103 n. 2, 494 n. 9.

v. Baltimore etc. R. R. Co., 1 Mackey (D. C.) 78: §318 n. 9.

Doctor v. Hartman, 74 Ind. 221: §393 n. 2.

Dodge v. Acworth, 32 N. H. 474: §555 n. 4.

v. Burns, 6 Wis. 514: §606 n. 1.

v. Council Bluffs, 57 Ia. 560: §242 n. 5.

v. County Comrs., 3 Met. 380: §146 n. 1, 3.

v. Essex, 31 Met. 380: §220 n. 6.

v. Omaha etc. R. R. Co., 20 Neb. 276: §§335 n. 4, 628 n. 5.

Dodson v. Cincinnati, 34 Ohio St. 276: §§102 n. 1, 2; 502 n. 6.

Doe v. Georgia R. R. & B. Co., 1 Ga. 524: §§11 n. 2, 452 n. 1, 456 n. 2, 458 n. 3, 607 n. 2.

Dolan v. Mayor etc. 62 N. Y. 472: §534 n. 3.

Dollarhide v. Muscatine Co., 1 G. Greene, 158: §414 n. 2.

Dolphin v. Pedley, 27 Wis. 469: §512 n. 1.

Domestic Tel. Co. v. Newark, 49 N. J. L. 344: §181 n. 3.

Donald v. St. Louis etc. R. R. Co., 52 Ia. 411: §§318 n. 4, 623 n. 1.

Donnaker v. State, 8 S. & M. 649: §§115 n. 4, 119 n. 1.

Donnelly v. Decker, 58 Wis. 461: §§185 n. 2, 186 n. 2, 6; 198 n. 1.

Donovan v. Springfield, 125 Mass. 371: §447 n. 1.

Doody v. Vaughan, 7 Neb. 28: §§347 n. 1, 5; 369 n. 2, 382 n. 1, 602 n. 3.

Doran v. Cent. Pac. R. R. Co., 24 Cal. 245: §§143 n. 1, 330 n. 1.

Dorchester v. Wentworth, 31 N. H. 451: §§554 n. 2.

Dore v. Milwaukee, 42 Wis. 108: §105 n. 3, 217 n. 5, 223 n. 2.

Dorgan v. Boston, 12 Allen, 223: §469 n. 5, 501 n. 2.

Dorlan v. East Brandywine etc. R. R. Co., 46 Pa. S. 520: §§433 n. 3, 480 n. 4.

Dorman v. Jacksonville, 13 Fla. 538: §§96 n. 1.

Dorrence Street, Matter of, 4 R. I. 230: §5 n. 4.

Dotson v. Sibert, 4 Bibb, 464: §316 n. 1.

Dougherty v. Brown, 91 Mo. 26: §§347 n. 16.
v. Wabash etc. Ry. Co., 19 Mo. App. 419: §§584 n. 3.

Doughty v. Somerville etc. R. R. Co., 21 N. J. L. 442: § 301 n. 1, 304 n. 4, 307 n. 8, 374 n. 1, 454 n. 2, 580 n. 1.
v. Sommerville etc. R. R. Co., 7 N. J. Eq. 51: §§454 n. 2, 646 n. 1.

Douglass v. Boonsborough Turnpike Co., 22 Md. 219: §140 n. 2, 4,
v. Rawlins, 4 Hayward, (Tenn) 111: §§411 n. 1, 413 n. 1.

Downing v. Des Moines etc. Ry. Co., 63 Ia. 177: §§580 n. 1, 3.

Downs v. Huntington, 35 Conn. 588: §§247 n. 4.

Dows v. Johnson, 110 U. S. 223: §§426 n. 5.

Drady v. Des Moines etc. R. R. Co., 57 Ia. 393: §§219 n. 1, 246 n. 3, 493 n. 9, 624 n. 5, 625 n. 3.

Drake v. Chicago etc. Ry. Co., 63 Ia. 302: §§89 n. 1, 572 n. 2, 625 n. 2, 666 n. 2.
v. Clay, Sneed, 139: §§166 n. 3, 168 n. 1.

v. Hamilton Woolen Co., 99 Mass. 574: §§64 n. 2.

v. Hudson Riv. R. R. Co., 7 Barb. 508: §§111 n. 5.

Drain Comrs. v. Baxter, 57 Mich. 127: §§240 n. 10.

Drainage, Application for, 35 N. J. L. 497: §§89 n. 4.

Draining etc. Pequest R., 39 N. J. L. 433: §§185 n. 1, 186 n. 6.

Draining etc. Peqnest R., 41 N. J. L. 175: §§185 n. 1.

Draining Swamp Lands, Matter of, 5 Hun, 116: §§194 n. 2.

Draper v. Williams, 2 Mich. 536: §§288 n. 3.

Drath v. Burlington etc. R. R. Co., 15 Neb. 367: §§533 n. 1, 656 n. 6, 7.

Dreham v. Stifel, 41 Mo. 184: §§8 n. 7.

Dreher v. Iowa etc. R. R. Co., 59 Ia. 599: §§496 n. 2.

Drisner v. Simpson, 72 Ind. 435: §§354 n. 2.

Driver v. Western Union R. R. Co., 32 Wis. 569: §§467 n. 6, 477 n. 8, 487 n. 3, 663 n. 9.

Drouberger v. Reed, 11 Ind. 420: §§311 n. 2, 454 n. 3, 457 n. 5.

Drucker v. Manhattan El. Ry. Co., 51 N. Y. Supr. Ct. 429: §§123 n. 9, 493 n. 7.
v. Manhattan Ry. Co., 106 N. Y. 157: §§493 n. 8.

Druley v. Adam, 102 Ills. 177: §§63 n. 3.

Drury v. Boston, 101 Mass. 439: §§659 n. 1.
v. Midland R. R. Co., 127 Mass. 571: §§84 n. 2, 318 n. 2, 356 n. 1, 446 n. 4, 499 n. 1, 621 n. 1.

Dubach v. Hannibal etc. R. R. Co., 89 Mo. 483: §§117 n. 5, 635 n. 6.

Dubose v. Levee Comrs., 11 La. An. 165: §§150 n. 3.

Dubuque v. Benson, 23 Ia. 248: §§590 n. 7.
v. Malony, 9 Ia. 450: §§114 n. 5, 133 n. 1.

Dubuque etc. R. R. Co. v. Critenden, 5 Ia. 514: §§537 n. 6.
v. Diehl, 64 Ia. 635: §§697 n. 5.
v. Shinn, 5 Ia. 516: §§537 n. 6.

Dudley v. Butler, 10 N. H. 281: §§516 n. 5.
v. Cilley, 5 N. H. 558: §§166 n. 12.

Duff Private Road, 66 Pa. S. 459: §§548 n. 2.

Duke of Bedford v. Dawson, 20 L. R. Eq. Cas. 353: §§607 n. 2.

Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 H. L. 418: §§82 n. 3.

Duke of Norfolk v. Tenant, 9 Hare, 744: §§645 n. 1.

Dukes v. Working, 93 Ind. 501: §§314 n. 10.

Dumass v. Francis, 15 Ills. 543: §§604 n. 4.

Dunbar *v.* San Francisco, 1 Cal. 355:
§ 7 n. 2.
v. Wightman, 51 Mo. 432: §§578
n. 2.

Duncan *v.* Louisville, 8 Bush, 98:
 §§613 n. 3, 656 n. 15.
v. Pennsylvania R. R. Co., 94 Pa.
S. 435: §§12 n. 6, 225 n. 1, 245
n. 4.
v. Penna. R. R. Co., 18 Phila. 68:
 §§225 n. 1.

Dunham *v.* Hyde Park, 75 Ills. 271:
 §§233 n. 3, 646 n. 3.
v. Williams, 36 Barb. 136: §§278
n. 9, 596 n. 1.

Dunlap *v.* Mount Sterling, 14 Ills.
251: §§239 n. 2, 540 n. 2.
v. Toledo etc. Ry. Co., 46 Mich.
190: §§370 n. 3, 543 n. 1, 2; 549
n. 3.

Dunn *v.* Birmingham Canal Co., 8
L. R. Q. B. 42: §607 n. 2.
v. Charleston, Harper (S. C.) 189:
 §§157 n. 2, 204 n. 1.

Dunning *v.* Comrs., 44 Mich. 518:
§549 n. 4.
v. Matthews, 16 Ills. 308: §456 n. 1.
v. Township Dv. Comrs., 44 Mich.
518: §379 n. 1.

Dupont *v.* Highway Comrs., 28
Mich. 362: §§383 n. 3, 549 n. 3.

Dupuis *v.* Chicago etc. Ry. Co., 115
Illi. 97: §§407 n. 20, 428 n. 2,
477 n. 4, 480 n. 8, 487 n. 5.

Durant *v.* Lawrence, 1 Allen, 125:
§249 n. 1.

Durkee *v.* Union, 38 N. J. L. 21:
§103 n. 4

Duryea *v.* New York, 26 Hun, 120:
§86 n. 1.

Dusenbury *v.* Mutual Union Tel.
Co., 11 Abb. N. C. 440: §131 n. 1.
v. Mut. Union Tel. Co., 64 How.
Pr. 206: §456 n. 2.

Dutton *v.* Strong, 1 Black. 23: §§82
n. 3, 83 n. 3.

Dwenger *v.* Chicago etc. R. R. Co.,
98 Ind. 153: §115 n. 4.

Dwiggins *v.* Denver, 24 Ohio St.
629: §§166 n. 11, 322 n. 6.

Dwight *v.* County Comrs., 7 Cush.
533: §327 n. 4.
v. County Comrs., 11 Cush. 201:
§436 n. 4.
v. Springfield, 4 Gray, 107: §542
n. 4.

Dwight Printing Co. *v.* Boston, 122
Mass. 583: §65 n. 6.

Dyckman *v.* New York, 5 N. Y.
434: §§327 n. 1, 2; 379 n. 1, 606
n. 4.
v. New York, 7 Barb. 498: §327
n. 2.

Dyer *v.* Phila., 4 Phila. 328: §499
n. 11.
v. St. Louis, 11 Mo. App. 590:
§211 n. 1.
v. St. Paul, 27 Minn. 457: §§101
n. 3, 151 n. 7, 569 n. 2.
v. Tuscaloosa Bridge Co., 2 Por-
ter, 290: §§2 n. 1, 135 n. 2, 136
n. 3, 607 n. 2.
v. Wightman, 66 Pa. S. 425: §483
n. 7.

E.

Eagle *v.* Charing Cross Ry. Co., 2
L. R. C. P. 638: §231 n. 1.
Eagle White Lead Co. *v.* Cincin-
nati, 1 Cinn. Supr. Ct. 154: §98-
n. 21.

Eames *v.* New Eng. Worsted Co., 11
Met. 570: §506 n. 2.

Earl of Sandwich *v.* Great North-
ern Ry. Co., L. R. 10 Ch. Div.
707: §62 n. 3, 11.

Earl St. Germans *v.* Crystal Palace
Ry. Co., L. R. 11 Eq. Cas. 568:
§620 n. 1.

Earle *v.* De Hart, 1 Beasley, 12 N.
J. 280: §88 n. 1.

East Ala. Ry. Co. *v.* Visscher, 114
U. S. 340: §595 n. 1, 2.

East Brandywine R. R. Co. *v.*
Ranck, 78 Pa. S. 454: §§439 n.
2, 469 n. 10.

East Hartford *v.* Hartford Bridge
Co., 17 Conn. 79; 16 Conn. 149;
10 How. 511: §137 n. 7.

East Haven *v.* Hemingway, 7 Conn.
186: §§72 n. 8, 83 n. 3.

East Line R. R. Co. *v.* Garrett, 52
Tex. 133: §295 n. 1.

East Penna. R. R. Co. *v.* Hiester,
40 Pa. S. 53: §§439 n. 8, 443 n.
7, 496 n. 2.
v. Holtenstine, 47 Pa. S. 28: §469
n. 10.
v. Schollenberger, 54 Pa. S. 144:
§298 n. 6.

East Riv. Bridge etc. Co., Matter of,
10 Abb. N. C. 245; 25 Hun 490:
§123 n. 2.
Matter of, 26 Hun, 490: §115 n. 4.

East Saginaw etc. R. R. Co. *v.* Ben-
ham, 28 Mich. 459: §§379 n. 1,
515 n. 4.

East St. Louis v. Lockhead, 7 Ills. App. 88: §227 n. 5.
v. O'Flynn, 19 Ills. App. 64: §54 n. 4, 227 n. 5, 436 n. 2.
v. O'Flynn, 119 Ills. 200: §134 n. 4.
v. St. John, 47 Ills. 463: §256 n. 23.
v. Wiggins Ferry Co., 11 Ills. App. 254: §495 n. 1.

East St. Louis etc. Ry. Co. v. East St. Louis Union Ry. Co., 108 Ills. 265: §§136 n. 3, 268 n. 1, 644 n. 1.

East Tennessee etc. R. R. Co. v. Love, 3 Head. 63; §§322 n. 2, 6; 467 n. 3.

East & West India Docks etc. Co. v. Gattke, 3 McN. & G. 155: §222 n. 2.
v. Gattke, 20 L. J. n. s. Ch. 217: §230 n. 1.
v. Gattke, 3 McN. & G. 155: §645 n. 1.

Eastabrooks v. Peterborough etc. R. R. Co., 12 Cush. 224: §§66 n. 7, 67 n. 2, 651 n. 1.

" Eastern R. R. Co. v. Boston etc. R. R. Co., 111 Mass. 125: §§243 n. 6, 262 n. 1, 267 n. 3.

Eastman v. Amoskeag Manf. Co., 44 N. H. 143: §§10 n. 2, 67 n. 2.
v. Stowe, 37 Me. 86: §429 n. 2.

Easton Borough v. Rinek, 116 Pa. S. 1: §508 n. 6.

Eaton v. B. C. & M. R. R. Co., 51 N. H. 504: §§54 n. 4, 58, 91 n. 1, 293 n. 7, 568 n. 1.
v. European etc. Ry. Co., 59 Me. 520: §§146 n. 1, 573 n. 1, 599 n. 3, 649 n. 9.
v. Framingham, 6 Cush. 245: §537 n. 10.

Eberhart a. Chicago etc. Ry. Co., 70 Ills. 347: §§231 n. 2, 470 n. 20.

Eddings v. Seabrook, 12 Rich. 504: §§487 n. 1, 498 n. 1.

Eddy v. People, 15 Ills. 386: §§365 n. 1, 368 n. 2.

Edgcombe v. Burlington, 46 Vt. 218: §176 n. 1.

Edgeton v. Huff, 26 Ind. 35: §§277 n. 1, 592 n. 2.

Edgewood R. R. Co's. Appeal, 79 Pa. S. 257: §§170 n. 12, 184 n. 6.

Edmunds v. Boston, 108 Mass. 535: §§488 n. 1, 499 n. 1, 656 n. 24.

Edmundson v. Pittsburg etc. R. R. Co., 111 Pa. S. 316: §236 n. 1.

Edwards v. Stonington Cem. Ass., 20 Conn. 466: §176 n. 1.

Edwardsville R. R. Co. v. Sawyer, 92 Ills. 377: §§116 n. 5, 647 n. 14.
Eel Riv. etc. R. R. Co. v. Field, 67 Cal. 429: §258 n. 6.

Eggleston v. New York etc. R. R. Co., 35 Barb. 162: §298 n. 1.

Egypt Street, 2 Grant's Cases, 455: §272 n. 5.

Egyptian Levee Co. v. Hardin, 27 Mo. 495: §§199 n. 1, 200 n. 6.

Eichels v. Evansville St. R. R. Co., 78 Ind. 261: §124 n. 1.

Eidemiller v. Wyandotte City, 2 Dill. 376: §§454 n. 2, 631 n. 2, 632 n. 1.

Eighth School Dist. v. Copeland, 2 Gray, 414: §§592 n. 6, 649 n. 2.

Eldredge v. Binghamton, 42 Hun. 202: §§470 n. 6, 596 n. 3, 5.

Eldridge v. Smith, 34 Vt. 434: §170 n. 4, 5, 6, 7.

Elevated R.R. Co., Matter of, 18 Hun. 378: §310 n. 6.

Elgin v. Eaton, 88 Ills. 535: §223 n. 1.
v. Eaton, 2 Ills. App. 90: §223 n. 1.

Elgin Hydraulic Co. v. Elgin, 74 Ills. 433: §86 n. 2.

Elizabethtown etc. R. R. Co. v. Combs, 10 Bush, 382: §§100 n. 2, 114 n. 4, 115 n. 1, 2, 4; 493 n. 5, 13; 565 n. 1, 625 n. 2.

v. Helm's Heirs, 8 Bush, 681: §§318 n. 1, 468 n. 2, 478 n. 5.
v. Thompson, 79 Ky. 52: §§112 n. 1, 115 n. 4, 523 n. 3.

Elkhart v. Simonton, 69 Ind. 196: §631 n. 2.
v. Simonton, 71 Ind. 7: §§519 n. 9, 655 n. 1.

Ellicottville etc. R. R. Co. v. Buffalo etc. R. R. Co., 20 Barb. 644: §141 n. 8.

Ellington v. Bennett, 59 Ga. 286: §§87 n. 3, 478 n. 3.

Elliott v. Fair Haven etc. R. R. Co., 32 Conn. 579: §124 n. 1.
v. Fitchburg R. R. Co., 10 Cush. 191: §62 n. 3.

v. Lewis, 1 A. K. Marsh. 514: §411 n. 1, 413 n. 1.

Ellis v. Iowa City, 29 Ia. 229: §§96 n. 1, 103 n. 7.
v. Pacific R. R. Co., 51 Mo. 200: §647 n. 2.

Ells v. Pacific R. R. Co., 51 Mo. 200: §§301 n. 1, 7; 604 n. 2.

Ellsworth v. Chickasaw Co., 40 Ia. 571: §134 n. 8.

Elting Woolen Co. v. Williams, 36 Conn. 310: §§305 n. 5.

Elwell v. Eastern R. R. Co., 124 Mass. 160: §618 n. 1.

Elwood v. Rochester, 43 Hun, 102: §308 n. 11.

Ely v. Comrs., 112 Ind. 361: §§346 n. 11.

v. Rochester, 26 Barb. 133: §§104 n. 1, 639 n. 4.

Embry v. Conner, 3 N. Y. 511: §§157 n. 2, 4; 204 n. 1, 3; 280 n. 4, 606 n. 1.

v. Conner, 2 Sandf. 98: §§157 n. 2, 204 n. 1, 3; 606 n. 1.

Emerson v. Reading, 14 Vt. 279: §396 n. 2.

v. Western Union R. R. Co., 75 Ills. 176: §§247 n. 5, 473 n. 6, 507 n. 2.

Emery v. San Francisco Gas. Co., 28 Cal. 345: §5 n. 4.

Emmons v. Minneapolis, 35 Minn. 503: §156 n. 25.

Empire City Bank, Matter of, 18 N. Y. 199: §367 n. 3.

Emporia v. Soden, 25 Kan. 588: §§61 n. 2, 62 n. 1, 9, 12; §641 n. 2.

Enbank v. Pence, 5 Litt. 338: §509 n. 6.

Endicott, Petitioner, 24 Pick. 339: §556 n. 4.

Enfield Toll B. Co. v. Hartford etc. R. R. Co., 17 Conn. 40: §§135 n. 2, 3; 138 n. 1, 170 n. 1, 271 n. 1, 274 n. 1, 642 n. 1.

Englewood etc. Ry. Co. v. Chicago etc. R. R. Co., 117 Ills. 611; 17 Ills. App. 141: §326 n. 6.

English v. New Haven etc. Co., 32 Conn. 240: §156 n. 26.

Epler v. Niman, 5 Ind. 459: §405 n. 2.

Epps v. Cralle, 1 Munf. 258: §402 n. 1.

v. Crath, 1 Munf. 258: §509 n. 6.

Erie R. R. Co. v. Delaware etc. R. R. Co., 21 N. J. Eq. 283: §634 n. 4.

Erie etc. R. R. Co. v. Casey, 26 Pa. S. 287: §594 n. 3.

v. Johnson, 101 Pa. S. 555: §296 n. 8.

Erkenbrecher v. Cincinnati, 2 Cinn. Sup. Ct. 412: §62 n. 16.

Erskine v. Boston, 14 Gray, 216: §667 n. 1.

Erwin v. Fulk, 94 Ind. 235: §§511 n. 1, 631 n. 3, 632 n. 1.

Essex Co. v. Comrs., 7 Gray, 450: §665 n. 7.

Estabrooks v. Peterborough etc. R. R. Co., 12 Cush. 224: §§66 n. 4, 154 n. 1.

Eureka Basin etc. Co., Matter of, 96 N. Y. 42: §§157 n. 2, 164 n. 6, 205 n. 2.

Evans v. Haefner, 29 Mo. 141: §587 n. 2.

v. James, 4 Wis. 408: §656 n. 1.

v. Lucas, 15 S. C. 67: §584 n. 7.

v. Missouri etc. Ry. Co., 64 Mo. 453: §§618 n. 1, 3; 634 n. 2.

v. Shields, 3 Head, 70: §540 n. 3, 551 n. 8.

In re Jane, 42 L. J. Ch. 357: §331 n. 3.

Evansville v. Decker, 84 Ind. 325: §103 n. 3.

Evansville etc. R. R. Co. v. Cochran, 10 Ind. 560: §§425 n. 2, 3, 4; 435 n. 1.

v. Dick, 9 Ind. 433: §§59 n. 1, 66 n. 3, 8.

v. Evansville, 15 Ind. 395: §605 n. 5.

v. Fitzpatrick, 10 Ind. 120: §§436 n. 14, 473 n. 2, 498 n. 1, 532 n. 7.

v. Grady, 6 Bush, 144: §§454 n. 2, 454 n. 8, 649 n. 11.

v. Miller, 30 Ind. 209: §§311 n. 2, 313 n. 1, 4, 426 n. 1, 533 n. 3.

v. Stringer, 10 Ind. 551: §§436 n. 14, 473 n. 2, 498 n. 1, 532 n. 7.

Everett v. Cedar Rapids etc. R. R. Co., 28 Ia. 417: §§382 n. 1, 2; 549 n. 4.

v. Union Pacific Ry. Co., 59 Ia. 243: §§434 n. 1, 443 n. 2, 16; 478 n. 1, 479 n. 10.

Evergreen Cem. Ass. v. Beecher, 53 Conn. 551: §§176 n. 2, 3; 336 n. 2, 353 n. 3.

v. New Haven, 43 Conn. 234: §176 n. 1.

Eversfield v. Mid-Sussex Ry. Co., 3 De G. & J. 286: §256 n. 26.

Exchange Alley, Matter of, 4 La. An. 4: §384 n. 9.

F.

Faber v. New Bedford, 135 Mass. 162: §601 n. 1.

Fagan v. Chicago, 84 Ills. 227: §§141 n. 18, 329 n. 2.

Fairbanks v. Fitchburg, 110 Mass. 224: §480 n. 3.

Fairbault v. Hulett, 10 Minn. 30: §348 n. 1.

Fairmount Park In re, 9 Phila. 553: §469 n. 10.

Falker v. New York etc. R. R. Co., 17 Abb. N. C. 279: §§114 n. 4, 493 n. 7, 635 n. 7.

Fall River Print Works v. Fall River, 110 Mass. 428: §447 n. 1, 2.

Fall River etc. Co. v. Old Colony etc. R. R. Co., 5 Allen, 221: §§255 n. 4, 257 n. 3.

Fall River R. R. Co. v. Chase, 125 Mass. 483: §541 n. 6.

Fanning v. Osborn, 34 Hun, 121: §§111 n. 2, 116 n. 2, 635 n. 2, 4.

Farmer v. Hooksett, 28 N. H. 244: §526 n. 3.
v. Lewis, 1 Bush, (Ky.) 66: §8 n. 5.
v. Pauley, 50 Ind. 583: §352 n. 1.

Farmer's Turnpike v. Coventry, 10 Johns. 389: §257 n. 1.

Farnham v. D. & H. Canal Co., 61 Pa. S. 265: §607 n. 2.

Farnsworth v. Boston, 126 Mass. 1: §§156 n. 11, 324 n. 1, 4.

Farnum v. Blackstone Canal Co., 1 Sumner, 46: §251 n. 2.

Farnum's Petition, 51 N. H. 376: §245 n. 4.

Farrand v. Marshall, 19 Barb. 380: §151 n. 1.

Farrant v. First Division etc. 13 Minn. 311: §118 n. 2.

Farrington v. Elish, 14 Me. 423: §343 n. 1.

Farwell v. Cambridge, 11 Gray, 413: §§469 n. 5, 476 n. 3.

Faulkner v. Somerset etc. Ry. Co., 42 L. J. Ch. 851: §284 n. 3.

Faust v. Passenger Ry. Co., 3 Phila. 164: §§111 n. 2, 112 n. 1, 115 n. 4.

Faville v. Greene, 12 Wis. 11: §355 n. 1.

Fay v. Salem etc. Co., 111 Mass. 27: §§76 n. 2, 77 n. 1, 85 n. 2.

Fazendel v. Morgan, 31 La. An. 549: §§298 n. 5, 299 n. 8.

Fearing v. Irwin, 55 N. Y. 486: §134 n. 5.

Fehr v. Schuylkill Nav. Co., 69 Pa. S. 161: §607 n. 2.

Feiber v. Coyle, 3 Watts, 407: §591 n. 2.

Feiten v. Milwaukee, 47 Wis. 494: §§658 n. 19, 20.

Felch v. Gilman, 22 Vt. 38: §606 n. 1.

Fellows v. New Haven, 44 Conn. 240: §§97 n. 1, 2; 101 n. 2, 102 n. 1.

Fenelon's Petition, 7 Pa. S. 173: §247 n. 5.

Feree v. Meily, 3 Yeates 153: §§453 n. 1, 509 n. 8.

Ferguson v. Loar, 5 Bush (Ky.) 689: §8 n. 8.

Fergusson v. London etc. Ry. Co., 33 Beav. 103; 3 DeG. J. & S. 653: §284 n. 3.

Ferrand v. Chicago etc. Ry. Co., 21 Wis. 435: §436 n. 11.

Ferree v. School District, 76 Pa. S. 376: §285 n. 6.

Ferrenback v. Turner, 86 Mo. 416: §589 n. 15.

Ferris v. Bramble, 5 Ohio St. 109: §§167 n. 1, 382 n. 2, 456 n. 2, 458 n. 4.

Fertilizing Co. v. Hyde Park, 97 U. S. 659: §6 n. 1.

Field v. Carnarvon etc. Ry. Co., L. R. 5 Eq. Cas. 190; 37 L. J. Ch. 176: §631 n. 1.
v. Des Moines, 39 Ia. 575: §7 n. 2, 3, 4.
v. Vt. & Mass. R. R. Co., 4 Cush. 150: §399 n. 3.
v. West Orange, 36 N. J. Eq. 118: §§103 n. 3, 641 n. 7.

Fifth and Sixth Sts., Matter of, 12 Phila. 587: §§214 n. 2, 667 n. 6.

Fifth Natl. Bank v. New York El. R. R. Co., 28 Fed. R. 231: §§123 n. 9, 493 n. 6.

Fillebrown v. Hoar, 124 Mass. 580: §483 n. 11.

Fink v. Newark, 40 N. J. L. 11: §499 n. 11.

Finn v. Providence etc. Co., 99 Pa. S. 631: §592 n. 5.

First Baptist Soc. v. Fall River, 119 Mass. 95: §562 n. 1, 2.

First Church v. Boston, 14 Gray, 214: §§469 n. 5, 475 n. 17.

First Parish v. County of Middlesex, 7 Gray, 106: §485 n. 3.

Fish v. Rochester, 6 Paige, 268: §96 n. 1.

Fisher v. Allen, 8 N. J. L. 301: §411 n. 1.
v. Chicago etc. R. R. Co., 104 Ills. 323: §§170 n. 8, 259 n. 7.
v. Coyle, 3 Watts, 407: §647 n. 15.
v. Horicon Iron etc. Co., 10 Wis. 351: §§180 n. 12, 607 n. 2.

Fisher *v.* New York, 57 N. Y. 344: §609 n. 1, 7.
v. New York, 3 Hun, 648: §610 n. 11.
v. Rochester, 6 Lans. 225: §§590 n. 7.
v. Smith, 5 Leigh, 611: §§411 n. 1, 413 n. 1.
v. Warwick R. R. Co., 12 R. I. 287: §609 n. 2, 6.
Ex parte, 72 Cal. 125: §156 n. 1.
Fisk *v.* Springfield, 116 Mass. 88: §108 n. 1.
Fiske *v.* Chesterfield, 14 N. H. 240: §499 n. 10.
v. Framingham Manf. Co., 12 Pick. 68: §§178 n. 2, 182 n. 1, 654 n. 1.
Fitch *v.* Seymour, 9 Met. 462: §298 n. 1.
v. Stevens, 2 Met. 505: §337 n. 2.
v. Stevens, 2 Met. 506: §561 n. 5.
Fitchbnrg R. R. Co. *v.* Boston etc. R. R. Co., 3 Cush. 58: §§74 n. 4, 403 n. 7, 407 n. 3.
v. Eastern R. R. Co., 6 Allen, 98: §523 n. 3.
v. Fitchburg, 121 Mass. 132: §375 n. 3.
Fitchburg etc. Ry. Co. *v.* McCloskey, 110 Pa. S. 436: §450 n. 2.
Fitzpatrick *v.* Penn. R. R. Co., 10 Phila. 107: §512 n. 1, 5.
Flagg *v.* Worcester, 13 Gray, 601: §§88 n. 5, 103 n. 4, 209 n. 2.
v. Worcester, 8 Cush. 69: §405 n. 38.
Flanagan *v.* Philadelphia, 42 Pa. S. 219: §72 n. 17.
Flanders *v.* Colebrooks, 51 N. H. 300: §525 n. 2.
v. Wood, 24 Wis. 572: §§283 n. 2, 631 n. 5.
Flatbnsh Ave., Matter of, 1 Barb. 286: §§135 n. 4, 186 n. 4, 349 n. 2.
Fleming *v.* Chicago etc. R. R. Co., 34 Ia. 353: §§475 n. 14, 497 n. 1.
v. Hight, 95 Ind. 78: §§538 n. 5, 540 n. 1.
Fletcher's Heirs *v.* Fugate, 3 J. J. Marsh. 631: §§166 n. 3, 364 n. 1, 369 n. 1, 401 n. 2, 513 n. 8.
Floyd *v.* Turner, 23 Tex. 292: §681 n. 3.
Folkenson *v.* Easton Borough, 116 Pa. S. 523: §223 n. 9.
Folley *v.* Passaic, 26 N. J. Eq. 216: §§326 n. 3, 631 n. 2, 632 n. 1.
Folmar *v.* Folmar, 68 Ala. 120: §405 n. 27.
Folmar *v.* Folmar, 71 Ala. 136: §§350 n. 9, 560 n. 4.
Folsom *v.* Apple River Log Driving Co., 41 Wis. 602: §64 n. 2.
Foltz *v.* Huntley, 7 Wend. 210: §483 n. 6.
Foot *v.* New Haven etc. Co., 23 Conn. 214: §§87 n. 2, 298 n. 1.
Foote *v.* Cincinnati, 11 Ohio 408: §§483 n. 6, 607 n. 3.
Forbes *v.* Delashmutt, 68 Ia. 164: §§417 n. 4, 631 n. 5.
Forbes St., 70 Pa. S. 125: §144 n. 1.
70 Pa. S. 125: §§528 n. 6, 663 n. 3.
Ford *v.* C. & N. W. Ry. Co., 14 Wis. 609: §§111 n. 2, 113 n. 3, 116 n. 6, 635 n. 2.
v. County Comrs., 64 Me. 408: §512 n. 2.
v. Danbury, 41 N.H. 388: §525 n. 9.
v. Ford, 110 Ind. 89: §379 n. 1.
v. Santa Cruz R. R. Co., 59 Cal. 290: §§115 n. 1, 4; 493 n. 9, 625 n. 3.
v. Surget, 46 Miss. 130: §8 n. 4.
v. Whitaker, 1 Nott & McC. 5: §519 n. 10.
Foreman's Heirs *v.* Allen, 2 Bibb, 581: §513 n. 11.
Forster *v.* Cumberland Valley R.R. Co., 23 Pa. S. 371: §664 n. 16.
Forsyth *v.* B. & O. Tel. Co., 12 Mo. App. 494: §131 n. 2.
v. Kreuter, 100 Ind. 27: §§47 n. 1, 15; 362 n. 2, 399 n. 2, 540 n. 2.
Forsythe *v.* Wheeling, 19 W. Va. 318: §§631 n. 1, 632 n. 1.
Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44: §136 n. 3.
Fort Worth etc. R. R. Co. *v.* Hogsett, 1 Tex. App. Civ. Cas., p. 200: §§352 n. 12, 440 n. 4.
v. Lamphear, 1 Tex. App. Civ. Cas. p. 127: §532 n. 1.
v. Scott, 2 Tex. App. Civ. Cas. 137: §§89 n. 4, 486 n. 2.
Forward *v.* Hampshire etc. Canal Co., 22 Pick. 462: §618 n. 5.
Foster *v.* Boston, 22 Pick. 33: §508 n. 2.
v. Demklin, 44 Mo. 216: §538 n. 6.
v. Kansas, 112 U. S. 201: §156 n. 14.
v. Paxton, 90 Ind. 122: §601 n. 1.
v. St. Louis, 71 Mo. 157; 4 Mo. App. 564: §103 n. 4.
v. Stafford National Bank, 57 Vt. 128: §§59 n. 1. 456 n. 1, 2; 458 n. 8.

Fotterby v. Metropolitan Ry. Co., 2 L. R. C. P. 188: §614 n. 3.
Fowle v. New Haven etc. Co., 112 Mass. 384: §§66 n. 9, 74 n. 5, 565 n. 1, 625 n. 2.
Fowler v. County Comrs., 6 Allen, 92: §446 n. 1.
 v. Holbrook, 17 Pick. 188: §609 n. 1.
 Matter of, 53 N. Y. 60: §238 n. 1.
Fox v. Holcomb, 34 Mich. 298: §§348 n. 1, 549 n. 2.
 v. West. Pac. R. R. Co., 31 Cal. 538: §§456 n. 1, 459 n. 1.
Frame v. Boyd, 35 N. J. L. 457: §518 n. 4.
Francis v. Schoellkoff, 53 N. Y. 152: §227 n. 8.
Franconia Township Road, 78 Pa. S. 316: §394 n. 1.
Frank v. Evansville etc. R. R. Co., 111 Ind. 132: §596 n. 3.
Frankel v. Chicago etc. Ry. Co., 70 Ia. 424: §563 n. 4.
Frankle v. Jackson, 30 Fed. R. 398: §§225 n. 1, 667 n. 6.
Franklin etc. T. Co. v. County Court, 8 Hampsh. 342: §§136 n. 3, 139 n. 1, 642 n. 8.
Fravert v. Finfrock, 43 Ohio St. 335: §§369 n. 1, 382 n. 1, 2.
Frederick v. Groshon, 30 Md. 436: §§631 n. 1, 632 n. 3.
 v. Shane, 32 Ia. 254: §472 n. 10.
Freedle v. North Carolina R. R. Co., 4 Jones L. 89: §473 n. 4.
Freeland v. Muscatine, 9 Ia. 461: §§96 n. 1, 105 n. 1.
 v. Penn. R. R. Co., 66 Pa. S. 91: §75 n. 1.
Freeman v. Cornish, 52 N. H. 141: §555 n. 6.
Freetown v. County Comrs., 9 Pick. 46: §370 n. 2.
Fremont etc. R. M. Co. v. Whalen, 11 Neb. 585: §§436 n. 17, 467 n. 2, 482 n. 1.
 v. Weeks, 45 Mich. 335: §606 n. 3.
French v. Braintree Manf. Co., 23 Pick. 216: §§178 n. 2, 182 n. 1, 305 n. 4.
 v. Comrs., 12 Mich. 267: §546 n. 1.
 v. Lord, 69 Me. 537: 323 n. 9.
 v. Lowell, 117 Mass. 363: §§469 n. 5, 476 n. 7.
 v. Milwaukee, 40 Wis. 584: §494 n. 3, 7.
 v. Milwaukee, 49 Wis. 584: §217 n. 6.
 French v. Owen, 5 Wis. 112: §§247 n. 607 n. 4.
 v. White, 24 Conn. 170: §188 n. 3.
Freshour v. Logansport etc. Co., 104 Ind. 463: 551 n. 4.
Frevert v. Finfrock, 31 Ohio St. 621: §§557 n. 2, 626 n. 1.
Freyburg v. Davenport, 63 Ia. 119: §103 n. 4.
Friend, Appellant, 53 Me. 387: §405 n. 22.
Fries v. Southern Penna. Ry. Co., 85 Pa. S. 73: §620 n. 1.
Frink v. Lawrence, 20 Conn. 117: §227 n. 8.
Frith v. Dubuque, 45 Ia. 406: §§115 n. 4, 117 n. 11.
 v. Justices, 30 Ga. 723: §411 n. 1.
Frizell v. Rogers, 82 Ills. 109: §631 n. 3.
Frost v. Earnest, 4 Whart. 86: §483 n. 21.
 v. Leatherman, 55 Mich. 33: §§347 n. 1, 2; 352 n. 9, 549 n. 2, 602 n. 3.
Frudle v. North Carolina, R. R. Co., 4 Jones L. 89: §469 n. 9.
Fryer v. McRae, 8 Porter, Ala. 187: §8 n. 10.
Fuller v. Atlanta, 66 Ga. 80: §96 n. 1.
 v. Chicago Manf. Co., 16 Gray. 46: §506 n. 2.
 v. County Comrs., 15 Pick. 81: §§298 n. 7, 396 n. 4.
 v. Edings, 11 Rich. 239: §§487 n. 1, 607 n. 2.
 v. French, 10 Met. 359: §§609 n. 2, 612 n. 5.
Fulton v. Davenport, 17 Ia. 404: §155 n. 9.
Fulton R. R. Co. v. Turner, 31 Ark. 494: §452 n. 4.
Furman St., Matter of, 17 Wend. 649: §§3 n. 7, 107 n. 2, 144 n. 1, 3; 478 n. 4, 500 n. 1.
Furniss v. Hudson R. R. Co., 5 Sandf. 551: §§565 n. 1, 567 n. 2.
 v. Midland Ry. Co., L. R. 6 Eq. 473: §284 n. 3.

G

Galbraith v. Letteich, 73 Ills. 209: §§419 n. 2, 3, 18; 604 n. 4, 605 n. 1.
Galena etc. R. R. Co. v. Birkbeck, 70 Ills. 208: §§360 n. 2, 496 n. 2.
 v. Haslam, 73 Ills. 494: §§318 n. 13, 424 n. 1, 436 n. 2.
 v. Pound, 22 Ills. 399: §605 n. 1.

Gallagher *v.* Head, 72 Ia. 173: §250 n. 1.

Gallup *v.* Woodstock, 29 Vt. 347: §239 n. 2.

Galveston etc. R. R. Co. *v.* Bock, 63 Tex. 245: §§225 n. 1, 493 n. 4.

v. Donahoo, 59 Tex. 128: §§89 n. 4, 289 n. 4, 496 n. 3, 623 n. 4, 623 n. 1.

v. Eddins, 60 Tex. 656: §§225 n. 1, 493 n. 4, 13.

v. Eddins, 29 Alb. L. J. 518: §115 n. 1, 2, 4.

v. Fuller, 63 Tex. 467: §§225 n. 1, 232 n. 2, 236 n. 1, 493 n. 4.

v. Graves, 1 Tex. App. Civil Cas. 301: 225 n. 1.

v. Lyons, 2 Tex. App. Civ. Cas. p. 133: §477 n. 9.

v. Mud Creek etc. Co., 1 Tex. App. Civ. Cas. p. 159: §§352 n. 12, 440 n. 4.

v. Pfeuffer, 56 Tex. 66: 318 n. 4.

G. B. & L. Ry. Co. *v.* Haggart, 9 Col. 346: §§440 n. 7, 441 n. 1.

G. H. & S. A. Ry. Co. *v.* Seymour, 63 Tex. 345: §625 n. 3.

v. Tait, 63 Tex. 223: §§89 n. 4, 625 n. 3.

Gamble *v.* McCrady, 75 N. C. 509: §§313 n. 8, 364 n. 1, 366 n. 7, 368 n. 1.

Gammage *v.* Georgia S. R. R. Co., 65 Ga. 614: §§618 n. 1, 631 n. 2, 634 n. 10.

Gammell *v.* Potter, 2 Ia. 562: §§345 n. 3, 5; 378 n. 17.

v. Potter, 6 Ia. 548: §180 n. 7.

Gannon *v.* Hargadon, 10 Allen, 106: 88 n. 5.

Ganson *v.* Buffalo, 1 Keyes, 454: §609 n. 2.

Gardiner *v.* Boston etc. R. R. Co., 9 Cush. 1: §220 n. 7.

Gardner *v.* Brookline, 127 Mass. 358: §§443 n. 3, 12; 463 n. 1, 479 n. 2, 7; 480 n. 5.

v. Charing Cross Ry. Co., 2 J. & H. 248; §284 n. 3.

v. Newburg, 2 Johns. Ch. 161: §§62 n. 1, 641 n. 2.

Garitee *v.* Baltimore, 52 Md. 422: §§82 n. 3, 83 n. 2, 3; 84 n. 4.

Garlick *v.* Strong, 3 Page, 440: §323 n. 11.

Garmoe *v.* Sturgeon, 65 Ia. 147: 339 n. 1.

Garnett *v.* Jacksonville etc. R. R. Co., 20 Fla. 889: §§111 n. 2, 117 n. 9, 635 n. 3.

Garrett *v.* St. Louis, 25 Mo. 505: §5 n. 4.

Garrison *v.* New York, 21 Wall. 196: §§456 n. 1, 588 n. 1, 2; 656 n. 1, 9, 18.

Garwood *v.* New York Central etc. R. R. Co., 83 N. Y. 400: §62 n. 3, 11.

v. New York Central etc. R. R. Co., 17 Hun. 356: §§62 n. 3, 641 n. 2.

Gashweller's Heirs *v.* McIlvoy, 1 A. K. Marsh. 84: §§454 n. 7, 457 n. 3, 513 n. 10.

Gates *v.* McDaniel, 2 Stew. 211: §138 n. 4.

Gavit *v.* Chambers, 3 Ohio, 495: §72 n. 11.

Gay *v.* Bradstreet, 49 Me. 580: §601 n. 1.

v. Caldwell, Hardin, 68: §§402 n. 4, 5; 406 n. 2.

v. Gardiner, 54 Me. 477: §499 n. 1.

v. Mutual Union Tel. Co., 12 Mo. App. 485: §131 n. 2.

v. New Orleans Pac. Ry. Co., 32 La. An. 277: §634 n. 1.

v. Welles, 7 Pick. 217: §§609 n. 3, 610 n. 7.

Gear *v.* Dubuque etc. R. R. Co., 20 Ia. 523: §§656 n. 1, 658 n. 2.

Gebhardt *v.* Reeves, 75 Ills. 301: §§114 n. 3, 596 n. 3.

Geddes *v.* Rice, 24 Ohio St. 60: §359 n. 4.

Gedney *v.* Tewksbury, 3 Mass. 307: §607 n. 2.

Geisy *v.* Cincinnati etc. R. R. Co., 4 Ohio St. 308: §§1 n. 1, 9 n. 1, 170 n. 2, 238 n. 2, 472 n. 7.

Genet *v.* Brooklyn, 99 N. Y. 296: §§242 n. 11, 286 n. 2, 470 n. 6.

Geneva *v.* Patterson, 21 Ills. App. 454: §494 n. 8.

Genois *v.* St. Paul, 35 Minn. 330: §96 n. 1.

George's Creek etc. Co. *v.* New Cent. Coal Co., 40 Md. 425: §§363 n. 3, 530 n. 11.

Geraghty *v.* Boston, 120 Mass. 416: §209 n. 3.

Gerard *v.* Omaha etc. R. R. Co., 14 Neb. 270: §§335 n. 5, 627 n. 11.

German Theological School *v.* Dubuque, 64 Ia. 736: §89 n. 6.

Germantown Ave. *In re*, 99 Pa. S. 479: §548 n. 4.
In re, 14 Phila. 351: §§214 n. 1, 223 n. 1.
In re, 15 Phila. 413: §214 n. 1.
Germantown etc. Road Co., 4 Rawle, 191: §516 n. 4.
Getty *v.* Hudson River R. R. Co., 22 Barb. 617: §77 n. 1.
Getz *v.* Phila. etc. R. R. Co., 105 Pa. S. 547: §§326 n. 2, 4; 336 n. 2, 3; 483 n. 21.
v. Phila. etc. R. R. Co., 113 Pa. S. 214: §483 n. 21.
Gherkey *v.* Haines, 4 Blackf. 159: §509 n. 6.
Giboney *v.* Cape Girardeau, 58 Mo. 141: §155 n. 13.
Gibson *v.* Fisher, 68 Ia. 29: §67 n. 6.
v. Hammersmith etc. Ry. Co., 2 D. & S. 603: §488 n. 1.
v. Mason, 5 Nev. 283: §§4 n. 3, 155 n. 5.
v. Mobile etc. R. R. Co., 36 Ala. 410: 155 n. 5.
v. Zimmerman, 27 Mo. App. 90: §211 n. 3.
Gibson & Guy's Mill Road, 37 Pa. S. 255: §527 n. 11.
Gidney *v.* Earl, 12 Wend. 98: §589 n. 3.
Gifford *v.* Dartmouth, 129 Mass. 135 §560 n. 1.
v. N. J. R. R. Co., 10 N. J. Eq. 171: §642 n. 1.
v. Norwich, 30 Conn. 35: §329 n. 1.
v. Republican etc. R. R. Co., 20 Neb. 538: §537 n. 8.
Gilbert *v.* Columbia T. Co., 3 Johns. Cas. 107: §§301 n. 1, 6; 604 n. 2.
v. Savannah etc. R. R. Co., 69 Ga. 396: §293 n. 3.
Gilbert El. R. R. Co. *v.* Anderson, 3 Abb. N. C. 434: §123 n. 2.
Gilbert El. Ry. Co., Matter of, 70 N. Y. 361: §§123 n. 2, 395 n. 2.
Gilbert El. R. R. Co., Matter of, 38 Hun. 433: §§114 n. 1, 493 n. 7.
Gile, Admr. *v.* Stevens, 13 Gray. 146: §8469 n. 5, 486 n. 5.
Gilfeather *v.* Council Bluffs, 69 Ia. 310: §103 n. 4.
Gilford *v.* Winnipiseogee Lake Co., 52 N. H. 262: §300 n. 2.
Gilkerson *v.* Scott, 76 Ills. 509: §408 n. 7.
Gilkey *v.* Watertown, 141 Mass. 317: §§510 n. 7, 601 n. 1, 662 n. 6.
Gillet *v.* Jones, 1 D. & B. 339: §506 n. 2.
Gillham *v.* Madison County R. R. Co., 49 Ills. 484: §89 n. 1.
Gilligan *v.* Providence, 11 R. I. 258: §§215 n. 2, 326 n. 2, 4; 335 n. 2, 614 n. 2.
Gillison *v.* Charleston, 16 W. Va. 282: §103 n. 3.
v. Railroad Co., 7 S. C. 173: §§620 n. 1, 621 n. 1, 2; §560 n. 1.
Gillispie *v.* Thomas, 15 Wend. 464: §§483 n. 22, 656 n. 8.
Gillon *v.* Hutchinson, 16 Cal. 153: §§143 n. 4, 184 n. 5.
Gilluly *v.* Madison, 63 Wis. 518: §103 n. 4.
Gilman *v.* Sheboygan etc. R. R. Co., 37 Wis. 317: §§458 n. 8, 621 n. 1, 622 n. 2.
v. Sheboygan etc. R. R. Co., 40 Wis. 653: §§618 n. 1, 2; 621 n. 1, 3.
v. Sheboygan, 2 Black, 510: §155 n. 5.
v. Westfield, 47 Vt. 20: §166 n. 5.
Gilmer *v.* Lime Point, 18 Cal. 229: §§161 n. 1, 203 n. 2, 238 n. 1, 242 n. 7.
v. Lime Point, 19 Cal. 47: §§301 n. 1, 2, 4; 304 n. 5, 392 n. 2.
Gilmore *v.* Dricoll, 122 Mass. 199: §151 n. 1.
v. Pittsburg etc. R. R. Co., 104 Pa. S. 275: §§486 n. 1, 497 n. 3, 4.
Gilson *v.* State, 5 Lea. 161: §601 n. 1.
Gimble *v.* Stolte, 59 Ind. 446: §§325 n. 1, 629 n. 1.
Girard Ave., Matter of, 11 Phila. 449: §417 n. 4.
Girard's Lessee *v.* Huges, 1 G. & J. 249: §33 n. 4.
Givens *v.* Van Studdiford, 4 Mo. App. 498: §227 n. 8.
Gladfelter *v.* Walker, 40 Md. 1: §65 n. 1.
Glasby *v.* Morris, 18 N. J. Eq. 72: §127 n. 1.
Glasgow *v.* St. Louis, 87 Mo. 678; 15 Mo. App. 112: §134 n. 10.
Gleason *v.* Assabet Manf. Co., 101 Mass. 72: §305 n. 5.
v. Jefferson, 78 Ills. 399: §633 n. 3.
Glover *v.* Manhattan Ry. Co., 66 How. Pr. 77: §§123 n. 6, 635 n. 5.
v. Manhattan Ry. Co., 51 N. Y. Supr. Ct. 1: §§123 n. 9, 635 n. 4.
v. Powell, 10 N. J. Eq. 211: §75 n. 3.

Glover *v.* North Staffordshire Ry. Co., 20 L. J. n. s. Q. B. 376: §227 n. 3.
v. North Staffordshire Ry. Co., 5 Eng L. & Eq. 335: § 645 n. 1.
Goddard *v.* Boston, 20 Pick. 407: §664 n. 1, 5.
Goddard, Petitioner, 16 Pick. 504: §182.
Goddard *v.* Worcester, 9 Gray, 88: §519 n. 12.
Goldconda *v.* Field, 108 Ills. 419 §§136 n. 1, 642 n. 2.
Gold *v.* Vermont Central R.R. Co., 19 Vt. 478: §§311 n. 2, 540 n. 8.
Goldie *v.* Oswald, 2 Dow. 534: §649 n. 2.
Goodall *v.* Milwaukee, 5 Wis. 32: §§97 n. 2, 108 n. 1, 114 n. 1.
Goodin *v.* Cincinnati etc. Canal Co., 18 Ohio St. 169: §§479 n. 3, 618 n. 5.
Goodford *v.* Stonehouse etc. Ry. Co., 38 L. J. Eq. 307: §620 n. 1.
Goodloe *v.* Cincinnati, 4 Ohio 500: §98 n. 1.
Goodman *v.* Bradley, 2 Wis. 257: §256 n. 27.
Goodrich *v.* Comrs., 1 Mich. 385: §546 n. 1.
v. Milwaukee, 24 Wis. 422: §217 n. 1.
Goodwin *v.* Comrs. 60 Me. 328: §358 n. 2, 6.
v. Gibbs, 70 Me. 243: §§336 n. 2, 8.
v. Milton, 25 N. H. 458: §§320 n. 3, 523 n. 2.
v. Wethersfield, 43 Conn. 437: §§166 n. 8, 418 n. 1, 4.
Gordon *v.* Tucker, 6 Me. 247: §565 n. 1.
Goszler *v.* Georgetown, 6 Wheat. 593: §§96 n. 1, 107 n. 1.
Gottschalk *v.* Chicago etc. R. R. Co., 14 Neb. 550: §§225 n. 1, 2; 232 n. 2, 235 n. 4, 236 n. 1.
v. Lincoln etc. R. R. Co., 14 Neb. 389: §333 n. 1.
Gough *v.* Bell, 2 Zab. 441: §§82 n. 3, 83 n. 3.
Gould *v.* Booth, 66 N.Y. 62: §103 n. 6.
v. Boston Dock Co., 13 Gray, 442: §182 n. 1.
v. Glass, 19 Barb. 179: §452 n. 10.
v. Hudson River R. R. Co., 6 N. Y. 522: §§77 n. 1, 79 n. 1, 83 n. 1, 5; 84 n. 2.
v. Hudson River R. R. Co., 12 Barb. 616: §§77 n. 1, 84 n. 2.
Gould *v.* Hudson River R. R. Co., 23 Barb. 617: §84 n. 2.
v. Rochester, 105 N. Y. 46: §152 n. 6.
Governor etc. of British Cast Pl. Manfrs. *v.* Meredith, 4 T. R. 794: §92 n. 3.
Graf *v.* St. Louis, 8 Mo. App. 562: §301 n. 1, 7.
Graff *v.* Baltimore, 10 Md. 544: §§655 n. 1, 656 n. 1, 658 n. 2, 8.
Grafton *v.* B. & O. R. R. Co., 21 Fed. R. 309: §§219 n. 6, 493 n. 3, 624 n. 1.
Graham *v.* Columbus etc. R. R. Co., 27 Ind. 260: §647 n. 1.
v. Connerville etc. R. R. Co., 36 Ind. 463: §§477 n. 3, 507 n. 8.
v. Virgin, 78 Me. 338: §607 n. 2.
Grand Rapids *v.* Grand Rapids etc. R. R. Co., 58 Mich. 641: §§301 n. 11, 324 n. 1, 491 n. 4.
Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308: §§58 n. 1, 59 n. 1, 67 n. 2, 71 n. 2, 10; 240 n. 3.
Grand Rapids etc. R. R. Co. *v.* Alley, 34 Mich. 16, 18: §327 n. 3.
v. Horn, 41 Ind. 479: §§426 n. 1, 473 n. 2.
v. Grand Rapids etc. R. R. Co., 35 Mich. 265: §§268 n. 1, 274 n. 1, 644 n. 2.
v. Grand Rapids, 47 Mich. 393: §493 n. 3.
v. Heisel, 47 Mich. 393: §§111 n. 2, 113 n. 3, 115 n. 4, 117 n. 8, 219 n. 6.
v. Heisel, 38 Mich. 62: §§113 n. 3, 114 n. 4, 115 n. 4, 117 n. 8.
v. Van Driele, 24 Mich. 409: §§354 n. 3, 393 n. 2.
Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. 454: §584 n. 7.
Granger *v.* Avery, 64 Me. 292: §72 n. 5.
v. Syracuse, 38 How. Pr. 308: §470 n. 6.
Grannis *v.* St. Paul etc. Ry. Co., 18 Minn. 194: §469 n. 4.
Grant *v.* Courier, 24 Barb. 232: §155 n. 5.
v. Davenport, 18 Ia. 179: §83 n. 3.
v. United States, 1 Ct. of Cl. 41: §8 n. 6.
Graunville *v.* Comrs., 97 Mass. 193: §545 n. 1.
Grape St., *In re*, 103 Pa. S. 121: §664 n. 1.

Gray v. Bartlett, 20 Pick. 186: §72 n. 7.

v. Burlington etc. R. R. Co., 37 Ia. 119: §296 n. 2, 6.

v. Iowa Land Co., 26 Ia. 387: §134 n. 4.

v. Knoxville, 85 Tenn. 99: §§88 n. 1.

v. Liverpool etc. Ry. Co., 9 Beav. 391: §254 n. 1.

v. Middletown, 56 Vt. 53: §405 n. 4.

v. St. Louis etc. Ry. Co., 81 Mo. 126: §§242 n. 5, 648 n. 7, 656 n. 25.

v. St. Paul etc. R. R. Co., 13 Minn. 315: §§113 n. 3, 116 n. 3.

Grayville & Mattoon R. R. Co., v. Christy, 92 Ills. 337: §427 n. 1.

Graves v. Otis, 2 Hill, 466: §§96 n. 1, 346 n. 7.

Great Falls Manf. Co. v. Att'y General, 124 U. S. 581: §879 n. 1.

v. Fernald, 47 N. H. 444: §§178 n. 1, 180 n. 4.

v. Garland, 25 Fed. R. 521: §§311 n. 2, 456 n. 2, 457 n. 2, 633 n. 1.

Gredney v. Tewksbury, 3 Mass. 307: §609 n. 5.

Greeley v. Maine Central R. R. Co., 53 Me. 200: §§88 n. 5, 89 n. 5.

Green v. Benthon, 30 Ga. 896: §500 n. 7.

v. Borough of Reading, 9 Watts, 382: §§95 n. 2, 96 n. 1.

v. Chicago, 97 Ills. 370: §§425 n. 1, 435 n. 10, 470 n. 19.

v. Eales, 2 A. & E. N. S. 295: §483 n. 21.

v. East Haddam, 51 Conn. 547: §§421 n. 2, 525 n. 3, 530 n. 3.

v. Elliott, 86 Ind. 5: §540 n. 4, 5.

v. Fall River, 113 Mass. 262: §§443 n. 17, 469 n. 5.

v. Green, 34 Ills. 320: §662 n. 1.

v. Missouri Pacific Ry. Co., 82 Mo. 653: §647 n. 6.

v. New York Cent. R. R. Co., 65 How. Pr. 154: §117 n. 11.

v. State, 56 Wis. 583: §378 n. 1.

v. Swift, 47 Cal. 536: §66 n. 11.

Greencastle v. Hazelett, 22 Ind. 186: §90 n. 5.

Greenleaf v. Francis, 18 Pick. 117: §90 n. 1.

Greenleaf Court, Case of, 4 Whart. 514: §413 n. 4.

Greenwood v. Freight Co., 105 U.S. 13: §135 n. 3.

Greenville etc. R. R. Co. v. Partlow, 5 Rich. 428: §§470 n. 9, 14; 498 n. 1.

v. Partlow, 6 Rich. 286: §§559 n. 1, 560 n. 1.

Gregg v. Baltimore, 56 Md. 256: §§204 n. 1, 220 n. 11, 494 n. 9, 644 n. 3.

Greve v. First Division etc., 26 Miun. 66: §507 n. 7.

Griffin v. Augusta etc. R. R. Co., 70 Ga. 164: §618 n. 5.

v. Dogan, 48 Miss. 11: §4 n. 3.

v. Foster, 8 Jones Law, 337: §300 n. 2.

v. Lawrence, 135 Mass. 365: §87 n. 3.

v. Martin, 7 Barb. 297: §§133 n. 6, 590 n. 1.

Griggs v. Foote, 4 Allen, 195: §§288 n. 6, 624 n. 6.

Grigsby v. Burtnett, 31 Cal. 406: §§631 n. 2, 632 n. 1.

Grimes v. Doyle, Sneed 58: §§411 n. 1, 513 n. 8.

Grindley v. Barker, 1 Bos. & Pul. 229: §419 n. 1.

Grinnel v. Adams, 34 Ohio St. 44: §347 n. 13.

Griscom v. Gilmore, 15 N. J. L. 475: §§253 n. 1, 419 n. 7, 509 n. 1.

Groce v. Zumwalt, 4 Mo. 567: §§364 n. 1, 528 n. 5.

Groff v. Frederick City, 44 Md. 67: §155 n. 13.

Grosvenor v. Hempstead etc. R. R. Co., 1 DeG. & J. 446: §284 n. 3.

Groton v. Haines, 36 N. H. 388: §589 n. 13.

v. Hurlbut, 22 Conn. 178: §273 n. 3.

v. North Staffordshire Ry. Co., 20 L. J. n. s. Q. B. 376: §227 n. 3.

Grove St. In re, 61 Cal. 438: §§348 n. 4, 605 n. 5.

Gue v. Tide Water Canal Co., 24 How. 257: §595 n. 1.

Guess v. Stone Mountain etc. Co., 72 Ga. 320: §493 n. 4.

Guilford v. County Comrs., 40 Me. 296: §378 n. 2.

Petition of, 25 N. H. 124: §§379 n. 1, 414 n. 1.

Guillotette v. New Orleans, 12 La. An. 482: §156 n. 15.

Gulf etc. R. R. Co. v. Helsley, 62 Tex. 593: §§89 n. 1, 625 n. 3.

v. Holliday, 65 Tex. 512: §89 n. 1.

v. Jones, 63 Tex. 524: §91 n. 3.

Gulf etc R. R. Co. v. Pomeroy, 67 Tex. 498: §§67 n. 10.
 v. Mud Creek etc. Co., 1 Tex. App. Civil Cas. p. 169: §§253 n. 1.
 Gunter v. Geary, 1 Cal. 462: §§85 n. 11.
 Gurnsey v. Edwards, 26 N. H. 224: §§605 n. 6, 606 n. 3.
 Gwynne v. Cincinnati, 3 Ohio 24: §§323 n. 4, 8.

H.

Hackstack v. Keshena Improvement Co., 66 Wis. 439: §§64 n. 2, 607 n. 9.
 Hadley v. Citizens' Savings Inst., 123 Mass. 301: §§388 n. 1, 390 n. 1, 396 n. 1, 5.
 Hagaman v. Moore, 84 Ind. 496: §§436 n. 14, 20; 470 n. 5, 496 n. 1, 2; 498 n. 1.
 Hagar v. Brainard, 44 Vt. 294: §§324 n. 1, 339 n. 1, 377 n. 10, 385 n. 1.
 v. Suprs. etc. 47 Cal. 222: §§5 n. 4, 185 n. 2, 189 n. 2.
 Haight v. Keokuk, 4 Ia. 199: §72 n. 18.
 Haldeman v. Bruckhart, 45 Pa. S. 514: §90 n. 4.
 v. Penn. R. R. Co., 50 Pa. S. 425: §§278 n. 6, 596 n. 3.
 Hale v. Burwell, 2 Patten & Heath, 608: §§314 n. 3, 315 n. 3, 338 n. 1.
 v. McLea, 53 Cal. 578: §90 n. 4.
 v. Point Pleasant etc. R. R. Co., 23 W. Va. 454: §§454 n. 2, 493 n. 4, 635 n. 3.
 Haley v. Phila., 68 Pa. S. 45: §499 n. 9.
 Hall v. Boyd, 14 Ga. 1: §456 n. 2.
 v. Bristol, L. R. 2 C. P. 322: §222 n. 1.
 v. Ionia, 38 Mich. 493: §62 n. 1.
 v. Manchester, 39 N. H. 295: §510 n. 5.
 v. People, 57 Ills. 307: §§301 n. 9, 456 n. 1, 650 n. 3, 6.
 v. Pickering, 40 Me. 548: §§290 n. 4, 607 n. 2.
 v. Ragsdale, 4 Stew. & Por. 252: §§136 n. 3, 139 n. 1.
 v. Smith, 2 Bing. 156: §92 n. 5.
 v. Thayer, 105 Mass. 219: §405 n. 7.
 Hallock v. County of Franklin, 2 Met. 558: §§407 n. 2, 656 n. 23.
 v. Woolsey, 23 Wend. 328: §§609 n. 4, 610 n. 6.

Halsey v. Lehigh Valley R. R. Co., 45 N. J. L. 26: §607 n. 7.
 Ham v. Salem, 100 Mass. 350: §§443 n. 15, 444 n. 1.
 v. Wisconsin etc. Ry. Co., 61 Ia. 716: §§442 n. 2, 472 n. 9, 475 n. 1, 3.
 Hamlin v. Comrs., 16 Gray, 256: §§652 n. 1.
 Hamilton v. Annapolis etc. R. R. Co., 1 Md. 553: §§259 n. 1, 460 n. 2, 588 n. 2.
 v. Annapolis etc. R. R. Co., 1 Md. Ch. 107: §§59 n. 1, 456 n. 1, 2; 460 n. 2, 588 n. 2.
 v. Ft. Wayne, 73 Ind. 1: §535 n. 3.
 v. New York etc. R. R. Co., 9 Paige, 171: §635 n. 8.
 v. Vicksburg etc. R. R. Co., 119 U. S. 280: §85 n. 7.
 Hamilton Avenue, Matter of, 14 Barb. 405: §§135 n. 4, 136 n. 3, 423 n. 5.
 Hamilton Co. v. Garrett, 62 Tex. 602: §§525 n. 11, 623 n. 1.
 Hamlin v. New Bedford, 143 Mass. 192: §§252 n. 3, 559 n. 4.
 Hammersley v. New York, 56 N. Y. 533: §§457 n. 8, 499 n. 10.
 v. New York, 67 Barb. 35: §499 n. 10.
 Hammerslough v. City of Kansas, 57 Mo. 219: §633 n. 2.
 Hammett v. Philadelphia, 65 Pa. S. 146: §§5 n. 4, 263 n. 1.
 Hammond v. Port Royal etc. R. R. Co., 15 S. C. 10; 16 S. C. 567: §297 n. 2.
 Hamor v. Bar Harbor Water Co., 78 Me. 127: §§61 n. 2, 62 n. 1, 307 n. 4, 607 n. 11.
 Hampden Paint Co. v. Springfield etc. R. R. Co., 124 Mass. 118: §477 n. 3.
 Hampton v. Coffin, 4 N. H. 517: §656 n. 23.
 v. Commonwealth, 19 Pa. S. 329: §247 n. 3, 656 n. 1.
 Hancock v. Boston, 1 Met. 122: §§379 n. 1, 545 n. 5, 10.
 Hancock Street, Extension of, 18 Pa. S. 26: §5 n. 3, 4.
 Hand Gold Mining Co. v. Parker, 59 Ga. 419: §§157 n. 2, 164 n. 5, 184 n. 3, 242 n. 3.
 Hankins v. Calloway, 88 Ills. 155: §412 n. 2.
 v. Lawrence, 8 Blackf. 266: §180 n. 2, 181 n. 7, 456 n. 2, 3.

Hanlin *v.* C. & N. W. Ry. Co., 61 Wis. 515: §113 n. 3.

Hanlon *v.* Suprs. etc. 57 Barb. 383: §§288 n. 5, 311 n. 2.

Hannibal *v.* Hannibal etc. R. R Co., 49 Mo. 480: §266 n. 1.

Hannibal Bridge Co. *v.* Schanbacker, 49 Mo. 555: §§29 n. 1.

v. Schanbacker, 57 Mo. 582: §475 n. 13.

Hannibal etc. R. R. Co. *v.* Morton, 20 Mo. 70: §§54 n. 2.

v. Morton, 27 Mo. 317: §§333 n. 3, 413 n. 2.

v. Muder, 49 Mo. 165: §§170 n. 2, 6; 304 n. 1, 357 n. 3.

v. Rowland, 29 Mo. 337: §530 n. 11.

Hanrahan *v.* Fox, 47 Ia. 102: §498 n. 4.

Hanson *v.* Effingham, 20 N. H. 460: §560 n. 5.

v. La. Fayette, 18 La. An. 295: §150 n. 3.

Harbeck *v.* Boston, 10 Cush. 295: §278 n. 3.

v. Toledo, 11 Ohio St. 219: §§253 n. 1, 349 n. 9, 382 n. 1, 2; 604 n. 2.

Hardenburg *v.* Lockwood, 25 Barb. 9: §§133 n. 6, 590 n. 1.

Harding *v.* Funk, 8 Kan. 315: §§157 n. 21, 180 n. 8, 469 n. 2.

v. Goodlett, 3 Gerg. 41: §§3 n. 1, 179 n. 3, 181 n. 1, 206 n. 3.

v. Medway, 10 Met. 465: §656 n. 23.

v. Stamford Water Co., 41 Conn. 87: §62 n. 1, 2.

Hardy *v.* Houston, 2 N. H. 309: §518 n. 2.

v. Keene, 54 N. H. 449: §359 n. 2.

v. McKinney, 107 Ind. 364: §540 n. 1.

Harlow *v.* Marquette etc. R. R. Co., 41 Mich. 336: §507 n. 3.

v. Pike, 3 Me. 438: §§364 n. 1, 368 n. 1, 8; 542 n. 5, 603 n. 2, 649 n. 2.

Harness *v.* Chesapeake etc. Canal Co., 1 Md. Ch. 248: §§10 n. 2, 5; 311 n. 2, 313 n. 3, 456 n. 1, 2, 3; 618 n. 1, 656 n. 3.

Harper *v.* Lexington etc. R. R. Co., 2 Dana, 227: §§367 n. 1, 411 n. 1, 413 n. 1.

v. Miller, 4 Ired. L. 34: §399 n. 2, 4.

v. Richardson, 22 Cal. 251: §§664 n. 1, 11.

Harrell *v.* Ellsworth, 17 Ala. 576: §138 n. 2.

Harrington *v.* County Comrs., 22 Pick. 263: §§656 n. 23.

v. Harrington, 1 Met. 404: §519 n. 4, 5.

v. People, 6 Barb. 607: §605 n. 4.

v. St. Paul etc. R. R. Co., 17 Minn. 215: §§111 n. 2, 113 n. 3 116 n. 6, 318 n. 4, 497 n. 1, 635 n. 2.

Harris *v.* Howes, 75 Me. 436: §§483 n. 19, 515 n. 1, 5; 627 n. 2.

v. Marblehead, 10 Gray, 40: §§243 n. 1, 253 n. 1, 647 n. 2.

v. Thompson, 9 Barb. 350: §§157 n. 2, 158 n. 1, 238 n. 1.

v. Woodstock, 27 Conn. 567: §420 n. 2.

Harrisburg *v.* Crangle, 3 W. & S. 460: §326 n. 1.

Harrison *v.* Iowa etc. R. R. Co., 36 Ia. 323: §§425 n. 4, 436 n. 15, 20; 472 n. 9, 478 n. 6.

v. Lexington etc. Co., 9 B. Mon. 470: §594 n. 1.

v. New Orleans etc. R. R. Co., 34 La. An. 462: §§113 n. 3, 115 n. 4, 635 n. 7.

v. Young, 9 Ga. 359: §426 n. 2.

Hart *v.* Baton Rouge, 10 La. An. 171: §§83 n. 3, 85 n. 5.

Hartford etc. R. R. Co., Matter of, 45 How. Pr. 133: §278 n. 15.

Hartshorn *v.* Worcester, 113 Mass. 111: §494 n. 3.

v. Pottroff, 89 Ills. 509: §606 n. 1, 5.

Hartwell *v.* Armstrong, 19 Barb. 166: §§161 n. 1, 185 n. 1, 194 n. 2.

Hartwell Matter, 2 Nisi Prius Rep. Mich. 97: §§2 n. 1, 3 n. 7, 180 n. 15.

Hartz *v.* St. Paul & S. C. R. R. Co., 21 Minn. 358: §§113 n. 3, 493 n. 9.

Harvard Branch R. R. Co. *v.* Rand, 8 Cush. 218: §562 n. 5.

Harvey *v.* Dewoody, 18 Ark. 252: §156 n. 3.

v. Lackawanna etc. R. R. Co., 47 Pa. S. 428: §504 n. 3.

v. Lloyd, 3 Pa. S. 331: §§175 n. 1, 345 n. 3, 469 n. 10.

v. Thomas, 10 Watts, 63: §§10 n. 4, 171 n. 1, 2.

Harwinton v. Catlin, 19 Conn. 520: §239 n. 2.

Haskell v. Comrs., 9 Gray, 341: §§665 n. 8.

- *New Bedford*, 108 Mass. 208: §§86 n. 4, 273 n. 1, 508 n. 4, 641 n. 8.

Haslam v. Galena etc. R. R. Co., 64 Ills. 353: §§405 n. 30, 478 n. 3, 480 n. 4.

Hastings v. Burlington etc. R. R. Co., 38 Ia. 316: §§580 n. 1, 655 n. 1.

Hastings etc. R. R. Co. v. Ingalls, 15 Neb. 123: §§111 n. 2, 319 n. 1, 524 n. 3.

Haswell v. Vermont Central R. R. Co., 23 Vt. 228: §§538 n. 7, 616 n. 1, 4.

Hatch v. Cincinnati etc. R. R. Co., 18 Ohio St. 92: §§141 n. 11, 496 n. 2, 497 n. 1.

- *Dwight*, 17 Mass. 289: §182 T.
- *Hawkes*, 126 Mass. 177: §606 n. 1.
- *New York*, 82 N.Y. 436: §627 n. 9.
- *Pottawattamie Co.*, 43 Ia. 442: §191 n. 1.
- *Vt. Cent. R. R. Co.*, 25 Vt. 49; 28 Vt. 142: §115 n. 4.

Hatermehl v. Dickinson, 8 Phila. 282: §§456 n. 2, 457 n. 4.

Hatfield v. Central R. R. Co., 29 N. J. L. 571: §298 n. 1.

Hatfield Township Road, 4 Yeates, 392: §247 n. 3.

Hatry v. Painsville etc. Ry. Co., 1 Ohio Circ. Ct. 426: §621 n. 1, 3.

Haverhill Bridge v. County Comrs., 103 Mass. 120: §§238 n. 1, 286 n. 2, 456 n. 2, 457 n. 3.

Hawkins v. County Comrs., 2 Allen, 254: §321 n. 1.

- *Fall River*, 119 Mass. 94: §435 n. 1, 5.
- *Justices etc.*, 12 Lea, 351: §343 n. 4.
- *Randolph*, 1 Murphy, 118: §552 n. 3.
- *Robinson*, 5 J. J. Marsh. 9: §560 n. 1.
- *Rochester*, 1 Wend. 53: §656 n. 10.

Hawley v. Harrall, 19 Conn. 128: §§456 n. 1, 2.

Hay v. Cohoes Co., 2 N. Y. 159: §§146 n. 2, 573 n. 1, 599 n. 9.

Hay v. Cohoes Co., 3 Barb. 42: §§146 n. 2, 180 n. 16, 573 n. 1.

Hayes v. Board of Comrs., 59 Ind. 552: §656 n. 1.

- *Chicago etc. Ry. Co.*, 64 Ia. 753: §499 n. 5, 7.
- *Ottawa etc. R. R. Co.*, 54 Ills. 373: §§436 n. 2, 473 n. 6, 476 n. 6, 481 n. 1.

Hayford v. County Comrs., 78 Me. 153: §352 n. 14.

Haynes v. Buffalo etc. R. R. Co., 38 Hun, 17: §296 n. 2.

- *Thomas*, 7 Ind. 38: §§100 n. 2, 114 n. 4.

Hays v. Bowman, 1 Rand. 417: §72 n. 10.

- *Briggs*, 74 Pa. S. 373: §443 n. 7.
- *Campbell*, 17 Ind. 430: §348 n. 5.
- *Hinkleman*, 68 Pa. S. 324: §88 n. 2.
- *Lewis*, 28 Ohio St. 326: §280 n. 4.
- *Parish*, 52 Ind. 132: §§412 n. 16, 419 n. 5.
- *Risher*, 32 Pa. S. 169: §171 n. 1, 3.
- *Shackford*, 3 N. H. 10: §511 n. 1.
- *State*, 8 Ind. 425: §511 n. 1.

Hayward v. Bath, 40 N. H. 100: §422 n. 6.

- *Charlestown*, 34 N. H. 23: §343 n. 1.

Haywood v. Bath, 35 N. H. 514: §549 n. 16.

Hazelhurst v. Freeman, 52 Ga. 244: §257 n. 1.

Hazen v. Boston etc. R. R. Co., 2 Gray, 574: §649 n. 9.

- *Essex Co.*, 12 Cush. 475: §§177 n. 2, 180 n. 3, 182 n. 1, 271 n. 12, 456 n. 2, 3; 458 n. 6, 607 n. 2.

Head v. Amoskeag Manf. Co., 113 U. S. 9: §§180 n. 6, 182 n. 2, 193 n. 12.

Heady v. Vevey etc. Turnpike Co., 52 Ind. 117: §§252 n. 1, 425 n. 4, 540 n. 1.

Heagy v. Black, 90 Ind. 534: §605 n. 5.

Healey v. Babbitt, 14 R. I. 533: §596 n. 1.

- *New Haven*, 49 Conn. 394: §§218 n. 1, 624 n. 5, 667 n. 6.

Heard v. Brooklyn, 60 N. Y. 242: §141 n. 12.

Heard *v.* Middlesex Canal, 5 Met. 81: §§469 n. 5, 665 n. 3.

Heath *v.* Barmon, 49 Barb. 496: §140 n. 3.

v. Barmon, 50 N. Y. 303: §§140 n. 3, 291 n. 1.

v. Des Moines etc. Ry. Co., 61 Ia. 11: §§116 n. 2, 255 n. 4, 635 n. 15.

v. Texas etc. Ry. Co., 37 La. An. 728: §293 n. 3.

Hebron Gravel Road Co. *v.* Harvey, 90 Ind. 192: §67 n. 2, 8.

Heck *v.* School District, 49 Mich. 551: §307 n. 1.

Hedges *v.* Metropolitan Ry. Co., 28 Beav. 109: §615 n. 1.

Hedrick *v.* Hedrick, 55 Ind. 78: §§361 n. 10, 398 n. 1.

v. Olathe, 30 Kan. 348: §625 n. 6.

Hegar *v.* C. & N. W. Ry. Co., 26 Wis. 624: §§113 n. 3, 493 n. 2.

Heick *v.* Voight, 110 Ind. 279: §§186 n. 6, 190 n. 3, 348 n. 2, 394 n. 4.

Heidelberg Township Road, 47 Pa. S. 536: §517 n. 1.

Heilman *v.* Union Canal Co., 50 Pa. S. 268: §§62 n. 2, 15; 318 n. 8.

Heirs of Van Vorst, *Ex parte*, 2 N. J. Eq. 292: §616 n. 2, 5.

Heise *v.* Penna. R. R. Co., 62 Pa. S. 67: §401 n. 5.

Heiser *v.* New York, 29 Hun, 446: §213 n. 2.

v. New York, 104 N. Y. 68: §213 n. 2.

Heiss *v.* Milwaukee etc. R. R. Co., 69 Wis. 555: §113 n. 4.

Helen *v.* Webster, 85 Ills. 116: §114 n. 3.

Helena *v.* Harvey, 6 Mon. 114: §354 n. 3.

v. Thompson, 29 Ark. 569: §104 n. 1, 2.

Heller *v.* Atchison etc. R. R. Co., 28 Kan. 622: §134 n. 2, 4.

Hempstead *v.* Des Moines, 52 Ia. 303: §§208 n. 2, 3; 494 n. 2, 624 n. 5.

v. Des Moines, 63 Ia. 36: §§208 n. 6, 625 n. 2, 667 n. 2.

Hendershott *v.* Ottumwa, 46 Ia. 658: 102 n. 1.

Henderson *v.* Adams, 5 Cush. 610: §§314 n. 15, 429 n. 3.

v. Minneapolis, 32 Minn. 319: 96 n. 1.

v. New York Cent. R. R. Co., 78 N. Y. 423: §§113 n. 3, 116 n. 6, 121 n. 1, 493 n. 2, 635 n. 2.

v. New York Cent. R. R. Co., 17 Hun. 344: §635 n. 2.

Henderson etc. R. R. Co. *v.* Dickerson, 17 B. Monroe, 173: §§311 n. 2, 468 n. 2, 6; 478 n. 5, 558 n. 1.

Hendrick *v.* Johnson, 5 Porter, 208: §656 n. 1.

Hendricks *v.* Johnson, 6 Porter, 472: §§264 n. 1, 305 n. 6, 8; 656 n. 1.

Hendrick's Appeal, 103 Pa. S. 358: §§223 n. 7, 224 n. 2.

Henkie *v.* Detroit, 49 Mich. 249: §132 n. 2.

Hennessey *v.* Andrews, 6 Cush. 170: §334 n. 5.

Henry *v.* Dubuque etc. R. R. Co., 2 Ia. 288: §§278 n. 1, 472 n. 9.

v. Dubuque etc. R. R. Co., 10 Ia. 540: §649 n. 2.

v. Pittsburg etc. Bridge Co., 8 W. & S. 85: §96 n. 1.

v. Thomas, 119 Mass. 583: §346 n. 2.

v. Vermont Cent. R. R. Co., 30 Vt. 638: §66 n. 4.

Henry St., Matter of, 7 Cow. 400: §530 n. 4.

Hensen *v.* Moore, 104 Ills. 403: §323 n. 4.

Hentz *v.* Long Island R. R. Co. 13 Barb. 646: §§111 n. 5, 618 n. 5.

Hepburn's Case, 3 Bland, 95: §157 n. 2, 5.

Herbein *v.* Railroad Co., 9 Watts, 272: §560 n. 1.

Herman's Heirs *v.* Municipality, 15 La. 597: §405 n. 37.

Herzer *v.* Milwaukee, 39 Wis. 108: 217 n. 4.

Hessing *v.* District of Columbia, 3 Mackey, 572: §103 n. 4.

v. Scott, 107 Ills. 600: §134 n. 4.

Hessler *v.* Drainage Comrs., 53 Ills. 105: §5 n. 1.

Heston *v.* Canal Comrs., Brightly N. P. 183: 631 n. 2.

Hetfield *v.* Central R. R. Co., 29 N. J. L. 206 and 571: §318 n. 4.

Heth *v.* Fond du Lac, 63 Wis. 228: §88 n. 5, 103 n. 4.

Hewes *v.* Andover, 16 Vt. 510: §347 n. 1, 2.

Hewitt *v.* Western Union Tel Co., 4 Mackey, 424: §§131 n. 1, 637 n. 4.

Hewitt's Appeal, 88 Pa. S. 55: §155 n. 13.

Heyl v. Philadelphia, 12 Phila. 291: §427 n. 1.

Heyward v. New York, 7 N. Y. 314: §§83 n. 7, 277 n. 1, 2; 311 n. 2, 596 n. 3, 4.

v. New York, 8 Barb. 486: §§174 n. 3, 277 n. 2, 596 n. 3, 4.

Hibbs v. Chicago etc. Ry. Co., 39 Ia. 340: §§618 n. 1, 2; 634 n. 2.

Hickman's Case, 4 Harr. (Del) 580: §167 n. 1, 12.

Hickok v. Hine, 23 Ohio St. 523: §§85 n. 9, 273 n. 5.

Hickory Tree Road, 43 Pa. S. 139: §247 n. 5.

Hickox v. Cleveland, 8 Ohio, 543: §98 n. 5.

Hicks v. Foster, 32 Ga. 414: §409 n. 1.

Hidden v. Davisson, 51 Cal. 138: §321 n. 1.

Higbee v. Camden etc. R. R. Co., 19 N. J. Eq. 276: §§177 n. 7, 637 n. 2.

v. Camden etc. R. R. Co., 20 N. J. Eq. 435: §§117 n. 7, 120 n. 2; 637 n. 2.

v. Peed, 98 Ind. 420: §527 n. 6.

Higgins v. Chicago, 18 Ill. 276: §§613 n. 1, 6; 656 n. 13.

v. Flemington Water Co., 36 N. J. Eq. 538: §§62 n. 1, 641 n. 2.

v. Reynolds, 31 N. Y. 151: §590 n. 7.

Higginson v. Nahant, 11 Allen 530: §§166 n. 10, 175 n. 4.

High v. Big Creek Ditching Assn., 44 Ind. 356: §405 n. 11.

Highway Comrs. v. Ely, 54 Mich. 173: §589 n. 6.

Hilbourne v. County of Suffolk, 120 Mass. 393: §§469 n. 5, 476 n. 3.

Hildreth v. Lowell, 11 Gray 345: §§173 n. 1, 367 n. 1, 377 n. 7, 512 n. 4.

Hill v. Baker, 28 Me. 9: §336 n. 2.

v. Bridges, 6 Porter 197: §554 n. 2.

v. Chicago etc. R. R. Co., 38 La. An. 590: §115 n. 4.

v. Comrs., 4 Gray 414: §650 n. 9.

v. Higdon, 5 Ohio St. 243: §5 n. 4.

v. Mohawk etc. R. R. Co., 5 Denio 206: §505 n. 2.

v. Mohawk etc. R. R. Co., 7 N. Y. 152: §§481 n. 6, 505 n. 2, 13.

v. Sayles, 4 Cush. 549: §654 n. 1.

Hill v. Sayles, 12 Met. 142: §654 n. 1.

v. St. Louis, 59 Mo. 412: §105 n. 1.

v. Ward, 2 Gil. (Lls.) 205: §67 n. 2.

v. Western Vt. R. R. Co., 32 Vt. 68: §§288 n. 1, 290 n. 5, 291 n. 3, 595 n. 1.

Hilltown Road, 18 Pa. S. 233: §§405 n. 8, 407 n. 1.

Hilton v. Thirty-fourth St. R. R. Co., 1 How. Pr. N. S. 453: §310 n. 6.

Hinchman v. Patterson H. R. R. Co., 17 N. J. Eq. 75: §§124 n. 1, 636 n. 2.

Hinckley et al. Petitioners, 15 Pick. 447: §§329 n. 1, 364 n. 1, 366 n. 7, 368 n. 1, 3; 379 n. 3.

Ex parte, 8 Me. 146: §§405 n. 1, 549 n. 5.

Hinde v. Wabash Navigation Co., 15 Ills. 72: §243 n. 7.

Hine v. K. & D. M. R. R. Co., 42 Ia. 636: §115 n. 4.

v. New Haven, 40 Conn. 478: §§6 n. 2, 156 n. 4.

v. New York El. R. R. Co., 36 Hun. 293: §436 n. 6.

Hine, The v. Trevor, 4 Wall. 555: §72 n. 3.

Hingham etc. Bridge Co. v. County of Norfolk, 6 Allen 353: §§140 n. 3, 242, n. 11, 279, n. 1, 520 n. 1.

Hinkley v. Hastings, 3 Pick. 162: §511 n. 15.

Hiss v. Baltimore etc. Ry. Co., 52 Md. 242: §124 n. 1.

Hitchcock v. Comrs., 131 Mass. 519: §650 n. 9.

v. Danbury etc. R. R. Co., 25 Conn. 516: §606 n. 1.

Hoag v. Denton, 20 Ia. 118: §378 n. 17.

v. Switzer, 61 Ill. 294: §148 n. 1.

Hoagland v. Culvert, 20 N. J. L. 387: §412 n. 13.

v. Sacramento, 52 Cal. 142: §66 n. 11.

Hoard v. Des Moines, 62 Ia. 326: §67 n. 12.

Hobart v. Ford, 6 Nev. 77: §143 n. 1.

v. Milwaukee City Ry. Co., 27 Wis. 194: §§124 n. 1, 125 n. 7.

v. Plymouth Co., 100 Mass. 159: §439 n. 3.

Hobbs v. Comrs., 103 Ind. 575: §415 n. 1.

Hoboken v. Pennsylvania R. R. Co., 124 U. S. 656: §77 n. 1.

Hobson's Trusts, *In re*, 7 L. R. Ch. D. 708: §616 n. 7.

Hodges *v.* Baltimore Pass. Ry. Co., 58 Md. 603: §124 n. 1.

Hodgkinson *v.* Ennor, 4 B. & S. 229: §90 n. 5.

v. Long Island R. R. Co., 4 Edwards Ch. 411: §109 n. 6.

Hoffer *v.* Penn. Canal Co., 87 Pa. S. 221: §469 n. 10.

Hoffman *v.* Connor, 76 N. Y. 121: §444 n. 1.

v. Rodman, 39 N. J. L. 252: §511 n. 8.

v. St. Louis, 15 Mo. 651: §§96 n. 1, 103 n. 4, 107 n. 2.

Hogan *v.* Central Pacific R. R. Co., 71 Cal. 83: §§115 n. 4, 635 n. 16.

Hogencamp *v.* Patterson H. R. R. Co., 17 N. J. Eq. 83: §§124 n. 1, 636 n. 2.

Hogenson *v.* St. Paul etc. Ry. Co., 31 Minn. 224: §89 n. 3.

Hoggatt *v.* Vicksburg etc. R. R. Co., 34 La. An. 624: §588 n. 2.

Hogue *v.* Penn, 3 Bush (Ky.) 663: §8 n. 8.

Holbert *v.* St. Louis K. C. & N. R. R. Co., 45 Ia. 23: §242 n. 5.

Holcomb *v.* Moore, 4 Allen 529: §149 n. 4.

Holcraft *v.* King, 25 Ind. 352: §589 n. 9.

Holden *v.* Cole, 1 Pa. S. 303: §149 n. 4.

Hollingsworth *v.* Des Moines etc. Ry. Co., 63 Ia. 443: §§443 n. 2, 19; 463 n. 1, 499 n. 6.

Hollister *v.* Union Co., 9 Conn. 436: §71 n. 1.

Holloway *v.* University R. R. Co., 85 N. C. 452: §607 n. 2.

Holmes *v.* Drew, 7 Pick. 141: §334 n. 3.

Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335: §65 n. 1.

Holt *v.* Gas Light etc. Co., 7 L. R. Q. B. 728: §231 n. 3.

v. Somerville, 127 Mass. 408: §291 n. 1.

Holton *v.* Milwaukee 31 Wis. 27: §§504 n. 4, 467 n. 6.

Holyoke Co. *v.* Lyman, 15 Wall. 500: §156 n. 21.

Holyoke W. P. Co. *v.* Conn. River Co., 52 Conn. 570: §71 n. 1.

v. Conn. River Co., 22 Blatch. 181: §§71 n. 1, 251 n. 2, 641 n. 3.

Home Ins. Co. *v.* Smith, 28 Hun. 296: §324 n. 1.

Homer *v.* Bar Harbor Water Co., 78 Me. 127: §607 n. 2.

Hood *v.* Finch, 8 Wis. 381: §311 n. 2.

v. Nashville etc. R. R. Co., 2 Swan 497: §540 n. 7.

Hook *v.* Smith, 6 Mo. 225: §305 n. 8.

Hooker *v.* Cummings, 20 Johns. 90: §69 n. 5.

v. Martin, 10 Hun. 302: §§324 n. 1, 4, 628 n. 4.

v. New Haven etc. Co., 14 Conn. 146: §§59 n. 1, 87 n. 1.

v. New Haven etc. Co., 15 Conn. 312: §§59 n. 1, 87 n. 1, 147 n. 1.

v. Rochester, 37 Hun. 181: §65 n. 5.

Hooper *v.* Columbus etc. Ry. Co., 78 Ala. 213: §§647 n. 4, 648 n. 6.

v. Savannah etc. R. R. Co., 69 Ala. 529: §§292 n. 4, 297 n. 2.

Hope *v.* Norfolk etc. R. R. Co., 79 Va. 283: §289 n. 2.

Hopkins *v.* Gt. Western Ry. Co., L. R. 2 Q. B. D. 224: §228 n. 2.

v. Kansas City etc. R. R. Co., 79 Mo. 98: §391 n. 3.

Hoppikus *v.* Comrs., 16 Cal. 248: §311 n. 2.

Horenstine *v.* Vaughn, 7 Blackf. 520: §§349 n. 2, 514 n. 1.

Horisman *v.* Covington etc. R. R. Co., 18 B. Mon. 218: §569 n. 1.

Hornback *v.* Cincinnati etc. R. R. Co., 20 Ohio St. 81: §§292 n. 5, 296 n. 3, 8; 648 n. 1.

Hornstein *v.* Atlantic etc. R. R. Co., 51 Pa. S. 87: §469 n. 10.

Horton *v.* Grand Haven, 24 Mich. 465: §393 n. 3.

v. Hoyt, 11 Ia. 496: §631 n. 2.

v. Norwalk, 45 Conn. 237: §399 n. 2.

Hortsman *v.* Covington etc. R. R. Co., 18 B. Mon. 218: §151 n. 4.

Hosher *v.* Kansas City etc. R. R. Co., 60 Mo. 303: §§435 n. 1, 3; 469 n. 6.

v. Kansas City etc. R. R. Co., 60 Mo. 329: §§89 n. 1, 5; 298 n. 1.

Hosmer *v.* Warner, 7 Gray 186: §396 n. 9.

v. Warner, 15 Gray 46: §§314 n. 6, 403 n. 7, 435 n. 1, 469 n. 5.

Hot Springs R. Co. *v.* Tyler, 36 Ark. 205: §§336 n. 2, 7.

v. Williamson, 45 Ark. 429: §§225 n. 1, 232 n. 2, 236 n. 1.

Hotchkiss *v.* Auburn etc. R. R. Co., 36 Barb. 600: §§328 n. 2, 4.

Hougan *v.* Milwaukee etc. Ry. Co., 35 Ia. 558: §§90 n. 3, 584 n. 5.

Hough *v.* Doylestown, 4 Brews. Pa. 333: §62 n. 1.

Houghton *v.* C. D. & M. R. R. Co., 47 Ia. 370: §72 n. 18.

v. Huron Copper Co., 57 Mich. 547: §§240 n. 10, 405 n. 31.

Houghton's Appeal, 42 Cal. 35: §§314 n. 13, 536 n. 1, 3.

Housatonic etc. R. R. Co. *v.* Lee etc. R. R. Co., 118 Mass. 391: §§267 n. 1, 276 n. 3, 9; 643 n. 1.

House *v.* Greensburg, 93 Ind. 533: §134 n. 12.

v. Rochester, 15 Barb. 517: §313 n. 6.

House Ave., Matter of, 67 Barb. 350: §301 n. 1.

Matter of, 3 N. Y. Supme. Ct. 770: §§301 n. 1, 12.

Householder *v.* City of Kansas, 83 Mo. 488: §§12 n. 2, 223 n. 1.

Houston etc. Ry. Co. *v.* Adams, 58 Tex. 476: §293 n. 3.

v. R. R. Co. *v.* Chaffin, 60 Tex. 553: §666 n. 1.

v. McKinney, 55 Tex. 176: §295 n. 1.

v. Meador, 50 Tex. 77: §299 n. 5.

v. Milburn, 34 Tex. 224: §§311 n. 2, 524 n. 5.

v. Odum, 53 Tex. 343: §115 n. 4.

Houston St., Matter of, 7 Hill 175: §405 n. 41.

Hovey *v.* Mayo, 43 Me. 322: §§88 n. 5, 590 n. 3.

How *v.* Chesapeake etc. Canal Co., 5 Harr. Del. 245: §87 n. 2.

Howard *v.* Hutchinson, 10 Me. 335: §§344 n. 1, 364 n. 1, 363 n. 1, 519 n. 2.

v. Proprietors etc., 12 Cush. 259: §§314 n. 4, 396 n. 1.

v. Providence, 6 R. I. 514: §§437 n. 1, 447 n. 1.

v. State, 47 Ark. 431: §§365 n. 3, 369 n. 2.

v. St. Clair Drain Co., 51 Ills. 130: §5 n. 1.

Petition of, 28 N.H. 157: §394 n. 8.

Howcott *v.* Coffield, 7 Ired. L. 24: §320 n. 1.

v. Warren, 7 Ired. L. 20: §320 n. 1.

Howe *v.* Jamaica, 19 Vt. 607: §§347 n. 1, 2; 361 n. 2.

Howe *v.* Ray, 110 Mass. 298: §3 6 n. 1.

v. Ray, 113 Mass. 88: §469 n. 5.

Howland *v.* County Comrs., 49 Me. 143: §512 n. 4.

Hoye *v.* Swan's Lessee, 5 Md. 237: §§157 n. 2, 205 n. 3.

Hoyt *v.* Hudson, 27 Wis. 656: §§88 n. 5, 103 n. 5, 6.

Hubbard *v.* Bell, 54 Ills. 112: §72 n. 13.

v. Kansas City etc. R. R. Co., 63 Mo. 68: §§292 n. 4, 296 n. 4, 8.

v. Wickliffe, 2 A. K. Marsh. 503; 1 Litt. 80: §401 n. 1.

Huddleston *v.* West Bellevue, 111 Pa. S. 110: §§84 n. 4, 103 n. 3.

Hudson *v.* Cuero Land etc. Co., 47 Tex. 56: §141 n. 16.

Hudson Riv. R. R. Co. *v.* Outwater, 3 Sandf. 689: §§248 n. 1, 655 n. 2, 4; 658 n. 1.

Hudson etc. Canal Co. *v.* New York etc. R. R. Co., 9 Paige, 323: §§136 n. 3, 139 n. 1, 258 n. 1, 624 n. 4.

Huges *v.* Miss. & Mo. R. R. Co., 12 Ia. 261: §§112 n. 1, 115 n. 4.

Hughes *v.* Morden College, 1 Ves. Sr. 188: §§283 n. 5, 631 n. 5.

v. Morden College, 3 Ves. Sr. 188: §283 n. 5.

v. Sellers, 34 Ind. 337: §§320 n. 4, 349 n. 2, 5; 362 n. 1, 531 n. 6.

Hull *v.* Chicago etc. Ry. Co., 65 Ia. 713: §296 n. 2, 8.

v. C. B. & Q. R. R. Co., 21 Neb. 371: §§378 n. 2, 9; 647 n. 2.

v. Decker, 48 Me. 255: §314 n. 16.

v. Westfield, 133 Mass. 433: §607 n. 2.

Hullin *v.* Second Municipality, 11 Rob. La. 97: §§655 n. 1, 658 n. 3.

Humes *v.* Knoxville, 1 Humph. 403: §§95 n. 1, 96 n. 1, 97 n. 2.

v. Shugart, 10 Leigh, 332: §305 n. 7.

Hummett *v.* Philadelphia, 65 Pa. S. 146: §4 n. 3.

Hunt *v.* New York etc. Ry. Co., 99 Ind. 593: §307 n. 9.

v. Smith, 9 Kan. 137: §§307 n. 8, 377 n. 3, 472 n. 3, 509 n. 14.

v. Whitney, 4 Met. 603: §§182 656 n. 1.

Hunter *v.* Jones, 13 Minn. 307: §606 n. 1, 5.

v. Matthews, 1 Rob. 468: §366 n. 6.

Hunter *v.* Matthews, 12 Leigh. 228: §405 n. 27.
v. Newport, 5 R. I. 325: §§513 n. 3.
Hunting *v.* Curtis, 10 Ia. 152: §655 n. 1.
Huntington *v.* Birch, 12 Conn. 142: §382 n. 2.
Huntress *v.* Effingham, 17 N. H. 584: §531 n. 5.
Hupert *v.* Anderson, 35 Ia. 578: §661 n. 3.
Hurford *v.* Omaha, 4 Neb. 336: §638 n. 2.
Hurniker *v.* Contoocook Valley R. R. Co., 29 N. H. 146: §607 n. 2.
Hursh *v.* First Division etc., 17 Minn. 439: §§454 n. 2, 649 n. 2.
Hussner *v.* Brooklyn City R. R. Co., 30 Hun. 409: §§113 n. 3, 649 n. 5.
Husted *v.* Greenwich, 11 Conn. 383: §361 n. 8.
Huston *v.* Clark, 112 Ills. 344: §379 n. 1.
v. Fort Atkinson, 56 Wis. 350: §590 n. 3.
Hutchinson *v.* Parkersburg, 25 W. Va. 226: §§228 n. 1, 322 n. 4.
Hutton *v.* Indiana Cent. R. R. Co., 7 Ind. 522: §§115 n. 4, 117 n. 2.
v. London etc. Ry. Co., 18 L. J. Ch. N. S. 345: §645 n. 1.
Hyde *v.* County of Middlesex, 2 Gray, 267: §505 n. 3.
Hyde Park *v.* Cemetery Assn., 119 Ills. 141: §272 n. 8.
v. Dunham, 85 Ills. 569: §470 n. 20.
v. Washington Ice Co., 117 Ills. 233: §478 n. 8.
Hymes *v.* Aydelott, 26 Ind. 431: §311 n. 2.
Hyslop *v.* Finch, 99 Ills. 171: §§247 n. 5, 253 n. 1, 470 n. 19, 545 n. 6.

I.

I. & G. N. Ry. Co. *v.* Benitos, 59 Tex. 326: §623 n. 1.
v. Bost, 2 Tex. App. Civil Cas. 334: §§293 n. 3, 584 n. 4.
v. Klaus, 64 Tex. 293: §66 n. 9.
v. Pope, 62 Tex. 313: §567 n. 2.
Illinois etc. Canal *v.* Chicago etc. R. R. Co., 14 Ills. 314: §§136 n. 3, 139 n. 10.
Illinois etc. Co. *v.* Switzer, 117 Ills. 399: §481 n. 4.
Illinois etc. R. R. Co. *v.* Allen, 39 Ills. 205: §318 n. 8.

Illinois *v.* Bloomington, 76 Ills. 447: §156 n. 27.
v. Fehringer, 82 Ills. 129: §§9 n. 1.
v. Grabill, 50 Ills. 242: §2-7 n. 8.
v. Mayrand, 93 Ills. 591: §§360 n. 2, 512 n. 8.
v. McClintock, 63 Ills. 514: §524 n. 7.
v. McClintock, 68 Ills. 296: §499 n. 10.
v. Rucker, 14 Ills. 353: §§387 n. 2, 404 n. 1, 650 n. 10.
v. Van Horn, 18 Ills. 257: §§435 n. 1, 5; 524 n. 3.
v. Walther, 17 Ills. App. 582: §§584 n. 7, 588 n. 1.
Illsley *v.* Portland etc. R. R. Co., 56 Me. 531: §618 n. 4.
Imlay *v.* Union Branch R. R. Co., 26 Conn. 249: §§111 n. 2, 113 n. 3, 116 n. 6, 121 n. 1, 493 n. 2.
Imperial Gas Co. *v.* Broadbent, 7 H. L. 600: §607 n. 7.
Indiana etc. R. R. Co. *v.* Allen, 100 Ind. 409: §§289 n. 8, 518 n. 4, 379 n. 1, 464 n. 1, 507 n. 2.
v. Brittingham, 98 Ind. 294: §289 n. 2.
v. Boden, 10 Ind. 96: §§113 n. 3, 115 n. 4, 624 n. 2.
v. Eberle, 110 Ind. 542: §§89 n. 1, 100 n. 2.
v. Hunter, 8 Ind. 74: §§470 n. 5, 473 n. 2.
v. Louisville etc. R. R. Co., 107 Ind. 301: §633 n. 1.
v. Oakes, 20 Ind. 9: §303 n. 1.
Indianapolis *v.* Cumberland Road Co., 93 Ind. 360: §313 n. 1.
v. Kingsbury, 101 Ind. 200: §114 n. 5.
v. Lawyer, 38 Ind. 348: §103 n. 3.
Indianapolis etc. R. R. Co. *v.* Belt Ry. Co., 110 Ind. 5: §142 n. 2.
v. Brower, 12 Ind. 374: §556 n. 5.
v. Calvert, 110 Ind. 555: §§117 n. 4, 635 n. 16.
v. Hartley, 67 Ills. 439: §§111 n. 2, 113 n. 3, 115 n. 4, 257 n. 1, 649 n. 5.
v. Lawrenceburg, 37 Ind. 489: §653 n. 1.
v. Newsom, 54 Ind. 121: §§348 n. 1, 352 n. 8.
v. Pugh, 85 Ind. 279: §435 n. 1, 3.
v. Reed, 52 Ind. 357: §307 n. 3.
v. Smith, 52 Ind. 428: §§113 n. 3, 118 n. 3.
v. Smythe, 45 Ind. 322: §532 n. 1.

Indianapolis etc. Road Co. v. Christian, 93 Ind. 360: §§311 n. 2, 313 n. 4, 348 n. 2.
v. State, 105 Ind. 37: §§367 n. 1, 2; 595 n. 1.

Ingalls v. Byer's Admir., 94 Ind. 134: §§297 n. 4, 627 n. 6.

Inge v. Birmingham etc. Ry. Co., 3 DeG. McN. & G. 658: §615 n. 1.
v. Police Jury, 14 La. An. 117: §318 n. 2.

Ingraham v. C. D. & M. R. R. Co., 34 Ia. 249; 38 Ia. 669: §115 n. 4.

Ingram v. Wilson, 4 Humph. 424: §401 n. 4.

Inhabitants of Adams, 10 Rich. 273: §546 n. 3.

Inhabitants of Brunswick, Appellants, 37 Me. 446: §529 n. 1.

Inhabitants of Limerick, 18 Me. 183: §540 n. 8.

Inhabitants of Livermore, 11 Me. 275: §525 n. 8.

Inhabitants of New Salem, 6 Pick. 470: §384 n. 1.

Inhabitants of Pownal, 8 Me. 271: §309 n. 1.

Inhabitants of Readington v. Dilley, 24 N. J. L. 209: §416 n. 5, 7, 8.

Inhabitants of Vasselborough, 19 Me. 338: §§166 n. 11, 419 n. 3, 545 n. 13.

Inhabitants of Windham, 32 Me. 452: §§415 n. 4, 517 n. 1.

Inmann v. Trip, 11 R. I. 520: §103 n. 3.

Ipswich v. County Comrs., 10 Pick. 519: §§407 n. 2, 545 n. 14.

Ipswich Mills v. Comrs., 108 Mass. 363: §665 n. 10.

Ireland v. Met. El. Ry. Co., 52 N. Y., Supr. Ct. 450: §§123 n. 9, 493 n. 7.

Irish v. Burlington etc. Ry. Co., 44 Ia. 380: §§618 n. 1, 634 n. 2.

Iron R. R. Co. v. Ironton, 19 Ohio St. 299: §§239 n. 4, 269 n. 7.

Isham v. Smith, 21 Wis. 32: §511 n. 15.

Isom v. Miss. Cent. R. R. Co., 36 Miss. 300: §§461 n. 2, 466 n. 2.

Ives v. East Haven, 48 Conn. 272: §§378 n. 14, 379 n. 1, 383 n. 1, 530 n. 2.

J.

Jackson v. Edwards, 22 Wend. 498: §323 n. 5, 11.
v. Edwards, 7 Paige, 386: §323 n. 11.

v. Hatheway, 15 Johns. 447: §589 n. 4, 590 n. 7.

v. Housel, 17 Johns. 281: §54 n. 4.

v. Jackson, 16 Ohio St. 163: §98 n. 16, 100 n. 2, 114 n. 4.

v. Portland, 63 Me. 55: §482 n. 1.

v. Rankin, 67 Wis. 285: §§256 n. 11, 350 n. 6, 511 n. 4.

v. Rutland etc. R. R. Co., 25 Vt. 150: §586 n. 1.

v. State, 104 Ind. 516: §605 n. 5.

v. Winn's Heirs, 4 Littell, 322: §§264 n. 5, 454 n. 7.

Jackson Co. v. Waldo, 85 Mo. 637: §469 n. 6.

Jackson County H. R. R. Co. v. Inter State etc. Co., 24 Fed. R. 306: §137 n. 9.

Jacksonville v. Lambert, 62 Ills. 519: §86 n. 1.

Jacksonville etc. R. R. Co. v. Caldwell, 21 Ills. 75: §437 n. 7.

v. Cox, 91 Ills. 500: §89 n. 4.

v. Kidder, 21 Ills. 131: §481 n. 4.

v. Walsh, 106 Ills. 253: §487 n. 1.

Jacob v. Louisville, 9 Dana, 114: §468 n. 2.

Jacobs' Petition, Matter of, 3 Harr. Del. 321: §359 n. 3.

Jacobs, Matter of, 98 N. Y. 98; 33 Hun, 374: §156 n. 34.

Jamaica v. Comrs., 56 Ind. 466: §540 n. 11.

Jamaica Pond Aq. Co. v. Brookline, 121 Mass. 5: §109 n. 3.

Jamaica etc. Road Co. v. New York etc. R. R. Co., 25 Hun, 585: §§456 n. 2, 643 n. 8.

James Kinney, Petition of, 5 Harr. 18: §377 n. 5.

James River etc. Co., 12 Leigh, 278: §270 n. 8.

v. Thompson, 3 Gratt. 270: §274 n. 1.

v. Turner, 9 Leigh, 313: §467 n. 4.

Jamieson v. Board of Comrs., 56 Ind. 466: §562 n. 13.

Jamison v. Burlington etc. Ry. Co., 69 Ia. 670: §§537 n. 13, 539 n. 11.

v. Springfield, 53 Mo. 224: §§364 n. 1, 623 n. 1, 4.

Jane Evans, In re, 42 L. J. Ch. 357: §331 n. 3.

Janesville Bridge Co. v. Stoughton, 1 Pinney, 667: §136 n. 1, 3.

Janssen v. Lammers, 29 Wis. 88: §664 n. 1, 2.

Jarden v. Phila. etc. R. R. Co., 3 Whart. 502: §631 n. 1.

Jefferson v. Delachaise, 22 La. An. 26: §§253 n. 1.

Jefferson Co. v. Cowan, 54 Mo. 234: §§347 n. 1, 4.

Jefferson etc. R. R. Co., v. Bowen, 40 Ind. 545: §425 n. 4.

v. Dougherty, 40 Ind. 33: §§454 n. 3, 457 n. 5.

v. Esterle, 13 Bush, 607: §§493 n. 2, 625 n. 2.

v. New Orleans, 31 La. An. 478: §§631 n. 2.

Jeffrey v. Blue Hill Turnpike Co., 10 Mass. 368: §609 n. 3.

Jeffries v. Phila. etc. R. R. Co., 3 Houst 447: §505 n. 5.

v. Swampscott, 105 Mass. 535: §§510 n. 6, 517 n. 12, 519 n. 5, 631 n. 3.

Jenal v. Green Island etc. Co., 12 Neb. 163: §§157 n. 2, 164 n. 6, 185 n. 1, 188 n. 4, 192 n. 1.

Jennings v. Le Roy, 63 Cal. 397: §667 n. 5.

Ex parte, 6 Cow. 518: §§69 n. 2, 70 n. 2.

Jersey City v. Central R. R. Co., 40 N. J. Eq. 417: §254 n. 1.

v. Fitzpatrick, 30 N. J. Eq. 97: §648 n. 1.

v. Sackett, 44 N. J. L. 428: §610 n. 10.

Jersey City etc. R. R. Co. v. Jersey City etc. R. R. Co., 20 N. J. Eq. 61: §§124 n. 1, 141 n. 17, 490 n. 1, 3; 643 n. 7.

v. Jersey City etc. R. R. Co., 21 N. J. Eq. 550: §643 n. 7.

Jessup v. Loucks, 55 Pa. S. 350: §596 n. 1.

Jeter v. Board, 27 Gratt. 910: §399 n. 2.

J. M. & I. R. R. Co. v. Esterle, 13 Bush, 667: §§114 n. 4, 115 n. 1, 2, 4.

John & C. St. Matter of, 19 Wend. 659: §§157 n. 2, 204 n. 1.

Johns v. Marion Co., 4 Or. 46: §352 n. 6.

Johnson In re, 49 N. J. L. 381: §§372 n. 2, 415 n. 1.

Johnson v. Alameda Co., 14 Cal. 106: §456 n. 1.

v. Atlantic etc. R. R. Co., 35 N. H. 569: §§89 n. 6, 154 n. 1.

v. Chicago etc. Ry. Co., 58 Ia. 537: §280 n. 6.

v. Crow, 87 Pa. S. 184: §§136 n. 1, 137 n. 6.

Johnson v. District of Columbia, 118 U. S. 19: §86 n. 6.

v. Freeport etc. Ry. Co., 111 Ills. 413: §§360 n. 2, 390 n. 3, 437 n. 1, 5, 15; 479 n. 2, 5.

v. Freeport etc. Ry. Co., 116 Ills. 521: §§360 n. 2, 551 n. 3.

v. Joliet etc. R. R. Co., 23 Ills. 202: §§311 n. 2, 363 n. 1, 368 n. 9, 456 n. 1.

v. Parkersburg, 16 W. Va. 402: §§223 n. 1, 232 n. 2, 624 n. 1.

v. St. Louis etc. Ry. Co., 32 Ark. 758: §607 n. 2.

v. Suprs. etc., 61 Ia. 89: §§166 n. 3, 549 n. 12.

v. Sutliff, 17 Neb. 423: §560 n. 2, 7.

v. Utica Water Works Co., 67 Barb. 415: §259 n. 8.

Johnston v. Rankin, 70 N. C. 550: §§10 n. 2, 11 n. 1, 405 n. 5, 456 n. 2, 458 n. 6, 631 n. 2.

v. Vandyke, 6 McLean, 422: §323 n. 5.

Joliet etc. R. R. Co. v. Barrows, 24 Ills. 562: §§543 n. 8, 655 n. 1.

Jones v. Bird, 5 B. & Ald. 837: §92 n. 5.

v. Chicago etc. R. R. Co., 68 Ills. 380: §§360 n. 2, 442 n. 3, 482 n. 1.

v. Clark, 7 Jones L. 418: §396 n. 1.

v. Comth., 1 Bush (Ky.) 34: §8 n. 8.

v. Goffstown, 39 N. H. 254: §416 n. 1.

v. New Orleans etc. Co., 70 Ala. 227: §507 n. 7, 10.

v. Oxford, 45 Me. 419: §609 n. 9.

v. Pettibone, 2 Wis. 308: §72 n. 16.

v. Portland, 57 Me. 42: §371 n. 1.

v. Stafford Justices, 1 Leigh. 584: §630 n. 8.

v. St. Louis etc. R. R. Co., 84 Mo. 151: §89 n. 1.

v. Wills Valley R. R. Co., 30 Ga. 43: §468 n. 1.

Jones' Heirs v. Barclay, 2 J. J. Marsh. 73: §§167 n. 3, 14; 328 n. 2, 369 n. 1, 440 n. 2.

Jordan v. Haskell, 63 Me. 189: §597 n. 4.

v. Hyatt, 3 Barb. 275: §5 n. 3.

v. Woodward, 40 Me. 317: §§162 n. 1, 180 n. 9, 592 n. 2.

Joseph Hydraulic Co. v. Cincinnati etc. Ry. Co., 109 Ind. 172: §606 n. 4.

Julia Bldg. Assn. v. Bell Tel. Co., 88 Mo. 258: §§131 n. 1, 226 n. 4.

Justice *v.* Nesquehoning Valley R. R. Co., 87 Pa. S. 28: §§507 n. 7, 10, 647 n. 1, 16.

Justices *v.* Jefferson, 1 Coldw. 419: §613 n. 2.

Justices etc. *v.* Plank Road Co., 9 Ga. 475: §§253 n. 1, 270 n. 5.

K.

Kaiser *v.* St. Paul etc. R. R. Co., 22 Minn. 149: §118 n. 3.

Kamer *v.* Klatsop Co., 6 Or. 238: §§347 n. 12, 394 n. 4.

Kane *v.* Baltimore, 15 Md. 240: §§173 n. 2, 292 n. 3.

Kankakee etc. R. R. Co. *v.* Chester, 62 Ills. 235: §515 n. 2.

v. Straut, 102 Ills. 666: §424 n. 1.

Kanne *v.* Minneapolis etc. Ry. Co., 30 Minn. 423: §§579 n. 2, 647 n. 3, 10.

v. Minneapolis etc. Ry. Co., 133 Minn. 419: §647 n. 2.

Kansas *v.* Hill, 80 Mo. 523: §311 n. 2.

Kansas Cent. R. R. Co. *v.* Allen, 22 Kan. 285: §§586 n. 2, 587 n. 1.

v. Allen, 24 Kan. 33: §§435 n. 1, 3; 436 n. 20, 437 n. 5.

Kansas City etc. R. R. Co. *v.* Campbell, 62 Mo. 585: §§301 n. 1, 7; 379 n. 4, 524 n. 1.

v. Kregelo, 32 Kan. 608: §§481 n. 4, 497 n. 1, 502 n. 4, 504 n. 6, 586 n. 2.

v. Merrill, 25 Kan. 421: §§475 n. 1, 3; 533 n. 3.

v. Riley, 33 Kan. 374: §88 n. 5.

v. Weaver, 86 Mo. 473: §§483 n. 5, 627 n. 7.

Kansas etc. Ry. Co. *v.* Hopkins, 18 Kan. 494: §292 n. 4.

Kansas R. R. Co. *v.* Mihlman, 17 Kan. 224: §625 n. 2.

Karber *v.* Nellis, 22 Wis. 215: §606 n. 1.

Karst *v.* St. Paul etc. R. R. Co., 22 Minn. 118: §§105 n. 4, 494 n. 2.

v. St. Paul etc. R. R. Co., 23 Minn. 401: §§105 n. 4, 494 n. 2.

Kauaga *v.* St. Louis etc. R. R. Co., 76 Mo. 207: §§298 n. 1, 648 n. 1.

Kauffman *v.* Greismer, 26 Pa. S. 407: §88 n. 2.

Kavanaugh *v.* Brooklyn, 38 Barb. 232: §108 n. 4.

Kean *v.* Stetson, 5 Pick. 492: §649 n. 2.

Kearsley *v.* Gibbs, 44 N. J. L. 169: §§512 n. 5, 514 n. 5.

Keasy *v.* Louisville, 4 Dana, (Ky.) 154: §§95 n. 1, 96 n. 1, 107 n. 2.

Keating *v.* Cincinnati, 38 Ohio St. 141: §§101 n. 3, 4, 5; 151 n. 7, 569 n. 2.

Keeling's Road, 59 Pa. S. 358: §167 n. 21.

Keenan *v.* Comrs' Court, 26 Ala. 568: §§411 n. 1, 413 n. 3, 549 n. 6.

Keenan, *Ex parte* 21 Ala. 558: §§545 n. 4, 650 n. 10.

Keene *v.* Bristol, 26 Pa. S. 46: §§457 n. 7, 631 n. 2.

v. Chapman, 25 Me. 126: §607 n. 2.

Kehver *v.* Richmond City, 81 Va. 745: §96 n. 1.

Keithsburg etc. R. R. Co. *v.* Henry, 79 Ills. 290: §§436 n. 2, 437 n. 5, 470 n. 18, 496 n. 1, 4; 497 n. 1.

Keller *v.* Corpus Christi, 50 Tex. 614: §7 n. 3, 4.

Kelley *v.* Horton, 2 Cow. 424: §649 n. 2, 10.

v. Pittsburgh, 85 Pa. S. 170: §155 n. 13.

Kelliner *v.* Miller, 97 Mass. 71: §447 n. 1.

Kellinger *v.* 42d St. R. R. Co., 50 N. Y. 206: §§100 n. 2, 114 n. 4, 124 n. 4, 125 n. 8, 134 n. 1.

Kellogg *v.* Malin, 50 Mo. 496: §§278 n. 5, 596 n. 3.

v. Price, 42 Ind. 360: §540 n. 7.

Kelly *v.* Donahoe, 2 Met. Ky. 432: §590 n. 3.

v. Harrison, 2 Johns. Cas. 29: §323 n. 5.

Kelsey *v.* King, 32 Barb. 410: §§127 n. 1, 339 n. 4.

Kemp *v.* Smith, 7 Ind. 471: §§361 n. 10, 373 n. 4, 540 n. 1.

Kemper *v.* Cincinnati etc. Co., 11 Ohio 392: §280 n. 2.

v. Louisville, 14 Bush, 87: §§59 n. 1, 103 n. 5.

Kendall *v.* Post, 8 Or. 141: §311 n. 2.

v. Railroad Co., 55 Vt. 438: §§618 n. 1, 2; 620 n. 1, 2, 4; 621 n. 1.

Kenedy *v.* Erwin, Busbee L. 387: §157 n. 2.

Kenesin *v.* Arlington, 144 Mass. 456: §307 n. 4.

Kennedy *v.* Dubuque etc. R. R. Co., 2 Ia. 521: §472 n. 9.

v. Indianapolis, 103 U. S. 599: §470 n. 13.

v. Milwaukee etc. Ry. Co., 22 Wis. 581: §§324 n. 1, 5; 477 n. 11, 628 n. 5, 7.

Kennett's Petition, 24 N. H. 139: §§148 n. 1, 309 n. 7, 433 n. 1, 511 n. 3.

Kensington *v.* Wood, 10 Pa. S. 93: §103 n. 7.

Kensington, Case of, 2 Rawle, 445: §§271 n. 2, 274 n. 1.

Kensington etc. Turnpike, *In re*, 97 Pa. S. 260: §527 n. 2.

Kent *v.* Wallingford, 42 Vt. 651: §§612 n. 2, 656 n. 23.

Kenton Co. Court *v.* Bank Lick T Co., 10 Bush, 529: §271 n. 7.

Kepley *v.* Taylor, 1 Blackf. 492: §§180 n. 2, 181 n. 7, 606 n. 1.

Kepple *v.* Keokuk, 61 Ia. 653: §208 n. 5.

Kerr, Petition of, 42 Barb. 119: §§942 n. 4, 274 n. 1.

v. South Park Comrs., 117 U. S. 379: §443 n. 20.

Kersley *v.* Gibbs, 44 N. J. L. 169: §529 n. 1.

Keyes *v.* Tait, 19 Ia. 123: §§347 n. 3, 6; 604 n. 4.

Keys *v.* Marion Co., 42 Cal. 252: §§545 n. 1, 5, 7.

v. Williamson, 31 Ohio St. 561: §382 n. 2.

Keystone Bridge Co. *v.* Summers, 13 W. Va. 476: §324 n. 1.

Kidder *v.* Jennison, 21 Vt. 108: §369 n. 2.

v. Oxford, 116 Mass. 165: §499 n. 1.

Kiecher *v.* Killbuck Turnpike Co., 33 Ind. 333: §647 n. 12.

Kier *v.* Boyd, 60 Pa. S. 33: §599 n. 3.

Kili *v.* Tellowhead, 80 Ills. 208: §606 n. 1.

Killbuck Private Road, 77 Pa. S. 39: §§253 n. 1, 511 n. 4.

Kimball *v.* Kenosha, 4 Wis. 321: §114 n. 1.

v. Rockland, 71 Me. 137: §§609 n. 3, 612 n. 2, 656 n. 24.

v. Supervisors, 46 Cal. 19: §311 n. 2.

Kimble *v.* White Water etc. Co., 1 Ind. 285: §§565 n. 1, 607 n. 2.

Kine *v.* Defenbaugh, 64 Ills. 291: §12 n. 2.

King *v.* Bristol Dock Co., 6 B. & C. 181: §92 n. 5.

v. Davenport, 98 Ills. 305: §§6 n. 2, 156 n. 4.

v. Iowa etc. R. R. Co., 34 Ia. 458: §§443 n. 2, 447 n. 1.

King *v.* Minneapolis Union Ry. Co., Minn. 224: §487 n. 8.

v. New York, 36 N. Y. 182: §§314 n. 12, 536 n. 1.

v. New York, 102 N. Y. 171: §318 n. 10.

v. Nottingham Water Works, 6 A. & E. 355: §614 n. 3.

v. Tarlton, 2 H. & McH. 473: §440 n. 3.

v. Wycombe Ry. Co., 28 Beav. 104: §284 n. 1.

v. Wycombe Ry. Co., 29 L. J. Ch n. s. 462: §284 n. 1.

Kingman *v.* Comrs., 6 Cush. 306: §545 n. 13.

Kings Co. *v.* Sea View Ry. Co., 23 Hun, 180: §635 n. 14.

Kings Co. El. Ry. Co., Matter of, §82 N. Y. 95: §123 n. 2.

Matter of, 20 Hun, 217: §310 n. 6.

Kings Co. Fire Ins. Co. *v.* Stevens, 101 N. Y. 411: §134 n. 4.

King's Leasehold Estates, *In re*, L. R. 16 Eq. Cas. 524: §483 n. 21.

King's Road, 1 Dall. 11: §530 n. 8.

Kingsland *v.* Clark, 24 Mo. 24: §483 n. 9.

v. New York, 35 Hun, 458: §84 n. 1.

Kip *v.* New York etc. R. R. Co., 67 N. Y. 227: §§244 n. 3, 265 n. 6.

v. New York etc. R. R. Co., 6 Hun, 24: §§265 n. 6, 646 n. 2.

Kirkendall *v.* Hunt, 4 Kan. 514: §631 n. 2.

Kirk's Appeal, 28 Pa. S. 185: §548 n. 4.

Kirtland *v.* Meriden, 39 Conn. 107: §656 n. 26.

Kissinger *v.* Hanselman, 33 Ind. 80: §§166 n. 2, 167 n. 8, 383 n. 2.

Kittell *v.* Missisquoi R. R. Co., 56 Vt. 96: §§618 n. 1. 2; 620 n. 2, 621 n. 1, 3.

Kivett *v.* McKeithan, 90 N. C. 106: §298 n. 1.

Klein *v.* St. Paul etc. Ry. Co., 30 Minn. 45: §539 n. 1, 2.

Klicker *v.* Guilband, 47 N. J. L. 277: §256 n. 3.

Knapp *v.* McAuley, 39 Vt. 275: §648 n. 1.

Knaust *v.* St. Paul etc. R. R. Co., 22 Minn. 173: §§477 n. 8, 499 n. 3.

Knickerbocker Ice Co. *v.* Phila. & R. R. R. Co., 15 Phila. 48: §117 n. 9.

Knock v. Metropolitan Ry. Co., 4 L. R. C. P. 131: §220 n. 14.
v. Metropolitan Ry. Co., 38 L. J. C. P. 78: §220 n. 14.
Knorr v. Germantown R. R. Co., 5 Whart. 256: §607 n. 2.
Knoth v. Barclay, 8 Col. 300: §§314 n. 10, 330 n. 1.
Knowles v. Muscatine, 20 Ia. 248: §§256 n. 14, 511 n. 5.
Knowles' Petition, 22 N. H. 361: §§166 n. 3, 511 n. 27.
23 N. H. 198: §560 n. 5.
Knox v. Chaloner, 42 Me. 150: §72 n. 5.
v. Epsom, 56 N. H. 14: §383 n. 1.
Knoxville v. Bird, 12 Lea, 121: §156 n. 1.
Kobs v. Minneapolis, 22 Minn. 159: §103 n. 3.
Koch v. Williamsport Water Co., 65 Pa. S. 288: §607 n. 2.
Koelhmel v. New Orleans etc. R. R. Co., 27 La. An. 442: §§115 n. 4, 117 n. 3.
Koenig v. Winona, 10 Minn. 238: §551 n. 10.
Kohl v. United States, 91 U. S. 367: §§287 n. 1, 315 n. 1.
Kohlheff v. West Roxbury, 120 Mass. 596: §605 n. 4.
Kokomo v. Mahan, 100 Ind. 242: §§96 n. 1, 107 n. 2, 207 n. 5, 638 n. 2.
Koppikus v. Comrs., 16 Cal. 248: §§313 n. 2, 364 n. 1.
Kough v. Darcey, 11 N. J. L. 287: §649 n. 8.
Kowistar v. Ward, Gilmer, Va. 127: §509 n. 6.
Kramer v. Cleveland etc. R. R. Co., 5 Ohio St. 140: §§311 n. 2, 313 n. 1, 368 n. 1, 11; 470 n. 7.
Krop v. Forman, 31 Mich. 144: §§253 n. 1, 343 n. 1, 510 n. 9, 549 n. 7.
Kucheman v. C. C. & D. Ry. Co., 46 Ia. 336: §§111 n. 2, 113 n. 3, 115 n. 4, 121 n. 1, 493 n. 2, 11.
Kuhn v. Truman, 15 Kan. 423: §319 n. 1.
Kundinger v. Saginaw, 59 Mich. 355: §§367 n. 4, 6; 405 n. 39, 537 n. 16.
Kyle v. Board of Comrs., 94 Ind. 115: §534 n. 4.
v. Miller, 108 Ind. 90; §524 n. 3.

L.

Lackland v. North Mo. R. R. Co., 31 Mo. 180: §§103 n. 2, 114 n. 4, 115 n. 4, 117 n. 2, 4, 7.
v. North Mo. R. R. Co., 34 Mo. 257: §§115 n. 4, 117 n. 2, 4, 7.
La Croix v. Medway, 12 Met. 123: §609 n. 8.
La Cross etc. R. R. Co., v. Seeger, 4 Wis. 268: §§429 n. 1, 609 n. 4.
La Fayette v. Bush, 19 Ind. 326: §§454 n. 3, 631 n. 2.
v. Shultz, 44 Ind. 97: §656 n. 14.
v. Spencer, 14 Ind. 399: §96 n. 1.
v. Spencer, 19 Ind. 326: §96 n. 1.
v. Wortman, 107 Ind. 404: §207 n. 2, 440 n. 2, 442 n. 1, 624 n. 5.
La Fayette etc. Co. v. New Albany etc., R. R. Co., 13 Ind. 90: §§135 n. 3, 136 n. 3, 4; 137 n. 1, 271 n. 6, 274 n. 1.
La Fayette etc. R. R. Co., v. Murdock, 68 Ind. 137: §§141 n. 10, 447 n. 1, 507 n. 15.
v. Smith, 6 Ind. 249: §607 n. 2.
Laehr v. Metropolitan El. R. R. Co., 104 N. Y. 268: §§1 n. 3, 59 n. 1, 114 n. 7, 493 n. 8.
Lake v. Toysen, 66 Wis. 424: §§350 n. 9, 356 n. 1, 2.
v. Virginia etc. R. R. Co., 7 Nev. 294: §§136 n. 1, 138 n. 1.
Lake Erie etc. Ry. Co. v. Griffin, 92 Ind. 487; 107 Ind. 464: §§621 n. 1, 622 n. 3.
v. Heath, 9 Ind. 558: §§311 n. 2, 314 n. 8.
v. Kinsey, 87 Ind. 514: §§580 n. 1, 3, 4; 647 n. 10.
Lake Merced Water Co. v. Cowles, 31 Cal. 215: §§1 n. 1, 306 n. 9.
Lake Pleasant Water Co. v. Contra Costa Water Co., 67 Cal. 659: §§272 n. 2, 389 n. 2.
Lake Shore etc. Ry. Co. v. Chicago etc. R. R. Co., 96 Ills. 125: §646 n. 2.
v. Chicago etc. R. R. Co., 97 Ills. 506: §§268 n. 1, 644 n. 1.
v. C. & W. I. R. R. Co., 100 Ills. 21: §489 n. 4.
Lake Superior etc. R. R. Co. v. Greve, 17 Minn. 322: §§503 n. 4, 586 n. 1.
Lake View v. Rose Hill Cem. Co., 70 Ills. 192: §§6 n. 3, 156 n. 20.

Lamb *v.* Lane, 4 Ohio St. 167: §§12 n. 2, 313 n. 8.
v. Ricketts, 11 Ohio 311: §72 n. 11.

Lambar *v.* St. Louis, 15 Mo. 610: §109 n. 1.

Lampsen *v.* Drain Comrs., 47 Mich. 469: §382 n. 1.

Lancashire etc. R. R. Co. *v.* Evans, 15 Beav. 322: §645 n. 1.

Lancaster *v.* Kennebec etc. Co., 62 Me. 272: §307 n. 2.
v. Pope, 1 Mass. 86: §382 n. 3.

Lance *v.* C. M. & St. P. Ry. Co., 57 Ia. 636: §§486 n. 1, 497 n. 3, 538 n. 11.

Lancis Appeal, 55 Pa. S. 16: §584 n. 8.

Landaff Petition, 34 N. H. 163: §§416 n. 11, 545 n. 1, 3; 549 n. 8.

Landerbrun *v.* Duffy, 2 Pa. S. 398: §§145 n. 9, 573 n. 2.

Lare *v.* Boston, 125 Mass. 519: §209 n. 5.
v. Burnap, 39 Mich. 736: §§382 n. 3, 549 n. 3.
v. Miller, 17 Ind. 58: §389 n. 1.
v. Miller, 22 Ind. 104: §607 n. 2.
v. Saginaw, 53 Mich. 442: §302 n. 1.

Langdon *v.* New York, 93 N. Y. 129: §§75 n. 3, 82 n. 3, 84 n. 4.

Laney *v.* Jasper, 39 Ills. 46: §88 n. 1.

Langford *v.* County Comrs., 16 Minn. 375: §§311 n. 2, 313 n. 2, 364 n. 1, 366 n. 7, 9.

Langworthy *v.* Dubuque, 13 Ia. 86: §155 n. 9.
v. Dubuque, 16 Ia. 271: 155 n. 9.

Lansbourough *v.* County Comrs., 22 Pick. 278: §§329 n. 1, 552 n. 5.

Lansing *v.* Caswell, 4 Paige, 519: §281 n. 2.
v. Smith, 4 Wend. 9: §85 n. 7.
v. Smith, 8 Cow. 146: §85 n. 7.

Lapish *v.* Bangor Bank, 8 Greenl. 85: §72 n. 5.

La Plaisance etc. Co. *v.* Monroe Walk. Ch., 155: §72 n. 14.

Large *v.* Philadelphia, 3 Phila. 382: §§385 n. 1, 631 n. 2.

Larsh *v.* Test, 48 Ind. 130: §305 n. 1.

Larson *v.* Superior etc. Ry. Co., 64 Wis 59: §§537 n. 1, 539 n. 7.

Lasala *v.* Holbrook, 4 Paige, 169: §151 n. 2.

Lauterman *v.* Blairstown R. R. Co., 28 N. J. Eq. 1: §633 n. 2.

Lautis, Matter of, 9 Mich. 324: §545 n. 7, 16.

Laviosa *v.* Chicago etc. R. R. Co., 1 McGloin, 299: §§115 n. 4, 117 n. 3.

Law *v.* Galena etc. R. R. Co., 18 Ills. 324: §548 n. 4.

Lawler *v.* Baring Boom Co., 56 Me. 443: §§64 n. 3, 67 n. 10.

Lawless *v.* Rees, 1 Bibb. 495: §538 n. 4.
v. Reese, 4 Bibb. 309: §§239 n. 2, 364 n. 1, 382 n. 1.

Lawrence *et al.* Appeal, 78 Pa. S. 365: §§297 n. 8, 483 n. 17.

Lawrence *v.* Boston, 119 Mass. 126: §§437 n. 9, 439 n. 6, 478 n. 2.
v. Fair Haven, 5 Gray, 110: §104 n. 1.
v. Great Northern Ry. Co., 16 Q. B. 643: §§66 n. 12, 224.
v. Miller, 2 N. Y. 245: §323 n. 5.
v. Miller, 1 Sandf. 516: §323 n. 5.
v. Newark, 38 N. J. L. 151: §457 n. 8.
v. Saratoga Lake R. R. Co., 36 Hun. 467: §296 n. 4.
v. Second Municipality, 2 La. An. 651: §499 n. 1.
v. Second Municipality Rob. La. 453: §623 n. 1, 4.

Lawrence R. R. Co. *v.* Cobb, 35 Ohio St. 94: §442 n. 2, 664 n. 16.

Lawrenceburg etc. R. R. Co. *v.* Smith, 3 Ind. 253: §536 n. 2.

L. C. & C. R. R. Co. *v.* Chappell, Rice (S. C.) 383: §242 n. 3.

Lea *v.* Johnson, 9 Iredell Law, 15: §254 n. 1.

Leach *v.* Day, 27 Cal. 643: §167 n. 3.

Leader *v.* Maxon, 3 Wils. 461; 2 Bl. 924: §§92 n. 1, 2.

League Island, *In re*, 1 Brews. Pa. 524: §203 n. 2.

Leak *v.* Selma etc. R. R. Co., 47 Ga. 345: §562 n. 1, 6.

Leary *v.* Hannibal etc. R. R. Co., 38 Mo. 485: §607 n. 2.

Leath *v.* Summers, 1 Ired. L. 108: §354 n. 1.

Leavenworth etc. Ry. Co. *v.* Paul, 28 Kan. 816: §§436 n. 16, 22; 498 n. 1.

Leavitt *v.* Eastman, 77 Me. 117: §§369 n. 2, 382 n. 3.

Lebanon *v.* Olcott, 1 N. H. 339: §§607 n. 2, 609 n. 3.

Leber *v.* Minneapolis etc. Ry. Co., 29 Minn. 256: §§454 n. 2, 507 n. 11.

Lecoul *v.* Police Jury, 20 La. An. 308: §239 n. 5.

Ledyard *v.* Ten Eyke, 36 Barb. 102: §76 n. 5.

Lee *v.* Minneapolis, 22 Minn. 13: §96 n. 1.

v. Northwestern etc. Ry. Co., 33 Wis. 222: §538 n. 3.

v. Pembroke Iron Co., 57 Me. 481: §§59 n. 1, 67 n. 2, 6; 75 n. 3.

v. Tebo etc. R. R. Co., 53 Mo. 178: §469 n. 6.

Leeds *v.* Richmond, 102 Ind. 372: §127 n. 1, 237 n. 3, 240 n. 2.

Lefevre's Apppeal, 32 Cal. 565: §440 n. 4.

Leffel *v.* Overchain, 90 Ind. 50: 537 n. 4.

Lehigh Valley Coal Co. *v.* Chicago, 26 Fed. R. 415: §§223 n. 1, 425 n. 2, 435 n. 1, 437 n. 14, 495 n. 1.

Lehigh etc. R. R. Co. *v.* Dover etc. R. R. Co., 43 N. J. L. 528: §§421 n. 1, 422 n. 5, 661 n. 2.

v. Lazarus, 28 Pa. S. 203: §497 n. 1.

v. Trone, 28 Pa. S. 206: §496 n. 4.

Lehigh Water Co's Appeal, 102 Pa. S. 515: §139 n. 14.

Lehmicke *v.* St. Paul etc. R. R. Co., 19 Minn. 464: §§435 n. 1, 436 n. 5, 437 n. 7, 443 n. 9, 446 n. 3.

Leisse *et al.* *v.* St. Louis etc. R. R. Co., 72 Mo. 561: §658 n. 12.

v. St. Louis etc. R. R. Co., 2 Mo. App. 105: §658 n. 12.

v. St. Louis etc. R. R. Co., 5 Mo. App. 535: §658 n. 12.

Leland *v.* Woodbury, 4 Cush. 245: §607 n. 2.

Leman *v.* New York, 5 Bos. 414: 105 n. 1.

Lennox *v.* Knox etc. R. R. Co., 62 Me. 322: §420 n. 2.

Lent *v.* Tillson, 72 Cal. 404: §§238 n. 1, 366 n. 1, 367 n. 4.

Lesher *v.* Wabash Nav. Co., 14 Ills. 85: §243 n. 7.

Leslie *v.* St. Louis, 47 Mo. 474: §301 n. 1, 7.

Lester *v.* Lobley, 7 A. & E. 124: §335 n. 2.

Levee Comrs. *v.* Allen, 60 Miss. 93: §406 n. 1.

v. Harkleroads, 62 Miss. 807: §496 n. 3.

Levering *v.* Phihila. etc. R. R. Co., 8 W. & S. 459: §§580 n. 3, 4; 647 n. 10.

Levering St. *In re* 14, Phila. 349: §§214 n. 1, 223 n. 1.

Levisay *v.* Delp, 9 Bax. 415: §612 n. 6.

Levistin *v.* Junction R. R. Co., 7 Ind. 597: §607 n. 2.

Levitt *v.* Eastmann, 77 Me. 117: §605 n. 2.

Lewell *v.* Shaw, 15 Me. 242: §622 n. 4.

Lewenthal *v.* New York, 5 Lans. 532: §86 n. 7.

Lewis *v.* Germantown etc. R. R. Co., 16 Phila. 608: §§243 n. 4, 270 n. 2.

v. Germantown etc. R. R. Co., 16 Phila. 621: §§267 n. 3, 274 n. 1.

v. McGuire, 3 Bush. (Ky.) 202: §8 n. 8.

v. New Britain, 52 Conn. 568: §504 n. 4.

v. Rough, 26 Ind. 398: §632 n. 2.

v. Washington, 5 Gratt. 265: §§166 n. 3, 167 n. 23.

v. Wilmington etc. R. R. Co., 11 Rich. Law, 91: §318 n. 4.

Lewis St. Matter of, 2 Wend. 472: §§114 n. 4, 5; 500 n. 1.

Lewiston *v.* County Comrs., 30 Me. 19: §§309 n. 2, 511 n. 14.

Lex or Mica St. *In re*, 12 Phila. 622: §656 n. 22.

Lexington *v.* Long, 31 Mo. 369: §§410 n. 1, 474 n. 3.

Lexington Ave., Opening of, 50 How. Pr. 114: §534 n. 4.

Lexington etc. R. R. Co., *v.* Applegate, 8 Dana. 289: §§100 n. 2, 114 n. 4, 115 n. 4, 170 n. 1.

Lexington etc. T. Co. *v.* McMurtry, 3 B. Mon. 516: §§141 n. 7, 831 n. 1.

Liber *v.* Minneapolis etc. Ry. Co., 29 Minn. 256: §507 n. 15, 16.

Liberty Alley, *In re*, 8 Pa. S. 381: §256 n. 20.

Ligat *v.* Comth., 19 Pa. S. 456: §§258 n. 2, 311 n. 2.

Limerick etc. T. Co's Appeal, 80 Pa. S. 425: §103 n. 3.

Linblom *v.* Ramsey, 75 Ills. 246: §578 n. 3.

Lincoln *v.* Colusa, 28 Cal. 662: §§253 n. 1, 301 n. 1, 2; 664 n. 1, 11.

Lind *v.* Clemens, 44 Mo. 540: §301 n. 1, 6.

Lindell's Adm. *v.* Hannibal etc. R. R. Co., 36 Mo. 543: §67 n. 2.

Lindsay *v.* Commissioners etc., 2 Bay (S. C.) 38: §10 n. 2.

Linton *v.* Sharpsburg Bridge Co., 1 Grant's Cases, 414: §240 n. 4.

Lipes *v.* Hand, 104 Ind. 503: §§186 n. 6, 190 n. 3, 311 n. 12, 517 n. 4.

Lister *v.* Lobley, 7 A. & E. 124: §326 n. 2.

v. Lobley, 34 E. C. L. R. 86: §326 n. 2.

Little *v.* May, 3 Hawks, 599: §379 n. 1.

v. Stanback, 63 N. C. 285: §§67 n. 5, 506 n. 3.

v. Thompson, 24 Ind. 146: §§347 n. 13, 369 n. 1.

Littlefield *v.* B. & M. R. R. Co., 65 Me. 248: §610 n. 9.

Littlejohn *v.* Cox, 15 La. An. 67: 167 n. 3.

Little Miami R. R. Co. *v.* Collett, 6 Ohio St. 182: §472 n. 5.

v. Naylor, 2 Ohio St. 235: §§117 n. 5, 258 n. 4.

v. Whitacre, 8 Ohio St. 590: §607 n. 2.

Little Miami etc. R. R. Co., *v.* Dayton, 23 Ohio St. 510: §266 n. 1.

Little Rock etc. Ry. Co., *v.* Woodruff, 49 Ark. 381: §§435 n. 1, 478 n. 2, 4; 479 n. 9, 524 n. 3.

Livermore *v.* Jamaica, 23 Vt. 361: §469 n. 11.

Livingston *v.* McDonald, 21 Ia. 160: §§88 n. 1, 2.

v. New York, 8 Wend. 85: §§11 n. 1, 114 n. 4, 5; 311 n. 2, 462 n. 2, 470 n. 6.

v. Paducah, 80 Ky. 656: §155 n. 6.

v. Sulzer, 19 Hun, 375: §483 n. 15.

Lobman *v.* St. Paul etc. R. R. Co., 18 Minn. 174: §369 n. 2.

Lockie *v.* Mutual Union Tel. Co., 103 Ills. 401: §§279 n. 3, 498 n. 3, 15; 592 n. 4.

Lockport etc. R. R. Co., Matter of, 77 N. Y. 557: §§304 n. 1, 357 n. 2, 390 n. 1, 392 n. 2.

Matter of, 19 Hun, 38: 489 n. 4.

Lockwood *v.* Charlestown, 114 Mass. 416: §260 n. 2.

v. Gregory, 4 Day. 407: §§354 n. 1, 527 n. 7.

v. N. Y. & N. H. R. R. Co., 37 Conn. 387: §83 n. 4.

Lodge *v.* Phila. etc. R. R. Co., 8 Phila. 345: §279 n. 4.

v. Railroad Co., 9 Phila. 543: §512 n. 3.

Logan *v.* Vernon etc. R. R. Co., 90 Ind. 552: §606 n. 1.

Logansport *v.* Pollard, 50 Ind. 151: §372 n. 1.

v. Seybold, 59 Ind. 225: §§10 n. 3, 13 n. 3, 155 n. 13.

v. Shirk, 88 Ind. 563: §§278 n. 4, 596 n. 6.

Logansport etc. Ry. Co., *v.* Buchanan, 52; Ind. 163: §§307 n. 5, 477 n. 1.

Lohman *v.* St. Paul etc. R. R. Co., 18 Minn. 174: §§618 n. 1, 631 n. 3, 634 n. 10.

Lombard *v.* Stearns, 4 Cush. 60: §173 n. 2.

London etc. Ry. Co., *v.* Bradley, 3 M. C. N. & G. 336: §645 n. 1.

v. Smith, 1 M. C. N. & G. 216: §645 n. 1.

Long *v.* Calley, 91 Mo. 305: §529 n. 4.

v. Comrs' Court, 18 Ala. 482: §§413 n. 2, 549 n. 13.

v. Fuller, 68 Pa. S. 170: §§174 n. 1, 457 n. 6.

v. Tuhley, 91 Mo. 305: §541 n. 8.

Long's Appeal, 87 Pa. S. 114: §245 n. 1.

Longfellow *v.* Quimby, 29 Me. 196: §601 n. 1.

Long Island etc. R. R. Co., 6 N. Y., Supm. Ct. §507 n. 8.

v. Bennett, 10 Hun, 91: §§366 n. 6, 470 n. 6.

Looby *v.* Austin, 19 Ills. App. 325: §605 n. 1.

Loomis *v.* Andrews, 49 Cal. 239: §578 n. 4.

Loop *v.* Chamberlain, 17 Wis. 504: §619 n. 8.

v. Chamberlain, 20 Wis. 135: §649 n. 2, 8.

Lorenz *v.* Jacobs, 63 Cal. 73: §157 n. 2.

Loring *v.* Boston, 12 Gray, 209: §§656 n. 24, 665 n. 2.

Lorman *v.* Benson, 8 Mich. 18: §72 n. 14.

Losch's Appeal, 109 Pa. S. 7: §§338 n. 6, 538 n. 9.

Loshbaugh *v.* Birdsall, 90 Ind. §466: §488 n. 1.

Loughbridge *v.* Harris, 42 Ga. 501: §§10 n. 2, 158 n. 1, 180 n. 14, 184 n. 5.

Louisiana etc. Road Co. *v.* Pickett, 25 Mo. 535: §§311 n. 2, 469 n. 6.

Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683: §156 n. 19.
Louisville v. Rolling Mill Co., 3 Bush. 416: §§99 n. 1, 638 n. 1.
Louisville etc. R. R. Co. v. Brown, 17 B. Mon. 763: §§112 n. 1, 115 n. 4.
v. Chappell, Rice, (18 S. C.) 383: §170 n. 1.
v. Covington, 2 Bush. 526: §293 n. 8.
v. Dickson, 63 Miss. 380: §§507 n. 7, 15.
v. Dryden, 39 Ind. 393: §311 n. 2.
v. Faulkner, 2 Head. 65: §654 n. 1.
v. Glazebrook, 1 Bush. 325: §§468 n. 2, 498 n. 1.
v. Hodge, 6 Bush. 141: §118 n. 2.
v. Louisville City Ry. Co., 2 Duvall 175: §139 n. 4.
v. Quinn, 14 La. 65: §§456 n. 2, 649 n. 3.
v. Ryan, 64 Miss. 399: §§446 n. 1, 478 n. 8, 533 n. 2, 655 n. 9.
v. State, 3 Head. 523: §653 n. 2.
v. Thompson, 18 B. Mon. 735: §468 n. 2.
Louk v. Woods, 15 Ills. 256: §§419 n. 2, 3, 18; 604 n. 4.
Loveland v. Berlin, 27 Vt. 713: §167 n. 4.
Low v. Galena etc. R. R Co., 18 Ills. 324: §§170 n. 7, 412 n. 15.
v. Railroad Co., 63 N. H. 557: §478 n. 8.
Lowe v. Aroma, 21 Ills. App. 598: §604 n. 3.
v. Brannan, 105 Ind. 247: §525 n. 8.
v. Ryan, 94 Ind. 450: §540 n. 4.
Lowell v. Boston, 111 Mass. 454: §§180 n. 3, 182 n. 1, 3; 185 n. 2, 186 n. 6.
Lower v. Chicago etc. R. R. Co., 59 Ia. 563: §§242 n. 5, 306 n. 6, 510 n. 8.
Loweree v. Newark, 38 N. J. L. 151: §§469 n. 8, 610 n. 11.
Lownder Co. v. Bowie, 34 Ala. 461: §457 n. 3.
Lucas v. Sawyer, 17 Ia. 517: §323 n. 4.
Ludlow v. Hudson Riv. R. R. Co., 6 Lans. 128: §§151 n. 3, 5, 9.
Lull v. Curry, 10 Mich. 397: §579 n. 2.
v. Fox etc. Co., 19 Wis. 100: §336 n. 9.
Lummery v. Braddy, 8 Ia. 33: §305 n. 6.
Lumsden v. Milwaukee, 8 Wis. 485: §§441 n. 2, 631 n. 3.
Lund v. Midland Ry. Co. 34 L. J. Eq. 276: §393 n. 3.
v. New Bedford, 121 Mass. 286: §§62 n. 1, 326 n. 3, 603 n. 4.
Luscombe v. Milwaukee, 36 Wis. 511: §217 n. 3.
Luther v. Winnisimment Co., 9 Cush. 171: §88 n. 5.
Lutterloh v. Cedar Keys, 15 Fla. 306: §§132 n. 1, 133 n. 2, 637 n. 8.
Lux v. Haggins, 69 Cal. 255: §§61 n. 2, 202 n. 1, 641 n. 2.
L. & Y. Ry. Co. v. Evans, 16 Beav. 322: §224.
Lybe's Appeal, 106 Pa. S. 626: §90 n. 3, 4.
Lycett v. Stafford etc. Ry. Co., 41 L. J. Eq. 474; L. R. 13 Eq. Cas. 261: §620 n. 1.
Lyman v. Burlington, 22 Vt. 131: §§411 n. 1, 412 n. 14, 416 n. 4.
Lynch v. New York, 76 N. Y. 60: §103 n. 4.
v. Stone, 4 Denio 356: §607 n. 2.
Lynn etc. R. R. Co. v. Boston etc. R. R. Co. 114 Mass. 88: §263 n. 4.
Lyon v. Fishmongers Company. L. R. I. App. Cas. 662: §§82 n. 1, 3; 83 n. 1.
v. Gormley, 53 Pa. S. 261: §587 n. 5.
v. Green Bay etc. Ry. Co. 42 Wis. 538: §§413 n. 2, 477 n. 8, 10; 507 n. 7.
v. Hamor, 73 Me. 56: §§167 n. 3, 256 n. 3.
v. Jerome, 15 Wend. 569: §243 n. 1.
v. Jerome, 26 Wend. 485: §243 n. 1.

M.

Mabon v. Halsted, 39 N. J. L. 640: §§656 n. 1, 657 n. 2.
Macdonnell v. Caledonia Canal Comrs., 8 Shaw & Dunl. 881: §68 n. 3.
Macey v. Met. Board of Works, 33 L. J. Ch. 377: §645 n. 1.
Mack v. Comrs., 41 Ills. 378: §255 n. 6.
Macon v. Harris, 73 Ga. 428: §116 n. 2.

Macon *v.* Harris, 75 Ga. 761: §635
n. 6.
v. Hill, 58 Ga. 595: §§96 n. 1, 105
n. 5.
v. Owen, 3 Ala. 116: §§305 n. 7,
510 n. 10.
v. Patty, 57 Miss. 378: §§5 n. 4,
13 n. 2.

Macon etc, R. R. Co. *v.* Bowen, 45
Ga. 531: §§290 n. 5, 298 n. 5,
508 n. 2.

Macy *v.* Indianapolis, 17 Ind. 267:
§§96 n. 1, 97 n. 3, 107 n. 2.

Magnolia Street, 8 Phila. 468: §421
n. 1.

Magnolia, The, 20 How. 296: §72
n. 3.

Maguire *v.* Centerville, 76 Ga. 84:
§89 n. 2.

Mahady *v.* Brunswick R. R. Co., 91
N. Y. 148: §§115 n. 4, 117 n. 8,
124 n. 4, 125 n. 6.

Mahon *v.* Council Bluffs, 12 Ia. 268:
§104 n. 3.
v. New York Cent. R. R. Co., 24
N. Y. 658: §§141 n. 8, 649 n. 5.
v. Utica etc. R. R. Co., Hill &
D. Sup. 156: §§111 n. 4, 118 n. 5.

Mahoney *v.* Comry, 103 Pa. S. 362:
§§242 n. 11, 286 n. 2.
v. Spring Valley Water Works,
52 Cal. 159: §243 n. 3.

Maine etc. Canal, Matter of, 50
How. Pr. 70: §269 n. 2.

Main Street, Matter of, 30 Hun, 424:
§247 n. 7.
Matter of, 98 N. Y. 454: §247 n. 7.

Major *v.* Taylor, 1 A. K. Marsh.
552: §509 n. 6.

Makepeace *v.* Worden, 1 N. H. 16:
§590 n. 7.

Mallard *v.* La Fayette, 5 La. An.
112: §658 n. 6.

Malone *v.* Toledo, 28 Ohio St. 643:
§§278 n. 4, 596 n. 3, 5.
v. Toledo, 34 Ohio St. 541: §§277
n. 2, 278 n. 4, 596 n. 3, 5; 664
n. 1, 5.

Manhattan Co., *Ex parte* 22 Wend.
653: §270 n. 6.

Maniquet *v.* Comrs. of Roads, 4
McCord (S. C.) 541: §10 n. 2.

Mankin *v.* State, 2 Swan, 206: §519
n. 6.

Mann *v.* Marston, 12 Me. 32: §519
n. 2.

Manning *v.* Lowell, 130 Mass. 21:
§103 n. 3.

Mannville Co. *v.* Worcester, 138
Mass. 89: §251 n. 6.

Mansfield etc. R. R. Co. *v.* Clark,
23 Mich. 519: §§350 n. 6, 393
n. 2, 406 n. 1.

Marble *v.* Whitney, 28 N. Y. 297:
§§298 n. 5, 419 n. 2, 3.

Marblehead *v.* Comrs., 5 Gray, 451:
§273 n. 1.

Marcey *v.* Fries, 18 Kan. 353: §469
n. 2.

March *v.* Portsmouth etc. R. R. Co.,
19 N. H. 372: §§443 n. 4, 14,
481 n. 7, 482 n. 2, 499 n. 8.

Mariner *v.* Shulte, 13 Wis. 692:
§72 n. 16.

Marion etc. R. R. Co. *v.* Ward, 9
Ind. 123: §396 n. 3.

Market St. Ry. Co. *v.* Central Ry.
Co., 51 Cal. 583: §§124 n. 1,
268 n. 3.

Markham *v.* Atlanta, 23 Ga. 402:
§§96 n. 1, 638 n. 1.
v. Brown, 37 Ga. 277: §§149 n. 5,
156 n. 17.

Marling *v.* Burlington etc. Ry. Co.,
67 Ia. 331: §606 n. 1.

Marquette etc. R.R. Co. *v.* Harlow,
37 Mich. 554: §299 n. 4.
v. Probate Judge, 53 Mich. 217:
§§528 n. 2, 7; 531 n. 3.

Marsh *v.* Portsmouth etc. R. R. Co.,
19 N. H. 372: §496 n. 5.
Matter of, 71 N. Y. 315: §§301 n.
1, 2, 5; 304 n. 3, 389 n. 4.
Matter of, 10 Hun, 49: §348 n. 1.

Marsh *et al.* Petitioners, 2 Aikin,
239: §534 n. 3.

Marshall Fishing Co. *v.* Hadley
Falls Co., 5 Cush. 602: §562
n. 4, 10.

Marshalltown *v.* Forney, 61 Ia. 578:
§134 n. 9.

Marson *v.* London etc. Ry. Co., L.
R. 6 Eq. Cas. 101; 37 L. J. Ch.
483: §284 n. 2.

Martin *v.* Beverley, 5 Call, 444:
§348 n. 1.
v. Brooklyn, 1 Hill, 545: §§655 n.
2, 656 n. 10, 658 n. 17.
v. Dix, 52 Miss. 53: §§11 n. 1, 155
n. 13.
v. Franklin Co., 62 Me. 455:
§349 n. 1.
v. Gleason, 139 Mass. 183: §285
n. 4.
v. London etc. Ry. Co., 1 L. R.
Eq. Cas. 145: §324 n. 1.

Martin *v.* Riddle, 26 Pa. S. 415: §§88 n. 1, 2.

v. Rushton, 42 Ala. 289: §§254 n. 1, 509 n. 1, 5; 604 n. 2.

Martin *et al. Ex parte*, 13 Ark. 198: §§10 n. 2, 5; 67 n. 2, 452 n. 6.

Martinsville etc. R. R. Co. *v.* Bridges, 6 Ind. 400: §348 n. 8.

Marylebone Imp'mt Co., *In re*, L. R. 12 Eq. Cas. 389: §326 n. 4.

Mason *v.* Brooklyn etc. R. R. Co., 35 Barb. 373: §§124 n. 2, 257 n. 1, 258 n. 1.

v. Harper's Ferry Bridge Co., 17 W. Va. 396: §§137 n. 1, 138 n. 4, 228 n. 1, 631 n. 2.

v. Kennebec etc. R. R. Co., 31 Me. 215: §§496 n. 5, 607 n. 2.

v. Lake Erie etc. Ry. Co., 9 Biss. 239: §278 n. 4, 596 n. 3.

v. Stokes etc. Co., 32 L. J. Ch. 110: §615 n. 1.

Mason City etc. Co. *v.* Mason, 23 W. Va. 211: §631 n. 2.

Massachusetts Cent. R. R. Co. *v.* Boston etc. R. R. Co., 121 Mass. 124: §489 n. 1.

Masters *v.* McHolland, 12 Kan. 17: §§166 n. 4, 6; 384 n. 1, 626 n. 1.

Mathias *v.* Drainage Comrs., 49 Mich. 465: §352 n. 10.

Matter of Highway, 3 N. J. L. 242: §§347 n. 1, 8; 394 n. 2, 517 n. 1.

Matter of Highway, 3 N. J. L. 272: §530 n. 11.

Matter of Highway, 3 N. J. L. 504: §405 n. 35.

Matter of Highway, 7 N. J. L. 37: §359 n. 1.

Matter of Highway, 15 N. J. L. 39: §381 n. 6.

Matter of Highway, 16 N. J. L. 391: §§350 n. 4, 376 n. 3, 412 n. 12, 418 n. 5.

Matter of Highway, 18 N. J. L. 291: §521 n. 2.

Matter of Highway, 22 N. J. L. 293: §§10 n. 2, 453 n. 1, 6.

Matter of 138th St. 60 How. Pr. 290: §524 n. 4.

Matter of 127th St., 56 How. Pr. 60: §144 n. 1.

Matter of Public Road, 4 N. J. L. 31: §350 n. 3.

Matter of Public Road, 4 N. J. L. 290: §511 n. 9.

Matter of Public Road, 4 N. J. L. 396: §411 n. 1, 4.

Matthews *v.* Duryee, 4 Keys, 525: §323 n. 11.

v. Shields, 2 Met. (Ky.) 558: §155 n. 8.

Mattingly *v.* Columbia, 97 U. S. 687: §261 n. 1.

v. Plymouth, 100 Ind. 545: §207 n. 3, 4.

Mattlage *v.* New York El. Ry. Co., 67 How. Pr. 232: §§117 n. 6, 123 n. 9, 635 n. 9.

Mayo *v.* Springfield, 136 Mass. 10; 138 Mass. 70: §102 n. 1.

Maxwell *v.* Bay City Bridge Co., 41 Mich. 453: §298 n. 1.

v. La Brune, 68 Ia. 689: §539 n. 1.

Meacham *v.* Fitchburg R. R. Co., 4 Cush. 291: §§469 n. 5, 474 n. 3.

Mead *v.* Haynes, 3 Rand. 33: §§72 n. 10, 343 n. 3.

v. Hein, 28 Wis. 533: §318 n. 6.

Meade *v.* United States, 2 Ct. of Claims, 224: §263 n. 3.

Mears *v.* Comrs., 9 Ired. L. 73: §§101 n. 2, 106 n. 1.

Meginnis *v.* Nunamaker, 64 Pa. S. 374: §627 n. 1.

Meily *v.* Zurmehly, 23 Ohio St. 627: §581 n. 2.

Meinzer *v.* Racine, 68 Wis. 241: §105 n. 1.

Melizet's Appeal, 17 Pa. S. 449: §323 n. 4.

Mellen *v.* Western R. R. Co., 4 Gray, 301: §651 n. 1.

Memphis *v.* Bolton, 9 Heisk. 508: §467 n. 3.

Memphis Freight Co. *v.* Memphis, 4 Coldw. 419: §§164 n. 6, 177 n. 5.

Memphis etc. Ry. Co. *v.* Parsons Town Co., 26 Kan. 503: §§380 n. 6, 384 n. 3, 647 n. 2.

v. Payne, 37 Miss. 700: §649 n. 2.

Menard *v.* Kincaid, 71 Ills. 587: §247 n. 3.

Mendenhall *v.* Clugist, 84 Ind. 94: §359 n. 7.

Mendon *v.* Comrs., 2 Allen, 463: §546 n. 2.

v. Comrs., 5 Allen, 13: §548 n. 1.

v. County of Worcester, 10 Pick. 235: §409 n. 2.

Menges *v.* Albany, 56 N. Y. 374: §318 n. 11.

Meranda *v.* Spurlin, 100 Ind. 380: §§316 n. 3, 527 n. 8.

Mercer *v.* McWilliams, Wright, 132: §456 n. 2, 3.

Mercer *v.* Pittsburg etc. R. R. Co., 36 Pa. S. 99: §115 n. 4.
v. Williams, Walker Ch. (Mich.) 85: §632 n. 2.

Mercer etc. R. R. Co. *v.* Delaware etc. R. R. Co., 26 N. J. Eq. 464: §580 n. 1.

Merchant Street, *In re*, 9 Phila. 590: §348 n. 1.

Merchants' Union etc. Co. *v.* C. B. & Q. R. R. Co., 70 Ia. 105: §§116 n. 2, 219 n. 1, 625 n. 5.

Meriam *v.* Brown, 128 Mass. 391: §507 n. 8.

Merrick *v.* Baltimore, 43 Md. 219: §656 n. 1.

Merrifield *v.* Worcester, 110 Mass. 216: §65 n. 4.

Merrill *v.* Berkshire, 11 Pick. 269: §§327 n. 1, 3; 410 n. 1.
v. Calkins, 74 N. Y. 1: §635 n. 2.

Meserole *v.* Brooklyn, 8 Paige, 198: §631 n. 3.

Metcalf *v.* Bingham, 3 N. H. 459: §167 n. 1.

Methodist Church *v.* Baltimore, 6 Gill, 391: §§239 n. 2, 367 n. 1.

Methodist Episcopal Church *v.* Wyandotte, 31 Kan. 721: §§96 n. 1, 107 n. 2.

Metler *v.* Easton etc. R. R. Co., 37 N. J. L. 223: §§477 n. 8, 14; 499 n. 3, 562 n. 1, 2.
v. Easton etc. R. R. Co., 25 N. J. Eq. 214: §§499 n. 12, 631 n. 1.

Met. Board of Works *v.* McCarthy, L. R. 7 E. & I. App. 243: §§227 n. 9, 235 n. 2.
v. Met. Ry. Co., 37 L. J. C. P. 281; 38 L. J. C. P. 172: §569 n. 2.
v. Sant, 38 L. J. Eq. 7: §627 n. 12.

Metropolitan etc. Ry. Co. *v.* Chicago etc. Ry. Co., 87 Ills. 317: §§44 n. 1, 262 n. 2, 275 n. 3.

Metropolitan etc. Co. *v.* Colwell Lead Co., 50 N. Y. Supr. Ct. 488: §§131 n. 1, 637 n. 4.
v. Colwell Lead Co., 67 How. Pr. 365: §637 n. 4.

Metropolitan R. R. Co. *v.* Highland Ry. Co., 118 Mass. 290: §§141 n. 17, 490 n. 2.
v. Quincy R. R. Co., 12 Allen, 262: §490 n. 2.

Metzler etc. Road, 62 Pa. S. 151: §§415 n. 4, 517 n. 3.

Meyer *v.* Burlington, 52 Ia. 560: §494 n. 2.

Meyers *v.* Brown, 55 Ind. 596: §349 n. 8.
v. St. Louis, 8 Mo. App. 266: §74 n. 2.

Miami Coal Co., *v.* Wighton, 19 Ohio St. 560: §§240 n. 1, 254 n. 1.

Michigan etc. Ry. Co. *v.* Barnes, 40 Mich. 383: §§24 n. 1, 7, 335 n. 9, 405, n. 39.
v. Barnes, 44 Mich. 222: §§416 n. 10, 512 n. 2.

Middle Creek Road, 9 Pa. S. 69: §509 n. 1.

Middleton *v.* Flat River Booming Co., 27 Mich. 533: §§64 n. 2, 641 n. 3.

v. Prichard, 3 Scam. 510: §72 n. 13.
v. Sage, 8 Conn. 221: §72 n. 8.

Middletown, Matter of, 82 N. Y. 196: §§302 n. 3, 336 n. 2, 366 n. 4.

Midland Ry. Co. *v.* Smith, 109 Ind. 488: §§352 n. 13, 361 n. 11.

Mifflin *v.* Comrs., 5 S. & R. 69: §610 n. 4.

v. Railroad Co., 16 Pa. S. 182: §§113 n. 3, 141 n. 9, 220 n. 12.

Mikesall *v.* Durkee, 34 Kan. 509: §§116 n. 2, 637 n. 3.

Milam *v.* Sproul, 36 Ga. 393: §§379 n. 1, 544 n. 4.

Milburn *v.* Cedar Rapids, 12 Ia. 246: §§111 n. 2, 115 n. 4.

Milhan *v.* Sharp, 15 Barb. 193: §111 n. 5, 124 n. 2.
v. Sharp, 27 N. Y. 611: §§124 n. 2, 125 n. 1, 3; 636 n. 3.

Milholland *v.* Thomas, 7 Ind. 165: §§149 n. 6, 349 n. 3, 379 n. 1.

Military Parade Ground, Matter of, 60 N. Y. 319: §655 n. 2.

Mill *v.* White Water etc. Co., 4 Ind. 431: §665 n. 8.

Miller *v.* Auburn etc. R. R. Co., 6 Hill 61: §298 n. 1.
v. Brown, 56 N. Y. 383: §253 n. 1.
v. Craig, 11 N. J. Eq. 175: §201 n. 4.
v. Graham, 17 Ohio St. 1: §376 n. 2.
v. Junction Canal Co., 41 N. Y. 98: §563 n. 3.
v. Keokuk etc. Ry. Co., 63 Ia. 680: §§482 n. 4, 572 n. 2, 625 n. 2, 666 n. 2.
v. Mobile, 47 Ala. 163: §631 n. 3.
v. New York etc. R. R. Co., 21 Barb. 513: §156 n. 27.
v. Porter, 71 Ind. 521: §§349 n. 5, 350 n. 7, 377 n. 2, 601 n. 1.
v. Prairie du Chien etc. R. R. Co., 34 Wis. 533: §§391 n. 1, 540 n. 2.

Miller v. Railroad Co., 6 Hill, 61: §120 n. 1.
v. Township Committee, 24 N. J. L. 54: §618 n. 1.
v. Troost, 14 Minn. 365: §§180 n. 10, 305 n. 1.
v. Weber, 1 Ohio Circ. Ct. R. 130: §436 n. 18.
Millick v. Phila., 11 Phila. 354: §499 n. 9.
Mills v. Brooklyn, 32 N. Y. 489: §103 n. 4, 6.
v. County Comrs., 3 Scam. 53: §484 n. 2.
v. Nashua, 63 N. H. 42: §86 n. 3.
v. Parlin, 106 Ills. 60: §635 n. 5.
v. Van Voorhies, 20 N. Y. 412: §323 n. 11.
Milton v. Wacker, 40 Mich. 229: §§382 n. 1, 510 n. 9, 549 n. 3, 7.
Milwaukee v. Milwaukee etc. R. R. Co., 7 Wis. 85: §§119 n. 1, 635 n. 14.
Milwaukee etc. R. R. Co. v. Eble, 4 Chand. 72: §§467 n. 6, 477 n. 8, 498 n. 1, 3.
v. Faribault, 23 Minn. 167: §§266 n. 6, 276 n. 9, 643 n. 2.
Mims v. Macon etc. R. R. Co., 3 Ga. 333: §§242 n. 11, 243 n. 3, 620 n. 1, 621 n. 1, 2.
Mine Mill etc. R. R. Co. v. Lippincott, 86 Pa. S. 468: §299 n. 7.
Miner v. Gilmour, 12 Moore P. C. 131: §82 n. 3.
v. New York Cent. etc. R. R. Co., 46 Hun, 612: §596 n. 7.
Mineral Range Ry. Co. v. Detroit etc. Co., 25 Fed. R. 515: §315 n. 3.
Minhinnah v. Haines, 29 N. J. L. 383: §§249 n. 3, 613 n. 1.
Minneapolis v. Wilkin, 30 Minn. 140: §311 n. 2.
v. Wilkin, 30 Minn. 145: §499 n. 3, 4.
Minneapolis etc. R. R. Co. v. Kanne, 32 Minn. 174: §372 n. 2.
v. Woodworth, 32 Minn. 452: §§541 n. 4, 659 n. 1.
Minnesota Cent. R. R. Co. v. McNamara, 13 Minn. 508: §§476 n. 8, 547 n. 1.
v. Patterson, 31 Minn. 42: §551 n. 14.
Minnesota Valley Ry. Co. v. Doran, 17 Minn. 188: §§426 n. 1, 7; 475 n. 5, 17; 498 n. 10.
Minot v. Cumberland Comrs., 28 Me. 121: §440 n. 2.
Miskey v. Phila., 68 Pa. S. 48: §499 n. 9.
Mississippi Riv. Bridge Co. v. Longergan, 91 Ills. 508: §74 n. 4.
v. Ring, 58 Mo. 491: §§469 n. 6, 478 n. 1, 4; 499 n. 9, 528 n. 5, 529 n. 1.
Mississippi etc. R. R. Co. v. Byington, 14 Ia. 572: §556 n. 1.
v. Caruth, 51 Miss. 77: §89 n. 6.
v. Devaney, 42 Miss. 555: §258 n. 3.
v. Mason, 51 Miss. 234: §§66 n. 6, 67 n. 2, 89 n. 6.
v. McDonald, 12 Heisk. 54: §§245 n. 1, 467 n. 3.
v. Rousseau, 8 Ia. 373: §540 n. 1, 2.
v. Wooten, 36 La. An. 441: §586 n. 4.
Missouri etc. Ry. Co. v. Carter, 85 Mo. 448: §§316 n. 1, 328 n. 1, 2, 337 n. 2, 510 n. 1.
v. Coon, 15 Neb. 232: §437 n. 2.
v. Hays, 15 Neb. 224: §§477 n. 4, 496 n. 1.
v. Humes, 115 U. S. 512: §§156 n. 24, 311 n. 2.
v. Owen, 8 Kan. 409: §§435 n. 3, 436 n. 20, 499 n. 1.
v. Shepard, 9 Kan. 647: §§307 n. 7, 367 n. 1.
v. Texas etc. Ry. Co., 4 Wood 360: §§315 n. 2, 644 n. 3.
v. Ward, 10 Kan. 325: §507 n. 15.
Mitchell v. Bridgewater, 10 Cush. 411: §§401 n. 9, 508 n. 7.
v. Franklin etc. Turnpike Co., 3 Humph. 456: §607 n. 2.
v. Harmony, 13 How. 115: §8 n. 5, 6.
v. Holderness, 29 N. H. 523: §405 n. 4.
v. Illinois etc. Co., 68 Ills. 286: §§12 n. 2, 3; 654 n. 2.
v. Illinois etc. Coal Co., 85 Ills. 566: §425 n. 1.
v. New York etc. R. R. Co., 36 Hun, 177: §89 n. 3.
v. Rome, 49 Ga. 19: §§101 n. 2, 569 n. 1.
v. St. Louis, 14 Mo. App. 600: §211 n. 1.
v. Thornton, 21 Gratt. 164: §§399 n. 2, 467 n. 4.
Mithoff v. Carrollton, 12 La. An. 185: §§150 n. 1, 2, 3.

Mix *v.* La Fayette etc. R. R. Co., 67 Ills. 319: §§225 n. 1, 360 n. 2, 493 n. 5, 13.

Moale *v.* Baltimore, 5 Md. 314: §§144 n. 1, 658 n. 8.

Mobile *v.* Richardson, 1 Stew. & Por. 12: §299 n. 9.

Moetter *v.* Comrs., 39 Mich. 726: §§382 n. 1, 549 n. 3.

Mohawk Bridge Co. *v.* Utica etc. R. R. Co., 6 Paige, 554: §§138 n. 1, 257 n. 1.

Mohawk etc. R. R. Co. *v.* Artcher, 6 Paige, 83: §§167 n. 2, 282 n. 1, 643 n. 2.

Mold *v.* Wheatcroft, 27 Beav. 510: §618 n. 5.

Molett *v.* Keenan, 22 Ala. 484: §382 n. 3.

Molitor *v.* First Div. St. P. etc. R.R. Co., 14 Minn. 285: §113 n. 3.

Moll *v.* Benckler, 30 Wis. 584: §511 n. 15.

Mollandian *v.* U. P. R. R. Co., 4 McCrary, 290; 14 Fed. R. 394: §§225 n. 1.

Molton *v.* Newburyport Water Co., 137 Mass. 163: §478 n. 7.

Monagle *v.* Comrs., 8 Cush. 360: §664 n. 1.

Monchet *v.* Great West. Ry. Co., 1 Ry. Cas. 567: §645 n. 1.

Monmouth *v.* Gardiner, 35 Me. 247: §329 n. 3.

Monmouth Co. *v.* Red Bank etc. T. Co., 18 N. J. Eq. 91: §§140 n. 5, 618 n. 1.

Monongahela Nav. Co. *v.* Coon, 6 Pa. S. 379: §246 n. 1.
v. Coons, 6 W. & S. 101: §§75 n. 1, 77 n. 1.

Montana Cent. Ry. Co. *v.* Helena etc. R. R. Co., 6 Mon. 416: §276 n. 5.

Montana Ry. Co. *v.* Warren, 6 Mon. 275: §§437 n. 8, 479 n. 10.

Montclair R. R. Co. *v.* Benson, 36 N. J. L. 557: §§446 n. 4, 477 n. 8, 499 n. 3.

Montello, The, 20 Wall. 430: §72 n. 4.

Montgomery *v.* Townsend, 80 Ala. 489: §§224 n. 4, 232 n. 2, 236 n. 1, 494 n. 2.

Montgomery Co. *v.* Schuylkill Bridge Co., 110 Pa. S. 54: §§478 n. 7, 487 n. 6.

Montgomery etc. Ry. Co. *v.* Sayre, 72 Ala. 443: §§426 n. 2, 454 n. 2.
v. Varner, 19 Ala. 185: §436 n. 12.

Montgomery etc. Road Co. *v.* Rock, 41 Ind. 263: §498 n. 1.

v. Stockton, 43 Ind. 328: §§473 n. 2, 565 n. 1.

Moody *v.* Jacksonville etc. R. R. Co., 20 Fla. 597: §§456 n. 2, 458 n. 5, 8; 582 n. 6.

Mooers *v.* Kennebec etc. R. R. Co., 58 Me. 279: §§618 n. 5, 634 n. 6.

Moore *v.* Albany, 98 N. Y. 376: §§101 n. 3, 102 n. 1, 151 n. 7.

v. Atlanta, 70 Ga. 611: §§223 n. 1, 494 n. 2, 638 n. 3.

v. Bailey, 40 Mo. App. 156: §543 n. 1.

v. Boston, 8 Cush. 274: §§320 n. 1, 656 n. 24, 665 n. 12.

v. New York, 4 Sandf. 456: §323 n. 4, 7.

v. New York, 8 N. Y. 110: §323 n. 4, 7, 8, 13.

v. Roberts, 61 Wis. 538: §606 n. 1.

v. Street etc. R. R. Co., 3 Phila. 417: §419 n. 3.

v. Superior etc. R. R. Co., 34 Wis. 173: §248 n. 3.

Moorehead *v.* Little Miami R. R. Co., 17 Ohio 340: §§258 n. 4, 631 n. 6.

Moran *v.* Lydecker, 11 Abb. N. C. 298: §635 n. 11.

v. Troy, 9 Hun, 540: §5 n. 3.

Morean *v.* Ditchemendy, 18 Mo. 522: §323 n. 5.

Morey *v.* Fitzgerald, 56 Vt. 487: §145 n. 1.

Morford *v.* Unger, 8 Ia. 82: §155 n. 9.

Morgan *v.* Banta, 1 Bibb, 579: §270 n. 7.

v. Binghamton, 32 Hun, 602: §§65 n. 5, 152 n. 6, 641 n. 8.

v. C. & N. W. Ry. Co., 36 Mich. 428: §§378 n. 4, 549 n. 3.

v. Des Moines & St. L. Ry. Co., 64 Ia. 589: §219 n. 3.

v. King, 35 N. Y. 454; 18 Barb. 277: §68 n. 2.

v. Metropolitan Ry. Co., 4 L. R. C. P. 97: §614 n. 3.

v. Miller, 59 Ia. 481: §631 n. 1.

v. Monmouth Plank Road Co., 26 N. J. L. 99: §140 n. 2.

v. Reading, 3 S. & M. 366: §72 n. 15.

Morgan Civil Township *v.* Hunt, 104 Ind. 590: §527 n. 5.

Morgan's Appeal, 39 Mich. 675: §§393 n. 2, 507 n. 2, 524 n. 3.

Morgan's R. R. etc. Co. v. Bourdier, 1 McGloin (La.) 232: §§277 n. 2, 327 n. 3, 369 n. 1.

Morgan's R. R. etc. Co., Matter of, 32 La. An. 371: §483 n. 12, 15.

Morin v. St. Paul etc. Ry. Co., 30 Minn. 100: §477 n. 10.

Morrill v. Mackman, 24 Mich. 279: §298 n. 1.

Morris v. Baltimore, 44 Md. 598: §499 n. 9.

v. Council Bluffs, 67 Ia. 343: §103 n. 4.

v. Phila., 70 Pa. S. 333: §499 n. 9.

v. Schallsville Branch etc., 4 Bush. 448: §281 n. 6.

Morris Canal Co. v. Jersey City, 12 N. J. Eq. 252; 12 N. J. Eq. 547: §144 n. 4.

v. Seward, 23 N. J. L. 219: §§576 n. 1, 654 n. 1.

v. State, 24 N. J. L. 62: §271 n. 8.

v. Townsend, 24 Barb. 658: §§242 n. 5, 263 n. 4.

Morris etc. R. R. Co. v. Blair, 9 N. J. Eq. 635: §306 n. 1, 5, 7.

v. Central R. R. Co., 31 N. J. L. 205: §§247 n. 1, 258 n. 1, 268 n. 1.

v. Hudson Tunnel R. R. Co., 25 N. J. Eq. 384: §§145 n. 6, 454 n. 2, 631 n. 2.

v. Newark, 10 N. J. Eq. 352: §§111 n. 2, 115 n. 4, 116 n. 1, 117 n. 9, 119 n. 3.

v. Prudden, 20 N. J. Eq. 530: §120 n. 2.

Morrison v. Bucksport etc. R. R. Co., 67 Me. 353: §§88 n. 5, 89 n. 5.

v. Hinkson, 87 Ills. 587: §§226 n. 3, 230 n. 2, 442 n. 2.

v. Rice, 35 Minn. 436: §323 n. 4.

v. Semple, 6 Binn. 94: §54 n. 4.

Morrow v. Comth., 48 Pa. S. 305: §258 n. 1.

Morse v. Stocker, 1 Allen, 150: §§149 n. 6, 631 n. 4.

Morseman v. Ionia, 32 Mich. 283: §301 n. 1, 6.

Morss v. B. & M. R. R. Co., 2 Cush. 536: §505 n. 15.

Morss Petitioner, 18 Pick. 443: §§505 n. 6, 15; 562 n. 1, 3.

Mortimer v. Southwestern Ry. Co., 1 E. & E. 375; 38 L. J. Q. B. 129: §610 n. 12.

Moses v. Pittsburgh etc. R. R. Co., 21 Ill. 516: §§111 n. 2, 115 n. 4, 257 n. 1.

Moses v. Sanford, 11 Lea, 731: §§136 n. 4, 484 n. 1.

v. St. Louis etc. Dock Co., 84 Mo. 242: §§301 n. 1, 7, 385 n. 1, 606 n. 6, 647 n. 2.

v. St. Louis etc. Ry. Co., 85 Mo. 86: §§89 n. 3, 575 n. 2, 584 n. 4.

Mossman v. Forrest, 27 Ind. 233: §511 n. 29.

Mott v. New York, 2 Hilton, 358: §105 n. 2.

Moulton v. Newburyport Water Co., 137 Mass. 163: §479 n. 12.

Mount Morris Square, Matter of, 2 Hill, 14: §§534 n. 1, 546 n. 1.

Mount Pleasant Ave., Matter of, 10 R. I. 320: §371 n. 1.

Mount Sterling v. Givens, 17 Ills. 255: 441 n. 1.

Mount Washington Road Co., 35 N. H. 134: 10 n. 2, 311 n. 2, 166 n. 10, 175 n. 4, 464 n. 1, 487 n. 1.

Mountjoy v. Oldham, 1 A. K. Marsh. 535: §509 n. 6.

Moyer v. N. Y. C. etc. R. R. Co., 88 N. Y. 351: §66 n. 12.

Moyer St. In re, 6 Phila. 81: §504 n. 2.

Mueller v. St. Louis etc. R. R. Co., 31 Mo. 262: §649 n. 2.

Mugler v. Kansas, 123 U. S. 623: §187 n. 2.

Muire v. Falconer, 10 Gratt. 12: §§378 n. 16, 379 n. 1, 540 n. 4.

Mulholland v. Des Moines etc. R. R. Co., 60 Ia. 740: §§246 n. 3, 624 n. 5, 667 n. 5.

Muller v. Earle, 35 N. Y. Supr. Ct. 461: §483 n. 15.

Mulligan v. Smith, 59 Cal. 206: §§346 n. 5, 364 n. 1, 365 n. 1, 367 n. 4.

Mumford v. Terry, 2 N. C. L. Reps. 425: §607 n. 2.

v. Whitney, 15 Wend. 380: §298 n. 1.

Muncey v. Joest, 74 Ind. 409: §§382 n. 2, 605 n. 5.

Municipality No. 1, 8 La. An. 377: §372 n. 1.

Municipality No. 2, 7 La. An. 72: §454 n. 2.

v. White, 9 La. An. 446: §5 n. 3.

Municipality No. 1 v. Young, 5 La. An. 362: §250 n. 3.

Munkers v. Kansas City etc. R. R. Co., 60 Mo. 334; 72 Mo. 514: §89 n. 1, 5.

Munkwitz *v.* Chicago etc. Ry. Co., 64 Wis. 403: § 425 n. 5, 449 n. 2, 480 n. 12.

Munn *v.* People, 69 Ills. 80: §§ 6 n. 2, 156 n. 32.

v. People, 94 U. S. 113: § 6 n. 2.

Munson *v.* Blake, 101 Ind. 78: §§ 517 n. 3, 527 n. 4, 538 n. 12.

v. Mallory, 36 Conn. 165: § 109 n. 10.

Munson, Matter of, 29 Hun, 325: § 655 n. 2.

Murdock *v.* Prospect Park etc. R. R. Co., 10 Hun, 598: § 120 n. 1.

v. Prospect Park etc. R. R. Co., 73 N. Y. 579: § 298 n. 1.

v. Stickney, 8 Cush. 113: §§ 178 n. 1, 180 n. 3, 182 n. 1.

Murphy *v.* Boston, 120 Mass. 419: § 209 n. 3.

v. Chicago, 29 Ills. 279: §§ 96 n. 1, 111 n. 2.

Murray *v.* Comrs., 12 Met. 455: § 140 n. 3.

Murry *v.* Sharp, 1 Bos. 539: § 85 n. 18.

Musser *v.* Hershey, 42 Ia. 356: §§ 72 n. 18, 83 n. 3.

Mutual Union Tel. Co. *v.* Kattcamp, 103 Ills. 420: § 524 n. 6.

Myers *v.* Old Mission etc. Road, 7 Ia. 315: § 538 n. 13.

v. Pownal, 16 Vt. 415: § 555 n. 3.

v. Simms, 1 Ia. 500: § 535 n. 1.

v. St. Louis, 82 Mo. 367: § 2 n. 3.

Mc.

McAllilly *v.* Horton, 75 Ala. 491: § 542 n. 3.

McArthur *v.* Kelley, 5 Ohio, 139: § 169 n. 3.

v. McEachin, 64 N. C. 454: § 652 n. 1.

v. Morgan, 49 Conn. 347: §§ 305 n. 4, 530 n. 2.

McAuley *v.* C. C. & I. C. Ry. Co., 83 Ills. 348: § 391 n. 2.

McAulay *v.* Western Vt. R. R. Co., 33 Vt. 311: §§ 298 n. 9, 648 n. 1, 3.

McBride *v.* Chicago, 22 Ills. 576: § 5 n. 1.

McCaffrey *v.* Smith, 41 Hun, 117: § 133 n. 5.

McCallister *v.* Ahney, 24 Ia. 362: § 348 n. 2.

McCann *v.* Otoe Co., 9 Neb. 324: §§ 288 n. 5, 429 n. 2.

v. Sierra Co., 7 Cal. 121: §§ 456 n. 1, 631 n. 2.

McCarthy *v.* Met. Board of Works, L. R. 7; C. P. 508: § 227 n. 1.

v. Met. Board of Works, L. R. 8; C. P. 191: § 227 n. 1, 9.

v. Met. Board of Works, L. C. 7; Eng. and Irish App. 243: §§ 227 n. 1, 235 n. 1, 236 n. 1.

v. St. Paul, 22 Minn. 527: §§ 210 n. 1, 217 n. 7, 494 n. 3, 5; 624 n. 3, 667 n. 6.

v. Syracuse, 46 N. Y. 194: § 589 n. 14.

v. Whalen, 19 Hun, 503: § 344 n. 1.

McCartney *v.* Chicago etc. R. R. Co., 112 Ills. 611: § 257 n. 1.

McCarty *v.* St. Paul etc. Ry. Co., 31 Minn. 278: § 293 n. 3.

McCaudless' Appeal, 70 Pa. S. 210: §§ 157 n. 2, 167 n. 22, 170 n. 12.

McCaulley *v.* Brooks, 16 Cal. 11: § 153 n. 1, 326 n. 2.

v. Dunlap, 4 B. Mon. 57: § 167 n. 3, 14.

v. Waller, 12 Cal. 500: §§ 153 n. 1, 456 n. 1.

McClain *v.* People, 9 Col. 190: § 582 n. 2.

McClary *v.* Hartwell, 25 Mich. 139: §§ 393 n. 2, 513 n. 2.

McClean *v.* Chicago etc. Ry. Co., 67 Ia. 568: §§ 485 n. 3, 5; 493 n. 3.

McClelland *v.* Miller, 28 Ohio St. 488: § 604 n. 3, 606 n. 7.

McClenachan *v.* Curwin, 3 Yates, 362; 6 Binn, 509: §§ 453 n. 1, 3, 4.

McClinton *v.* Pittsburg etc. R. R. Co., 66 Pa. S. 404: §§ 454 n. 2, 647 n. 1.

McClure *v.* Groton, 50 N. H. 49: § 378 n. 2.

v. Red Wing, 28 Minn. 186: § 103 n. 5.

McCollister *v.* Schney, 24 Ia. 362: § 382 n. 1, 2.

McCombe *v.* Akron, 15 Ohio. 474: § 98 n. 10, 12.

v. Bell, 2 Minn. 295: § 5 n. 4.

v. Stewart, 40 Ohio St. 647: §§ 278 n. 3, 596 n. 1.

McConnell's Mill Road, 32 Pa. S. 285: § 511 n. 16.

McCord *v.* Donniphin Branch Ry. Co., 21 Mo. App. 92: § 299 n. 1.

v. High, 24 Ia. 386: §§ 62 n. 4, 104 n. 1.

v. Sylvester, 32 Wis. 451: §§ 180 n. 12, 505 n. 4.

McCormick *v.* Kansas City etc. R. R. Co., 70 Mo. 359: § 89 n. 4.

McCormick *v.* Kansas City etc. R. R. Co. 57 Mo. 433: §§ 565 n. 1, 567 n. 2, 572 n. 2.
v. La Fayette, 1 Ind. 48: §§456 n. 2, 3; 458 n. 6.
v. Terre Haute etc. R. R. Co., 9 Ind. 283: §607 n. 2.
 McCrea *v.* Port Royal R. R. Co., 3 S. C. 381: §§ 245 n. 1, 243 n. 2.
 McCrory *v.* Griswold, 7 Ia. 248: §549 n. 10.
 McCullough *v.* Brooklyn, 23 Wend. 458: §§ 609 n. 4, 611 n. 2, 613 n. 1.
 McCune *v.* Swafford, 5 Ia. 552: §535 n. 1.
 McCunley *v.* Weller, 12 Cal. 500: §452 n. 4.
 McDonald *v.* Red Wing, 13 Minn. 38: §7 n. 2.
v. Wilson, 59 Ind. 54: §§350 n. 6, 352 n. 3.
 McDougle *v.* Clark, 7 B. Mon. 448: §§305 n. 2, 496 n. 4.
 McElroy *v.* Kansas City, 21 Fed. R. 257: §§12 n. 6, 223 n. 1, 454 n. 2, 638 n. 5.
 McFadden *v.* Johnson, 72 Pa. S. 335: §318 n. 4.
 McGee's Appeal, 114 Pa. S. 470: 134 n. 4.
 McGhee *v.* Mathis, 21 Ark. 40: §200 n. 6.
 McIlvoy *v.* Speed, 4 Bibb, 85: §516 n. 6.
 McIntire *v.* State, 5 Blackf. 384: §§462 n. 2, 3; 470 n. 5.
v. West. N. C. R. R. Co., 67 N. C. 278: §§456 n. 2, 3; 458 n. 6, 607 n. 2.
 McIntyre *v.* Easton etc. R. R. Co., 26 N. J. Eq. 425: §§321 n. 1, 335 n. 7, 377 n. 6.
v. Marine, 93 Ind. 193: §§367 n. 1, 2.
 McKee *v.* Hull, 69 Wis. 657: §298 n. 10.
v. St. Louis, 17 Mo. 184: §336 n. 2.
 McKeen *v.* Delaware Canal Co., 49 Pa. S. 424: §§75 n. 1, 77 n. 1.
 McKernan *v.* Indianapolis, 38 Ind. 228: §603 n. 2.
 McKenney *v.* County Comrs., 40 Me. 136: §410 n. 3.
 McKenny *v.* Monongahela Nav. Co., 14 Pa. S. 65: §607 n. 2.
 McKenzie *v.* Miss. etc. Boom Co., 29 Minn. 288: §§59n. 1, 67 n. 2, 3.
 McKinsey *v.* Bowman, 58 Ind. 88: 449 n. 1.
 McLaughlin *v.* Railroad Co., 5 Rich. 583: §§113 n. 3, 115 n. 4.
 McLaughlin *v.* Dorsey, 1 Harris & McHenry, 224: §320 n. 2.
v. Municipality No. 2, 5 La. An. 504: §653 n. 7.
v. Sandusky, 17 Neb. 110: §§256 n. 1, 632 n. 2.
v. State, 8 Ind. 281: §607 n. 2.
 McLean *v.* Chicago etc. Ry. Co., 67 Ia. 568: §435 n. 1.
 McLellan *v.* County Comrs. 21 Me. 390: §419 n. 1, 20.
 McLendon *v.* Railroad Co., 54 Ga. 293: §318 n. 4.
 McLeod *v.* Savannah etc. R. R. Co., 25 Ga. 445: §138 n. 1.
 McMahon *v.* Cincinnati etc. R. R. Co., 5 Ind. 413: §§248 n. 3, 473 n. 2, 520 n. 8.
v. Council Bluffs, 12 Ia. 268: §§127 n. 1, 2.
 McManus *v.* Carmichael, 3 Ia. 1: §72 n. 18.
v. McDonough, 107 Ills. 95: §§311 n. 4, 379 n. 1.
 McMasters *v.* Commonwealth, 3 Watts, 292: §469 n. 10.
 McMichen *v.* Cincinnati, 4 Ohio St. 394: §367 n. 1, 2.
 McMillan *v.* Baker, 20 Kan. 50: §§631 n. 3, 632 n. 1.
 McMullen *v.* State, 105 Ind. 334: §§408 n. 6, 517 n. 4, 601 n. 1.
 McMurtrie *v.* Stewart, 21 Pa. S. 322: §258 n. 1.
 McNally *v.* Smith, 12 Allen, 455: §607 n. 2.
 McPherson *v.* Holdridge, 24 Ills. 38: §§418 n. 3, 4; 631 n. 3.
v. Leathers, 29 Ind. 65: §§540 n. 1.
 McPike *v.* West, 71 Mo. 199: §§631 n. 1, 632 n. 1.
 McQuillen *v.* Hatton, 42 Ohio St. 202: §§157 n. 2, 158 n. 1, 161 n. 2, 196 n. 6.
 McRee *v.* Wilmington R. R. Co., 2 Jones L. 186: §188 n. 1.
 McReynolds *v.* Burlington etc. Ry. Co., 106 Ills. 152: §§426 n. 2, 470 n. 20, 524 n. 4.
 McVey *v.* Heavenridge, 30 Ind. 100: §537 n. 3.
 McWhirter *v.* Cockrell, 2 Head, 9: §393 n. 4.

N

Namer *v.* Comrs. 30 Mich. 490:
 §§383 n. 1, 543 n. 3.

Nankin *v.* State, 2 Swan, 206: §601
 n. 1.

Nashua, Petition of, 12 N. H. 425:
 §405 n. 4.

Nashville *v.* Nichol, 3 Bax. 338:
 §316 n. 1.

Nashville etc. R. R. Co. *v.* Cowardine,
 11 Hump. 348: §256 n. 16.

Nason *v.* Woonsocket etc. R. R. Co.,
 4 R. I. 377: §§482 n. 1, 2; 572
 n. 2.

Nassau Cable Co., Matter of, 36
 Hun, 272: §310 n. 6.
 Matter of, 2 How. Pr. N. S.
 124: §310 n. 6.

National etc. R. R. Co. *v.* Centr'l
 R. R. Co., 32 N. J. Eq. 755:
 §§238 n. 1, 241 n. 1, 255 n. 4,
 265 n. 5, 391 n. 2.

Neal *v.* Knox etc. R. R. Co. 61 Me.
 298: §§320 n. 1, 514 n. 8.
 v. Pittsburgh etc. R. R. Co., 2
 Grant's Cas. 137: §§532 n. 10,
 656 n. 20.

Neale *v.* Cogar, 1 A. K. Marsh. 589:
 §509 n. 5.

Nebraska City *v.* Lampkin, 6 Neb.
 27: §96 n. 1.

Nebraska etc. R. R. Co. *v.* Storer,
 22 Neb. 90: §537 n. 9.

Need's Road, 1 Pa. S. 353: §§328
 n. 1, 364 n. 1.

Neff *v.* Chicago etc. Ry. Co., 14
 Wis. 370: §§537 n. 1, 539 n. 1.
 v. Cincinnati, 32 Ohio St. 215:
 §426 n. 2.
 v. Reed, 98 Ind. 341: §§186 n. 6,
 190 n. 3, 256 n. 6, 426 n. 8.

Neff's Road, 3 S. & R. 210: §§411
 n. 1, 413 n. 1.

Neilson *v.* Chicago etc. Ry. Co., 58
 Wis. 516: §§436 n. 11, 467 n. 6,
 482 n. 1.

Neis *v.* Franzen, 18 Wis. 537: §602
 n. 5.

Nelson *v.* Butterfield, 21 Me. 220:
 §§334 n. 1, 355 n. 1, 440 n. 2.
 v. Fleming, 56 Ind. 310: §§278 n.
 4, 596 n. 3, 664 n. 1, 4.

v. Goodykoontz, 47 Ia. 32: §656
 n. 1.
 v. Vermont etc. R. R. Co., 26
 Vt. 717: §156 n. 24.

Neponset Meadow Co. *v.* Telison,
 133 Mass. 189: §153 n. 2.

Nesbitt *v.* Trumbo, 39 Ills. 110:
 §§157 n. 2, 4; 167 n. 2, 7.

Nevins *v.* Peoria, 41 Ills. 502: §§59
 n. 1, 103 n. 1, 8.

New *v.* Ewing, 1 A. K. Marsh. 55:
 §369 n. 1.

New Albany *v.* White, 100 Ind.
 206: §631 n. 2.

New Albany etc. R. R. Co. *v.* Connelly,
 7 Ind. 32: §§456 n. 2, 3;
 631 n. 2.
 v. Higman, 18 Ind. 77: §9 n. 5.
 v. Huff, 19 Ind. 315: §436 n. 14.
 v. O'Dailey, 12 Ind. 551: §§113
 n. 3, 115 n. 4, 635 n. 7.
 v. O'Daily, 13 Ind. 353: §§115 n.
 4, 624 n. 2.

New Bedford *v.* County Comrs., 9
 Gray, 346: §656 n. 23.

New Boston, Petition of, 49 N. H.
 328: §405 n. 4.

New Brighton *v.* Perisol, 107 Pa.
 S. 280: §§223 n. 1, 224 n. 2.
 v. United Presbyterian Church,
 96 Pa. S. 331: §§223 n. 1, 7;
 224 n. 2, 3.

New Brighton etc. R. R. Co. *v.*
 Pittsburg etc. R. R. Co., 105 Pa.
 S. 13: §306 n. 5.

New Castle etc. R. R. Co. *v.* Mc-
 Chesney, 85 Pa. S. 522: §219
 n. 3.
 v. Peru etc. R. R. Co., 3 Ind.
 464: §268 n. 1.

New Central Coal Co. *v.* George's
 Creek etc. Co., 37 Md. 537:
 §§157 n. 2, 158 n. 1, 171 n. 5,
 454 n. 2, 631 n. 2.

New Hannover Road, 18 Pa. S.
 220: §419 n. 14.

New Haven *v.* Sargent, 38 Conn.
 50: §590 n. 3, 6.

New Haven etc. Co. *v.* Northampton,
 102 Mass. 116: §562 n. 4.

New Jersey etc. R. R. Co. *v.* Comrs.,
 39 N. J. L. 28: §§266 n. 5, 276
 n. 3.
 v. Suydam, 17 N. J. L. 25: §§480
 n. 10, 498 n. 13, 528 n. 3, 7.
 v. Van Syckle, 37 N. J. L. 496:
 §§296 n. 1, 297 n. 1, 298 n. 5.

New Marlborough *v.* County
 Comrs., 9 Met. 423: §379 n. 1.

New Orleans, etc., 20 La. An. 497:
 §5 n. 3.

New Orleans *v.* Ellbott, 10 La. An.
 59: §5 n. 3.

v. Dr. Co. etc., 11 La. An. 338:
 §§5 n. 3, 188 n. 1, 199 n. 1.

New Orleans *v.* Dryades St., 11 La. An. 458: §§30 n. 12.
v. Sohr, 16 La. An. 393: §§253 n. 1, 346 n. 3.

New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650: §156 n. 19.

New Orleans Water Co. *v.* Rivers, 115 U. S. 674: §156 n. 19.

New Orleans W. W. Co. *v.* St. Tammany etc. Co., 4 Wood C. C. 184: §§6 n. 3, 156 n. 20.

New Orleans etc. R. R. Co., 26 La. An. 517: §115 n. 4.
v. Bougere, 23 La. An. 803: §384 n. 9.
v. Brown, 64 Miss. 479: §§151 n. 3, 599 n. 3.
v. Delamon, 114 U. S. 501: §111 n. 1.
v. Drake, 60 Miss. 621: §313 n. 1.
v. Frederick, 46 Miss. 1: §385 n. 1.
v. Gay, 31 La. An. 430: §§277 n. 2, 278 n. 1, 468 n. 3.
v. Hemphill, 35 Miss. 17: §§314 n. 2, 363 n. 4, 405 n. 34, 413 n. 2.
v. Jones, 68 Ala. 48: §§454 n. 2, 648 n. 2.
v. Lagarde, 10 La. An. 150: §468 n. 3.
v. Moye, 39 Miss. 374: §§115 n. 4, 466 n. 2.
v. Murrell, 34 La. An. 536: §505 n. 1, 4.
v. Murrell, 36 La. An. 344: §§468 n. 3, 496 n. 2, 3.
v. Southern etc. Tel. Co., 53 Ala. 211: §§172 n. 1, 269 n. 5, 275 n. 4, 389 n. 3.
v. Zerringue, 23 La. An. 521: §524 n. 8.

New Orleans Ry. Co. *v.* Gay, 32 La. An. 471: §§277 n. 2, 393 n. 4.

New Reservoir, Matter of, 1 Sheldon, 408: §§483 n. 1, 524 n. 1.

New River Co. *v.* Johnson, 2 E. & E. 435; 105 E. C. L. R. 434: §222 n. 2.

New Rochelle Water Co., Matter of, 46 Hun, 525: §173 n. 2.

New Vineyard *v.* Somerset, 15 Me. 21: §256 n. 19.

New Washington Road, 23 Pa. S. 485: §512 n. 1.

New York *v.* Bailey, 2 Denio, 433: 3 Hill, 531: §574 n. 1.
v. Dover St., 1 Cow. 74: §527 n. 1.
v. Lord, 17 Wend. 285; 18 Wend. 126: §7 n. 3.

New York *v.* Mapes, 6 Johns. Ch. 46: §§655 n. 2, 663 n. 5.
v. Peutz, 24 Wend. 668: §7 n. 3.
v. Stone, 20 Wend. 139: §7 n. 3.

New York, Case of, etc., 16 Johns. 231: §527 n. 1.

New York, Matter of, 6 Cow. 571: §584 n. 1.
 Matter of, 34 Hun, 441: §§242 n. 11, 286 n. 2, 419 n. 2, 3; 457 n. 4, 483 n. 22.
 Matter of, 99 N. Y. 569: §243 n. 11.

New York Bridge Co., Petition of, 4 Hun, 635: §397 n. 3, 5.

New York Cable Co., Matter of, 36 Hun, 355: §310 n. 6.

New York etc. R. R. Co. *v.* Arrot, 27 Hun, 151: §470 n. 6.
v. Boston etc. R. R. Co., 36 Conn. 196: §§3 n. 6, 247 n. 1, 262 n. 1, 267 n. 6, 306 n. 11.
v. Capner, 49 N. J. L. 555: §§415 n. 1, 418 n. 3.
v. Central Union Tel. Co., 21 Hun, 261: §269 n. 6.
v. Church, 31 Hun, 440: §420 n. 3.
v. Coburn, 6 How. Pr. 223: §540 n. 10.
v. Drummond, 46 N. J. L. 644: §§266 n. 8, 276 n. 9.
v. Forty-Second St. R. R. Co., 50 Barb. 285; 50 Barb. 309; 26 How. Pr. 68: §136 n. 3.
v. Gennett, 37 Hun, 317: §§444 n. 1, 507 n. 8.
v. Gunnison, 1 Hun, 496: §§170 n. 11, 256 n. 26.
v. Gunnison, 3 N. Y. Supm. Ct. R. 632: §256 n. 26.
v. Heirs of Stanley, 39 N. J. Eq. 361: §498 n. 1.
v. Kip, 46 N. Y. 546: §170 n. 3, 6.
v. Le Fevre, 27 Hun, 537: §475 n. 3.
v. Met. Gas Light Co., 5 Hun, 201: §170 n. 3.
v. Met. Gas etc. Co., 63 N. Y. 326: §§272 n. 3, 274 n. 2, 276 n. 9.
v. New York etc. R. R. Co., 11 Abb. N. C. 386: §307 n. 4.
v. Stanley, 34 N. J. Eq. 55: §648 n. 1.
v. Townsend, 36 Hun, 630: §§405 n. 32, 422 n. 1.
v. Young, 33 Pa. S. 175: §§75 n. 1, 242 n. 5.

Matter of, 5 Hun, 86: §353 n. 1.

New York etc. R. R. Co., Matter of, 6 Hun, 149: §475 n. 14.
 Matter of, 15 Hun, 63: §493 n. 2.
 Matter of, 20 Hun, 201: §272 n. 4.
 Matter of, 21 Hun, 250: §524 n. 7.
 Matter of, 26 Hun, 194: §387 n. 1.
 Matter of, 26 Hun, 592: §561 n. 1.
 Matter of, 27 Hun, 116: §479 n. 5.
 Matter of, 27 Hun, 151: §§443 n. 5, 479 n. 10.
 Matter of, 28 Hun, 426: §460 n. 2.
 Matter of, 29 Hun, 269: §77 n. 1.
 Matter of, 29 Hun, 602; 93 N. Y. 385: §523 n. 1.
 Matter of, 29 Hun, 609: §436 n. 6, 23.
 Matter of, 33 Hun, 148: §§256 n. 8, 345 n. 7, 8; 426 n. 1, 7, 8, 9.
 Matter of, 33 Hun, 231: §489 n. 5.
 Matter of, 33 Hun, 274: §302 n. 6.
 Matter of, 33 Hun, 293: §509 n. 9.
 Matter of, 33 Hun, 639; 98 N. Y. 447; 2 How. Pr. N. S. 225; 102 N. Y. 704: §§480 n. 12, 523 n. 4.
 Matter of, 35 Hun, 220: §§244 n. 1, 390 n. 1, 393 n. 4.
 Matter of, 35 Hun, 232: §509 n. 5.
 Matter of, 35 Hun, 260: §523 n. 2.
 Matter of, 35 Hun, 306: §§488 n. 4, 529 n. 5.
 Matter of, 35 Hun, 575: §407 n. 5.
 Matter of, 35 Hun, 633: §488 n. 4.
 Matter of, 39 Hun, 338: §§556 n. 2, 580 n. 1.
 Matter of, 44 Hun, 194: §265 n. 10.
 Matter of, 62 Barb. 85: §§301 n. 1, 307 n. 3, 369 n. 1.
 Matter of, 1 How. Pr. N. S. 190: §655 n. 2, 4.
 Matter of, 21 How. Pr. 434: §510 n. 2.
 Matter of, 63 How. Pr. 265: §523 n. 1.
 Matter of, 60 N. Y. 116: §§556 n. 3, 580 n. 1.
 Matter of, 64 N. Y. 60: §§522 n. 1, 523 n. 1, 534 n. 3.
 Matter of, 66 N. Y. 407: §§390 n. 2, 393 n. 4, 397 n. 2.
 Matter of, 70 N. Y. 191: §350 n. 1.
 Matter of, 77 N. Y. 248: §§170 n. 3, 285 n. 3, 393 n. 4, 8.
 Matter of, 88 N. Y. 279: §255 n. 7.
 Matter of, 94 N. Y. 287: §§559 n. 6, 562 n. 7.
 Matter of, 98 N. Y. 12: §§556 n. 2, 580 n. 1, 581 n. 2.
 Matter of, 99 N. Y. 12: §§244 n. 1, 265 n. 11, 390 n. 1, 393 n. 4, 8.
 New York etc. R. R. Co., Matter of, 101 N. Y. 685: §85 n. 8.
 New York El. R. R. Co., Matter of, 3 Abb. N. C. 401: §123 n. 2.
 Matter of, 36 Hun, 427: §§123 n. 9, 493 n. 6, 13.
 Matter of, 41 Hun, 502: §493 n. 6.
 Matter of, 44 Hun, 117: §123 n. 9.
 Matter of, 70 N. Y. 327: §§112 n. 2, 116 n. 3.
 Newburg Turnpike Co. v. Miller, 5 Johns. Ch. 101: §136 n. 3.
 Newby v. Platte Co., 25 Mo. 258: §§5 n. 4, 469 n. 6.
 Newcastle etc. R. R. Co. v. Brumback, 5 Ind. 543: §§433 n. 2, 473 n. 2.
 Newcomb v. Smith, 1 Chandler, (Mich.) 71: §§3 n. 7, 180 n. 12, 181 n. 8, 237 n. 2, 311 n. 2, 456 n. 2.
 Newell v. Minneapolis etc. Ry. Co., 35 Minn. 112: §124 n. 7.
 v. Smith, 15 Wis. 101: §§318 n. 6, 458 n. 8, 623 n. 1.
 v. Smith, 26 Wis. 582: §619 n. 1.
 Newport etc. Bridge Co. v. Foote, 9 Bush. 264: §§96 n. 1, 109 n. 8.
 Newton v. Agricultural Branch R. R. Co., 15 Gray, 27: §599 n. 6.
 Newville Road Case, 8 Watts, 172: §508 n. 1.
 Ney v. Swinney, 36 Ind. 454: §§301 n. 7, 10; 303 n. 4, 604 n. 4, 606 n. 4.
 Niagara, Matter of, 37 Hun, 537: §311 n. 2.
 Matter of, 102 N. Y. 734: §311 n. 2.
 Niagara Falls etc. Ry., *In re* 15 U. E. R. 429: §170 n. 14.
 Niagara Falls etc. Ry. Co., Matter of, 46: Hun, 94: §310 n. 5.
 Niagara Falls S. B. Co. v. Buchanan, 4 Lans. 553: §590 n. 3.
 Nicetown Lane, Matter, 11 Phila. 377: §418 n. 3.
 Nichols v. Bridgeport, 23 Conn. 189: §§5 n. 4, 406 n. 1, 469 n. 1, 604 n. 3, 605 n. 3.
 v. Salem, 14 Gray, 490: §§383 n. 1, 633 n. 1.
 v. Somerset etc. R. R. Co., 43 Me. 356: §§456 n. 2, 3; 607 n. 2.
 v. Sutton, 22 Ga. 369: §632 n. 2.
 Nicholson v. New York etc. R. R. Co., 22 Conn. 74: §§113 n. 3, 118 n. 3, 220 n. 3, 469 n. 1.
 Nicoll v. New York etc. R. R. Co., 12 N. Y. 121: §§288 n. 1, 291 n. 1.

Nielson *v.* Wakefield, 43 Mich. 434: §§382 n. 3, 549 n. 3.

Ninth Ave. R. R. Co. *v.* N. Y. El. R. R. Co., 3 Abb. N. C. 347: §123 n. 2.

Ninth Ave., Matter of, 45 N. Y. 729: §485 n. 3.

Noble *v.* Des Moines etc. Ry. Co., 61 Ia. 637: §562 n. 12.

Noble Street, Case of, 5 Whart. 333: §526 n. 4.

Matter of, 1 Ashmead, 276: §628 n. 2.

Noel *v.* Ewing, 9 Ind. 37: §323 n. 4.

Nolensville *v.* Baker, 4 Humph. 315: §140 n. 2.

Nolensville Turnpike Co. *v.* Quimby, 8 Humph. 476: §601 n. 1.

Noll *v.* Dubuque etc. R. R. Co., 32 Ia. 66: §§3 n. 7, 594 n. 1.

Noonan *v.* Albany, 79 N. Y. 470: §103 n. 3.

Norfleet *v.* Cromwell, 70 N. C. 634: §§188 n. 4, 195 n. 1, 200 n. 1.

Norfolk etc. R. R. Co. *v.* Ely, 95 N. C. 77: §§248 n. 1, 536 n. 1, 537 n. 16, 17.

Norris *v.* Baltimore, 44 Md. 598: §658 n. 8.

v. Chicago, 11 Ills. 650: §§551 n. 1.

v. Vermont Cent. R. R. Co., 28 Vt. 99: §§66 n. 4, 293 n. 3.

v. Waco, 57 Tex. 635: §155 n. 5, 13.

Norristown etc. Co. *v.* Burkett, 26 Ind. 53: §§311 n. 2, 312 n. 1, 440 n. 4, 454 n. 2.

North Berwick *v.* Comrs., 25 Me. 69: §167 n. 3.

North Branch Canal Co. *v.* Hirem, 44 Pa. S. 418: §278 n. 6.

North Carolina R. R. Co. *v.* Carolina etc. R. R. Co., 83 N. C. 489: §267 n. 6.

North Chicago City Ry. Co. *v.* Lake View, 105 Ills. 207: §156 n. 23.

North Eastern R. R. Co. *v.* Payne, 8 Rich. S. C. 177: §257 n. 1.

v. Sineath, 8 Rich. L. 185: §498 n. 3.

North Hudson etc. R. R. Co. *v.* Booraem, 28 N. J. Eq. 450: §§324 n. 1, 507 n. 2, 5, 12; 628 n. 5.

North Missouri R. R. Co. *v.* Gott, 25 Mo. 540: §248 n. 1.

v. Lackland, 25 Mo. 515: §§552 n. 1, 655 n. 1, 658 n. 2.

v. Reynal, 25 Mo. 534: §§552 n. 1, 655 n. 1, 658 n. 2.

North Pacific R. R. Co. *v.* Reynolds, 50 Cal. 90: §496 n. 1.

North Penn. R. R. Co. *v.* Davis, 26 Pa. S. 238: §§326 n. 2, 335 n. 2, 483 n. 13.

North Reading *v.* County Comrs.,⁷ Gray, 109: §512 n. 4.

North 13th St., Matter of, 5 Hun. 175: §655 n. 2.

North Vernon *v.* Voegler, 89 Ind. 77: §103 n. 3.

v. Voegler, 103 Ind. 314: §§96 n. 1, 106 n. 1, 482 n. 4, 625 n. 2.

North & W. Branch Ry. Co. *v.* Swank, 105 Pa. S. 555: §93 n. 3.

Northampton *v.* Abell, 127 Mass. 507: §603 n. 2.

Northampton Bridge Case, 116 Mass 442: §§271 n. 1, 286 n. 2, 537 n. 11.

Northern R. R. Co. *v.* Concord etc. R. R. Co., 27 N. H. 183: §§267 n. 6, 511 n. 15.

Northern Cent. R. R. Co. *v.* Baltimore, 21 Md. 93: §635 n. 14.

v. Baltimore, 46 Md. 425: §266 n. 3.

Northern Pacific etc. Co. *v.* Lowenberg, 9 Sawyer, 348: §315 n. 3.

Northern etc. R. R. Co. *v.* St. Paul etc. R. R. Co., 1 McCrary, 302: §§268 n. 2, 454 n. 2, 631 n. 2.

Northern Pacific T. Co. *v.* Portland, 14 Or. 24: §§406 n. 1, 604 n. 5.

Northern Trans. Co. *v.* Chicago, 99 U. S. 635; 7 Biss. 45: §147 n. 2.

Northwestern F. Co. *v.* Hyde Park, 70 Ills. 634: §§6 n. 2, 152 n. 5, 156 n. 20.

v. Hyde Park, 97 U. S. 659: §§6 n. 2, 152 n. 5, 156 n. 20.

Norton *v.* Hodges, 100 Mass. 241: §34 n. 6.

v. Peck, 3 Wis. 714: §456 n. 2.

v. Studley, 17 Ills. 556: §456 n. 1.

v. Walkill Valley R. R. Co., 61 Barb. 476: §286 n. 4.

v. Walkill Valley R. R. Co. 63 Barb. 77: §369 n. 1.

Norway Plaines Co. *v.* Bradley, 52 N. H. 86: §72 n. 6.

Norwegian St., 81 Pa. S. 349: §308 n. 10.

Norwich *v.* Story, 25 Conn. 41: §250 n. 3.

Nosser *v.* Seeley, 10 Neb. 460: §305 n. 1.

Noyes *v.* Chapin, 6 Wend. 461: §§288 n. 6.
v. Mason City, 53 Ia. 418: §624 n. 5.
v. Springfield, 116 Mass. 87: §§545 n. 7.
Null *v.* White Water Canal Co., 4 Ind. 431: §607 n. 2.
v. Zierle, 52 Mich. 540: §§353 n. 9, 549 n. 2.

O.

O'Bannan *v.* Jackson, Sneed, 201: §§510 n. 1.
O'Brien *v.* Ball, 119 Mass. 28: §483 n. 7.
v. Comrs., 51 Md. 15: §261 n. 1.
v. Norwich etc. Ry. Co., 17 Conn. 371: §85 n. 8.
v. St. Paul, 25 Minn. 331: §§59 n. 1, 103 n. 3.
Occum Co. *v.* Sprague Manf. Co., 35 Conn. 496: §§180 n. 1, 305 n. 5.
Ocean Grove etc. Ass. *v.* Asbury Park, 40 N. J. Eq. 447: §90 n. 1, 3.
O'Connor *v.* Fond du Lac etc. Ry. Co., 52 Wis. 526: §89 n. 5.
v. Pittsburgh, 18 Pa. S. 187: §96 n. 1.
Ogburn *v.* Connor, 46 Cal. 346: §88 n. 1.
Ogden *v.* Stokes, 25 Kan. 517: §606 n. 4.
O'Hara *v.* Lexington etc. R. R. Co., 1 Dana (Ky.) 232: §170 n. 1.
v. Penn. R. R. Co., 25 Pa. S. 445: §§309 n. 4, 357 n. 2.
Ohio *v.* Carman, Tappan (Ohio), 162: §518 n. 3.
Ohio etc. R. R. Co. *v.* Harress, 24 W. Va. 511: §510 n. 4.
v. Wallace, 14 Pa. S. 245: §512 n. 2.
Old Colony etc. R. R. Co. *v.* County of Plymouth, 14 Gray, 155: §§55 n. 2, 59 n. 1, 491 n. 4, 5.
Old Town *v.* Dooley, 81 Ills. 255: §589 n. 8.
Oliphant *v.* Comrs. 18 Kan. 386: §§343 n. 1, 605 n. 4, 631 n. 3.
Olmstead *v.* Camp, 33 Conn. 532: §§164 n. 1, 180 n. 1.
v. Morris Aqueduct Co., 46 N. J. L. 495, 47 J. L. 311: §§173 n. 2, 389 n. 4, 393 n. 4, 8.
Olney *v.* Wharf, 115 Ill. 519: §§111 n. 2, 625 n. 6.

Olson *v.* Merrill, 42 Wis. 203: §§72 n. 16, 81 n. 3.
Omaha etc. R. R. Co. *v.* Brown, 14 Neb. 170: §§66 n. 10, 67 n. 10.
v. Gerrard, 17 Neb. 587: §441 n. 1.
v. Menk, 4 Neb. 21: §§505 n. 3, 618 n. 1.
v. Standen, 22 Neb. 343: §§282 n. 2, 665 n. 2.
v. Umstead, 17 Neb. 459: §426 n. 1.
v. Walker, 17 Neb. 432: §§425 n. 2, 426 n. 1, 524 n. 4.
O'Neill *v.* Hudson, 41 N. J. L. 161: §§656 n. 1, 2; 657 n. 2.
Onken *v.* Riley, 65 Tex. 468: §379 n. 1.
Onthank *v.* Lake Shore etc. R. R. Co., 71 N. Y. 194: §290 n. 7.
Opening Albany St., 6 Abb. Pr. 273: §381 n. 5.
Opening of Berks St., 15 Phila. 381: §500 n. 1.
Opening 15th St., 10 Phila. 214: 498 n. 2.
Opening Sixty-seventh St., 60 How. Pr. 264: §500 n. 1.
Opening Spuyten Duyvil Parkway, 67 How. Pr. 341: §399 n. 3.
Opening of Streets etc., 10 Phila. 145: §265 n. 1.
Opening 28 St., 11 Phila. 436: §509 n. 5.
Orange St., Matter of, 50 How. Pr. 244: §374 n. 5.
Oregon etc. R. R. Co. *v.* Bailey, 3 Or. 164: §267 n. 1.
v. Barlow, 3 Or. 311: §§426 n. 1, 477 n. 4.
Oregon Ry. Co. *v.* Bridwell, 11 Or. 282: §533 n. 3.
v. Hill, 9 Or. 377: §454 n. 2.
Oregon Ry. etc. Co. *v.* Moiser, 14 Or. 519: §507 n. 7.
v. Oregon Real Estate Co., 10 Or. 444: §§301 n. 1, 2; 304 n. 2.
Oregon Central R. R. Co. *v.* Wait, 3 Or. 91, 3 Or. 428: §473 n. 7.
O'Reilly *v.* Kankakee etc. Co., 32 Ind. 169: §§161 n. 1, 185 n. 2, 186 n. 2, 6; 188 n. 5, 190 n. 1.
Orr *v.* Quimby, 54 N. H. 590: 1 n. 1, 145 n. 2, 3, 8; 203 n. 4, 456 n. 2.
Orington *v.* County Comrs., 51 Me. 570: §525 n. 1.

Ortman *v.* Union Pacific Ry. Co., 32 Kan. 419: §§424 n. 5, 540 n. 18.

Orton *v.* Tilden, 110 Ind. 131: §379 n. 1.

Ortwine *v.* Baltimore, 16 Md. 387: §625 n. 2.

Osborn *v.* Hart, 24 Wis. 89: §§157 n. 2, 167 n. 2, 7.

Osborne *v.* Detroit, 32 Mich. 282: §369 n. 1.

Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547: §136 n. 3.

Ottawa Gas etc. Co. *v.* Graham, 28 Ills. 73: §227 n. 8.

Otoe Co. *v.* Heye, 19 Neb. 289: §428 n. 5, 504 n. 5.

Overman *v.* May, 35 Ia. 89: §390 n. 4.

Overman Silver etc. Co. *v.* Corcoran, 15 Neb. 147: §184 n. 2.

Owen *v.* Jordan, 27 Ala. 608: §509 n. 5.

Owens *v.* Crossett, 105 Ills. 354: §631 n. 7.

v. Missouri etc. Ry. Co., 67 Tex. 679: §89 n. 1.

Owings *v.* Worthington, 10 G. & J. 283: §§167 n. 3, 353 n. 2, 604 n. 2.

Owners of Ground *v.* Albany, 15 Wend. 374: §§175 n. 1, 364 n. 1, 367 n. 1, 561 n. 4.

Oxford *v.* Brands, 45 N. J. L. 332: §§422 n. 3, 514 n. 10, 529 n. 2.

P

Pace *v.* Freeman, 10 Ired. L. 103: §440 n. 3.

Pacific R. R. Co. *v.* Chrystal, 25 Mo. 544; §469 n. 6.

v. Leavenworth City, 1 Dill. 393: §117 n. 1.

v. Reed, 41 Cal. 256: §115 n. 1.

Pack *v.* Chesapeake etc. R. R. Co., 5 W. Va. 118: §314 n. 1.

Paducah etc. R. R. Co. *v.* Stovall, 12 Heisk. 1: §§467 n. 3, 474 n. 3.

Page *v.* Baltimore, 34 Md. 558: §265 n. 8.

v. Boston, 106 Mass. 84: §667 n. 4.

v. Chicago etc. R. R. Co., 70 Ills. 324: §§464 n. 2, 470 n. 20.

v. Heineberg, 40 Vt. 81: §§288 n. 1, 929 n. 1, 596 n. 3.

v. O'Toole, 144 Mass. 303: §278 n. 8.

Pagels *v.* Oaks, 64 Ia. 198: §§166 n. 3, 382 n. 1, 2; 394 n. 5, 545 n. 10.

Paine *v.* Boston, 4 Allen, 168: §443 n. 3, 13.

v. Leicester, 22 Vt. 44: §§166 n. 3, 549 n. 10.

v. Wood, 108 Mass. 160: §§76 n. 2, 324 n. 1, 350 n. 6, 439 n. 3, 476 n. 9.

Palatine *v.* Kreuger, 121 Ills. 72; 20 Ills. App. 420: §589 n. 4.

Palairé's Appeal, 67 Pa. S. 479: §205 n. 4.

Palmer *v.* Conway, 22 N. H. 144: §408 n. 3.

v. Highway Comrs., 49 Mich. 45: §362 n. 1.

Palmer Co. *v.* Ferrill, 17 Pick. 58: §§469 n. 5, 476 n. 1.

Palmer etc., Matter of, 9 A. E. 463: §326 n. 4.

Palmyra *v.* Morton, 25 Mo. 593: §5 n. 4.

Panton Turnpike Co. *v.* Bishop, 11 Vt. 198: §140 n. 2.

Papworth *v.* Milwaukee, 64 Wis. 389: §589 n. 14.

Paradise Road, 29 Pa. S. 20: §419 n. 1, 2, 3.

Paret *v.* Bayonne, 39 N. J. L. 559: §288 n. 5.

v. Bayonne, 40 N. J. L. 333: §623 n. 2.

Parham *v.* Justices etc. 9 Ga. 341: §§10 n. 2, 5; 11 n. 3, 158 n. 1, 237 n. 3, 456 n. 2, 631 n. 4.

Paris *v.* Coltraine, 3 Hawks, 312: §562 n. 1.

v. Mason, 37 Tex. 447: §456 n. 1, 468 n. 4, 631 n. 3.

Parish *v.* Gilman, 11 N. H. 293: §§324 n. 3, 335 n. 4, 373 n. 3, 381 n. 1.

v. County of Plymouth, 8 Cush. 475: §498 n. 3.

Parker *v.* Boston, 15 Pick. 198: §425 n. 2.

v. Boston etc. R. R. Co., 3 Cush. 107: §§109 n. 8, 220 n. 5.

v. Cutter Milldam Co., 20 Me., 353: §85 n. 7.

v. East Tenn. etc. R. R. Co., 13 Lea 669: §§456 n. 2, 608 n. 1, 631 n. 2.

v. Met. Ry. Co., 109 Mass. 506: §246 n. 2.

v. Nashua, 59 N. H. 402: §103 n. 7.

v. People, 111 Ills. 581: §156 n. 22.

Parker etc. 36 N. H. 84: §§324 n. 3.
 Parker's Appeal, 64 Pa. S. 137: §257 n. 4.
Parkhurst v. Vanderveer, 48 N. J. L. 80: §§350 n. 8, 376 n. 8.
Parks v. Boston, 8 Pick. 218: §166 n. 11.
 v. Boston, 15 Pick. 198: §§477 n. 1, 2; 483 n. 8.
 v. Hampden Co., 120 Mass. 395: §§469 n. 5, 476 n. 3.
 v. Newburyport, 10 Gray, 28: §88 n. 5.
 v. Wisconsin etc. R. R. Co., 233 Wis 413: §436 n. 11.
Parmelee v. Oswego etc. R. R. Co., 6 N. Y. 24: §292 n. 1.
Parnell v. Comrs. Court, 34 Ala. 278: §544 n. 6.
Parrott v. Cincinnati etc. R. R. Co., 3 Ohio St. 330: §§115 n. 2, 4; 117 n. 9.
 v. Cincinnati etc. R. R. Co., 10 Ohio St. 624: §§113 n. 3, 115 n. 2, 4; 493 n. 5, 13.
 v. Lawrence, 2 Dill. 332: §138 n. 3.
Parry v. New Orleans etc. R. R. Co., 55 Ala. 418: §115 n. 4.
 v. Richmond, 27 Ind. 66: §298 n. 7.
Parsell v. State, 30 N. J. L. 530: 405 n. 6.
Parsons v. Howe, 41 Me. 218: §256 n. 26.
 v. Pettingill, 11 Allen, 507: §7 n. 3.
Parsons Water Co. v. Knapp, 33 Kan. 752: §§240 n. 1, 436 n. 16, 592 n. 3.
Parsonsfield v. Lord, 23 Me. 511: 517 n. 9.
Parst v. Bayonne, 39 N. J. L. 559: §429 n. 2.
Partridge v. Ballard, 2 Me. 50: §532 n. 3.
Paschall St., 81 Pa. S. 118: §412 n. 5, 419 n. 16.
Patchin v. Brooklyn, 2 Wend. 377; 8 Wend. 47: §424 n. 4.
Patchen v. Doolittle, 3 Vt. 457: §166 n. 11, 578 n. 3.
Patchin v. Morrison, 3 Vt. 590: §578 n. 3.
Patent v. Phila. etc. R. R. Co., 14 Weakley Notes (Pa.) 545: §225 n. 4.
Paterson etc. R. R. Co. v. Kamlah, 42 N. J. Eq. 93: §§298 n. 4, 648 n. 1.
Patrick v. Commissioners etc. 4 McCord, 541: §§10 n. 2, 451 n. 1.
Patten v. N. Y. El. R. R. Co., 3 Abb. N. C. 306: §123 n. 2.
Patten's Petition, 16 N. H. 277: §§358 n. 2, 16; 361 n. 7, 420 n. 1.
Patterson v. Baumer, 43 Ia. 477: §191 n. 1.
 v. Boom Co., 98 U. S. 403: §177 n. 3.
 v. Boom Co., 3 Dill. 465: §§177 n. 3, 277 n. 2.
 v. Boston, 20 Pick. 159: §§483 n. 8, 21; 487 n. 4.
 v. Boston, 23 Pick. 425: §§483 n. 21, 487 n. 4.
 v. Chicago D. & V. R. R. Co., 75 Ills. 588: §§225 n. 1, 635 n. 5.
Patterson etc. H. R. R. Co. v. Patterson; 24 N. J. Eq. 158: §124 n. 1.
Patton v. Clark, 9 Yerg. 268: §§414 n. 3, 553 n. 1.
Paul v. Detroit, 32 Mich. 108: §§393 n. 2, 420 n. 4.
Payne v. Morgan's R. R. etc. Co., 38 La. An. 164: §§89 n. 1, 585 n. 6.
Peabody v. Sweet, 3 Ind. 514: §§369 n. 1, 382 n. 1.
Pearce v. Gilmer, 54 Ills. 25: §511 n. 1.
 v. Milwaukee, 18 Wis. 428: §217 n. 2.
Pearl St. Matter of, 19 Wend. 651: §528 n. 3.
Pearson v. Johnson, 54 Miss. 259: §§177 n. 4, 454 n. 2, 458 n. 8.
Peavey v. Calais R. R. Co., 30 Me. 498: §§247 n. 1, 255 n. 2.
Peavy v. Wolfborough, 37 N. H. 286: §§327 n. 1, 379 n. 1, 420 n. 1, 514 n. 11.
Peck v. New Albany etc. R. R. Co., 101 Ind. 366: §259 n. 2.
 v. Smith, 1 Conn. 103: §589 n. 3.
 v. Van Rensselaer, 8 Blackf. Ind. 312: §265 n. 9.
 v. Whitney, 6 B. Mon. 117: §§513 n. 8, 554 n. 2.
Peckham v. School District, 7 R. I. 545: §422 n. 2.
Peddicord v. Baltimore etc. R. R. Co., 34 Md. 463: §§96 n. 1, 107 n. 2.
Pegler v. Highway Comrs., 34 Mich. 359: §384 n. 2.
Peik v. C. & N. W. Ry. Co., 94 U. S. 164: §§6 n. 2, 156 n. 32.
Pekin v. Brereton, 67 Ills. 477: §223 n. 1.
 v. Winkel, 77 Ills. 56: §223 n. 1.

Pembroke *v.* County Comrs. 12
Cush. 351: §§350 n. 4, 5; 525 n. 2.

Peninsular R. R. Co. *v.* Howard, 20
Mich. 18: §405 n. 21.

Penniman *v.* St. Johnsbury, 54 Vt.
306: §96 n. 1.

Pennoyer *v.* Saginaw, 8 Mich. 296:
§103 n. 3.

Pennsylvania Co. *v.* Erie etc. R. R.
Co., 108 Pa. S. 621: §297 n. 6.

Pennsylvania R. R. Co. *v.* Angel,
41 N. J. Eq. 316: §§117 n. 8, 152
n. 3, 635 n. 10.

v. Baltimore etc. R. R. Co., 60
Md. 263: §§269 n. 8, 461 n. 2.

v. Bruner, 55 Pa. S. 318: §509 n. 12.

v. Bunnell, 81 Pa. S. 414: §§361 n.
9, 435 n. 1, 3; 443 n. 7, 498 n. 5.

v. Cooper, 58 Pa. S. 408: §499 n. 9.

v. Eby, 107 Pa. S. 166: §§326 n.
2, 335 n. 2, 649 n. 2, 4.

v. Heister, 8 Pa. S. 445: §469 n. 10.

v. Keifer, 22 Pa. S. 356: §§416 n.
4, 561 n. 6.

v. Lippincott, 116 Pa. S. 472: §281
n. 4.

v. Lutheran Congregation, 53 Pa.
S. 445: §§311 n. 2, 361 n. 1.

v. Miller, 112 Pa. S. 34: §§62 n.
3, 11; 585 n. 7.

v. New York etc. R. R. Co., 23
N. J. Eq. 157: §§77 n. 1, 84 n. 2.

v. Porter, 29 Pa. S. 165: §§357 n.
4, 361 n. 6.

v. Reichert, 58 Md. 261: §505 n. 15.

Pennsylvania R. R. Co's. Appeal,
93 Pa. S. 150: §§124 n. 6, 240 n.
1, 256 n. 18, 644 n. 3, 5.

Pennsylvania R. R. Co's. Appeal,
115 Pa. S. 514: §§225 n. 1, 632
n. 3, 635 n. 6, 16.

Penny *v.* Penny, L. R. 5 Eq. Cas.
227: §483 n. 14, 21.

Penny, *In re*, 26 L. J. Q. B. N. S.
225; 7 E. & B. 660: §230 n. 3.

Penrice *v.* Wallis, 37 Miss, 172: §466
n. 2, 631 n. 3.

People *v.* Blake, 19 Cal. 579: §§278
n. 3, 311 n. 2, 393 n. 4.

v. Brighton, 20 Mich. 57: §§314
n. 18, 406 n. 1, 543 n. 6.

v. Brooklyn, 1 Wend. 318: §§655
n. 2, 656 n. 10.

v. Brooklyn, 6 Barb. 209: §§5 n. 3,
470 n. 6.

v. Brooklyn, 9 Barb. 535: §5 n. 3.

v. Brooklyn, 49 Barb. 136: §§423
n. 2, 7; 546 n. 1.

People *v.* Brooklyn, 4 N. Y. 419:
§§4 n. 3, 5 n. 3, 4; 263 n. 1.

v. Burnap, 38 Mich. 350: §382 n. 3.

v. Burton, 65 N. Y. 452: §§379 n. 1.
438 n. 1

v. Canal Appraisers, 9 Barb. 496:
§664 n. 1, 5.

v. Canal Appraisers, 13 Hun, 64:
§537 n. 15.

v. Canal Appraisers, 33 N.Y. 461:
§§72 n. 22, 73 n. 2, 77 n. 1.

v. Canal Appraisers, 18 Wend.
355: §67 n. 4.

v. Champion, 16 Johns. 61: §650
n. 2.

v. Cheritree, 4 N. Y. Supm. Ct.
289: §543 n. 11.

v. Cline, 23 Barb. 197: §405 n. 15.

v. Collins, 19 Wend. 55: §650 n. 2.

v. Comrs., 103 Ills. 640: §650 n. 8.

v. Comrs., 40 Mich. 165: §§549 n.
3, 545 n. 15.

v. Comrs., 1 Cow. 23: §650 n. 2.

v. Comrs., 13 Wend. 310: §§511 n.
2, 650 n. 2.

v. Comrs., 24 Wend. 367: §403 n. 3.

v. Comrs., 27 Barb. 94: §§655 n. 2,
650 n. 7.

v. Comrs., 1 N. Y. Supm. Ct. 193:
§§650 n. 6, 655 n. 2.

v. Comrs., 42 Hun, 463: §650 n. 8.

v. Comrs., 57 N. Y. 549: §283 n. 4.

v. Common Council, 76 N.Y. 558:
§7 n. 3.

v. Common Council, 78 N. Y. 56:
§655 n. 7.

v. Conner, 46 Barb. 333: §441 n. 1.

v. County Court, 28 Hun, 14: §391
n. 2.

v. Covert, 1 Hill, 674: §545 n. 14.

v. Curyea, 16 Ills. 547: §650 n. 5.

v. Davis, 38 Hun, 43: §§403 n. 4,
405 n. 3, 548 n. 1.

v. Diver, 19 Hun, 263: §511 n. 20.

v. Dolge, 45 Hun, 310: §403 n. 10.

v. Eggleston, 13 How. Pr. 123:
§394 n. 1.

v. Eldredge, 3 Hun, 541: §470 n. 6.

v. Ferris, 41 Barb. 121: §423 n. 6.

v. Ferris, 36 N. Y. 218: §549 n. 15.

v. First Judge, 2 Hill, 398: §405
n. 24.

v. Gallagher, 4 Mich. 244: §10 n. 3.

v. Goodwin, 5 N. Y. 568: §§282 n.
6, 547 n. 1.

v. Green, 3 Hun, 755: §614 n. 2, 5.

v. Griswold 67 N. Y. 59; 2 N. Y.
Supm. Ct. 351: §650 n. 2.

People *v.* Haines, 49 N. Y. 587: §149 n. 1.

v. Hawley, 3 Mich. 330: §§6 n. 2, 156 n. 14.

v. Hayden, 6 Hill, 359: §614 n. 1.

v. Highway Comrs., 88 Ills. 141: §613 n. 5.

v. Highway Comrs., 14 Mich. 528: §382 n. 3.

v. Highway Comrs., 16 Mich. 63: §604 n. 2.

v. Highway Comrs., 40 Mich. 165: §382 n. 1.

v. Hinds, 30 N. Y. 470: §419 n. 2, 11.

v. Horton, 8 Hun, 357: §283 n. 4.

v. Hyde Park, 117 Ills. 462: §656 n. 1.

v. Jeffords, 2 Hun, 149: §614 n. 5.

v. Jones, 63 N. Y. 306: §394 n. 4.

v. Judge of Columbia, 2 Hill, 398: §547 n. 1.

v. Judge of Dutchess, 23 Wend. 360: §§283 n. 8, 548 n. 4.

v. Judge of Recorder's Court, 40 Mich. 64: §§343 n. 1, 650 n. 12.

v. Kerr, 27 N. Y. 188: §§100 n. 2, 114 n. 1, 2, 4; 119 n. 1, 124 n. 2, 125 n. 1, 5.

v. Kerr, 37 Barb. 357; 25 How. Pr. 258: §124 n. 2.

v. Kimball, 4 Mich. 95: §12 n. 3.

v. Kingman, 24 N. Y. 559: §283 n. 3.

v. Kniskem, 50 Barb. 87: §605 n. 1.

v. Kniskem, 54 N. Y. 52: §369 n. 1.

v. La Grange, 2 Mich. 187: §378 n. 5.

v. Lake Shore & M. S. Ry. Co., 52 Mich. 277: §156 n. 27.

v. Landreth, 1 Hun, 544: §§405 n. 16, 545 n. 7.

v. Law, 34 Barb. 494: §§124 n. 2, 363 n. 3.

v. Law, 22 How. Pr. 109: §§113 n. 3, 635 n. 2.

v. Lawrence, 54 Barb. 589: §539 n. 4.

v. Lewis, 26 How. Pr. 378: §530 n. 13.

v. Loew, 39 Hun, 490; 102 N. Y. 471: §452 n. 2.

v. Lowell, 9 Mich. 144: §613 n. 2.

v. Marshall, 6 Ills. 672: §10 n. 3.

v. May, 27 Barb. 238: §538 n. 1.

v. McDonald, 69 N. Y. 362: §261 n. 1.

v. McGann, 34 Hun, 358: §156 n. 14.

v. McRoberts, 62 Ills. 38: §456 n. 1.

People *v.* Mich. Southern R. R. Co., 3 Mich. 496: §§311 n. 2, 456 n. 2, 457 n. 2, 594 n. 1, 664 n. 1, 5.

v. Mott, 60 N. Y. 649: §423 n. 2, 3.

v. Nearing, 27 N. Y. 306: §§185 n. 1, 187 n. 3, 194 n. 2.

v. New York etc. R. R. Co., 45 Barb. 73: §§256 n. 5, 258 n. 1.

v. Osborn, 20 Wend. 186: §539 n. 1, 9.

v. Otis, 90 N. Y. 48: §59 n. 1.

v. Palmer, 52 N. Y. 83: §408 n. 1.

v. Parkes, 58 Cal. 624: §189 n. 4.

v. Pfeiffer, 59 Cal. 89: §551 n. 2.

v. Pittsburgh R. R. Co., 53 Cal. 694: §170 n. 13.

v. Platt, 17 Johns. 195: §156 n. 22.

v. Port Jervis, 100 N. Y. 283: §346 n. 4.

v. Potter, 36 Hun, 181: §405 n. 1.

v. Robertson, 17 How. Pr. 74: §369 n. 2.

v. Robinson, 29 Barb. 77: §321 n. 1.

v. Rochester, 50 N. Y. 525: §240 n. 9.

v. Ruthruff, 40 Mich. 175: §§382 n. 1, 549 n. 3.

v. Saginaw Co., 26 Mich. 22: §185 n. 1.

v. Schuyler, 69 N. Y. 242: §613 n. 2, 7.

v. Scott, 8 Hun, 566: §405 n. 33.

v. Smith, 7 Hun, 17: §§382 n. 3, 549 n. 3.

v. Smith, 15 Ills. 326: §537 n. 12.

v. Smith, 21 N. Y. 595: §§162 n. 3, 238 n. 1, 311 n. 2, 366 n. 1.

v. St. Louis, 5 Gil. 351: §72 n. 18.

v. Supervisors, 33 Cal. 487: §247 n. 3.

v. Supervisors, 5 Cow. 292: §613 n. 1, 6.

v. Supervisors, 3 Barb. 332: §12 n. 2.

v. Supervisors, 4 Barb. 64: §§247 n. 9, 656 n. 17.

v. Supervisors, 12 Barb. 446: §12 n. 2.

v. Supervisors, 36 How. Pr. 544: §377 n. 4.

v. Supervisors, 9 Mich. 144: §613 n. 6.

v. Supervisors, 20 Mich. 95: §134 n. 4.

v. Supervisors etc., 20 N. Y. 252: §288 n. 6.

v. Supervisors, 7 Wend. 530: §650 n. 10.

People *v.* Supervisors, 19 Wend. 102: §148 n. 1.
v. Syracuse, 63 N. Y. 291: §§405 n. 19, 408 n. 1, 2.
v. Syracuse, 78 N. Y. 56: §656 n. 12.
v. Tallman, 36 Barb. 222: §§364 n. 1, 366 n. 7, 368 n. 1.
v. Talmage, 46 Hun, 603: §548 n. 2.
v. Taylor, 34 Barb. 481: §§350 n. 1, 407 n. 6.
v. Thayer, 63 N. Y. 348: §601 n. 1.
v. Thompson, 65 How. Pr. 407: §130 n. 2.
v. Thompson, 67 How. Pr. 491: §270 n. 8.
v. Thompson, 98 N. Y. 6: §§270 n. 8, 276 n. 3.
v. Toll, 97 N. Y. 203: §213 n. 3.
v. Township Board, 2 Mich. 187: §499 n. 12, 613 n. 2, 6.
v. Township Board, 3 Mich. 121: §613 n. 7.
v. Township Board, 12 Mich. 434: §525 n. 9.
v. Township Board, 38 Mich. 558: §382 n. 3.
v. Toynbee, 2 Parker (N. Y.) 490: §10 n. 3.
v. Van Alstyne, 32 Barb. 131: §547 n. 1.
v. Van Alstyne, 3 Keyes, 35: §166 n. 4.
v. Wallace, 4 N. Y. Supm. Ct. 438: §548 n. 1.
v. Wasson, 64 N. Y. 167: §652 n. 1, 3.
v. White, 11 Barb. 26: §§278 n. 4, 596 n. 3.
v. Whitney's Point, 32 Hun, 508: §§308 n. 5, 349 n. 2, 369 n. 2, 525 n. 2.
v. Whitney's Point, 102 N. Y. 81: §§525 n. 2, 613 n. 7.
v. Williams, 51 Ills. 63: §§470 n. 4, 456 n. 1.
v. Williams, 36 N. Y. 441: §419 n. 2, 11.
 People's P. Ry. Co. *v.* Baldwin, 14 Phila. 231: §259 n. 10.
 Peoria *v.* Kidder, 26 Ills. 351: §5 n. 1.
 Peoria Co. *v.* Harvey, 18 Ills. 364: §537 n. 6.
 Peoria etc. R. R. Co. *v.* Barnum, 107 Ills. 160: §425 n. 1, 6.
v. Birkett, 62 Ills. 332: §§12 n. 2, 481 n. 4.

Peoria etc. R. R. Co. *v.* Bryant, 57 Ills. 473: §§441 n. 1, 496 n. 4.
v. Lansie, 63 Ills. 264: §441 n. 1.
v. Mitchell, 74 Ills. 394: §533 n. 2.
v. Peoria etc. R. R. Co., 66 Ills. 174: §§267 n. 5, 533 n. 3.
v. Peoria etc. Ry. Co., 105 Ills. 110: §§391 n. 2, 481 n. 4.
v. Rice, 75 Ills. 329: §§338 n. 1, 656 n. 1.
v. Sawyer, 71 Ills. 361: §§360 n. 2, 425 n. 1, 496 n. 2, 4, 7.
v. Schertz, 84 Ills. 135: §635 n. 5.
v. Warner, 61 Ills. 52: §§363 n. 2, 366 n. 7, 368 n. 1.

Pequeo River, Matter of, 41 N. J. L. 175: §200 n. 1.
 Perley *v.* B. C. & M. R. R. Co., 57 N. H. 212: §565 n. 1.
v. Chandler, 6 Mass. 454: §589 n. 12.
 Perrine *v.* Farr, 22 N. J. L. 356: §§167 n. 1, 453 n. 2.
 Perry *v.* New Orleans etc. R. R. Co., 55 Ala. 413: §§113 n. 3, 116 n. 2.
v. Sherborn, 11 Cush. 388: §361 n. 11.
v. Webb, 21 La. An. 247: §167 n. 3.
v. Wilson, 7 Mass. 393: §§71 n. 3, 240 n. 1 3.
v. Worcester, 6 Gray, 544: §§66 n. 5, 104 n. 1.
 Perrysburg etc. Co. *v.* Fitzgerald, 10 Ohio St. 513: §12 n. 3.
 Peter Townsend, Matter of, 39 N. Y. 171: §242 n. 5.
 Peters *v.* Fergus Falls, 35 Minn. 549: §89 n. 2.
v. Griffer, 108 Ind. 121: §379 n. 7.
v. Hastings etc. Ry. Co., 19 Minn. 260: §537 n. 5.
 Peterson *v.* Ferreby, 30 Ia. 327: §580 n. 1, 3, 5.
v. Navy Yard etc. Ry. Co., 5 Phila. 199: §124 n. 1.
 Petition for Highway, 48 N. H. 433: §421 n. 5.
 Pettengill *v.* County Comrs., 21 Me. 377: §348 n. 1.
 Pettibone *v.* LaCrosse etc. R. R. Co., 14 Wis. 443: §618 n. 5.
 Pettigrew *v.* Evansville, 25 Wis. 223: §103 n. 3.
 Petis *v.* Providence, 11 R. I. 372: §385 n. 1.
 Peyser *v.* N. Y. El. R. R. Co., 12 Abb. N. C. 276: §123 n. 6.

Peyser *v.* Met. El. R. R. Co., 12 Daly, 70; 13 Daly, 122: §123 n. 9.
v. Met. El. R. R. Co., 13 N. Y. C. P. 122: §493 n. 7.

Pfeifer *v.* Sheboygan etc. R. R. Co., 18 Wis. 155: §§621 n.1, 622 n.1.

Pflegar *v.* Hastings etc. Ry. Co., 28 Minn. 510: §496 n. 3.

Phelps *v.* Parish of Morehouse, 12 La. An. 649: §136 n. 3.

Phifer *v.* Carolina etc. R. R. Co., 72 N. C. 433: §§540 n. 6, 541 n. 8, 557 n. 2, 631 n. 2.
v. Cox, 21 Ohio St., 248: §590 n. 7.

Philadelphia *v.* Dickson, 38 Pa. S. 247: §§609 n. 1, 612 n. 2, 656 n. 22.
v. Empire Pass. R. R. Co., 3 Brews. 547: §115 n. 4.
v. Field, 58 Pa. S. 320: §10 n. 3.
v. Miskey, 68 Pa. S. 49: §499 n. 4, 9.
v. Randolph, 4 W. & S. 514: §§103 n. 6, 104 n. 1.
v. Scott, 81 Pa. S. 80: §§6 n. 2, 156 n. 34.
v. Slocum, 14 Phila. 141: §132 n. 1.
v. Thirteenth etc. R. R. Co., 8 Phila. 648: §636 n. 3.
v. Trenton R. R. Co., 6 Wharton, 25: §548 n. 2.
v. Wright, 100 Pa. S. 235: §§12 n. 6, 214 n. 1.

Philadelphia etc. R.R. Co., 6 Whart. 25: §§113 n. 8, 115 n. 4.
 7 Phila. 461: §582 n. 3.

Philadelphia etc. R. R. Co.'s Appeal, 102 Pa. S. 123: §§137 n. 1, 258 n. 5, 275 n. 3.

Philadelphia etc. R. R. Co. *v.* Cake, 95 Pa. S. 139: §509 n. 5.
v. Cooper, 105 Pa. S. 239: §§454 n. 2, 647 n. 4.
v. Getz, 113 Pa. S. 214; 105 Pa. S. 547: §488 n. 3.
v. Johnson, 2 Whart. 275: §§560 n. 1, 561 n. 3.
v. Lawrence, 10 Phila. 604: §587 n. 8.
v. Obert, 109 Pa. S. 193: §440 n. 2.
v. Penna. etc. R. R. Co., 16 Phila. 636: §267 n. 6.
v. Phila., 47 Pa. S. 325: §156 n. 34.
v. Phila., 9 Phila. 563: §§264 n. 7, 266 n. 8.
v. Smick, 2 Whart. 273: §540 n. 9.
v. Trimble, 4 Whart. 47: §§496 n. 6, 512 n. 2.

Philadelphia etc. R. R. Co. *v.* Williams, 54 Pa. S. 103: §§259 n. 5, 285 n. 2.

Phillip *v.* Pease, 39 Cal. 582: §499 n. 11.

Phillips *v.* Council Bluffs, 63 Ia. 576: §638 n. 2.
v. County Comrs., 122 Mass. 258: §260 n. 1.
v. Dunkirk, W. & P. R. R. Co., 78 Pa. S. 177: §113 n. 6.
v. Sherman, 61 Me. 548: §327 n. 3.
v. Sherman, 64 Me. 171: §64 n. 1, 2.
v. South Park Comrs., 119 Ills. 626: §§456 n. 1, 499 n. 2.
v. Pucker, 3 Met. (Ky.) 69: §§405 n. 8, 511 n. 6.
v. Watson, 63 Ia. 28: §171 n. 9.

Phinizy *v.* Augusta, 47 Ga. 260: §87 n. 2.

Phipps *v.* West Md. R. R. Co., 66 Md. 319: §§111 n. 2, 113 n. 3.

Piatt *v.* Covington & Cinn. Bridge Co., 8 Bush, 31: §136 n. 3.

Pick *v.* Rubicon Hydraulic Co., 27 Wis. 433: §§318 n. 6, 467 n. 6.

Pickering's Lessee *v.* Rutty, 1 S. & R. 511: §205 n. 3.

Pickert *v.* Richfield Park. R. R. Co., 25 N. J. Eq. 316: §684 n. 3.

Pickford *v.* Lynn, 98 Mass. 491: §§380 n. 4, 549 n. 4.

Pickman *v.* Peabody, 145 Mass. 480: §256 n. 29.

Piddicord *v.* Baltimore etc. R. R. Co., 34 Md. 463: §124 n. 1.

Piedmont etc. Ry. Co. *v.* Speelman, 67 Md. 260: §§255 n. 7, 631 n. 1, 633 n. 4.

Pierce *v.* Boston etc. R. R. Co., 141 Mass. 481: §588 n. 2.
v. County Comrs., 63 Me. 252: §509 n. 5.
v. Drew, 136 Mass. 75: §§131 n. 1, 172 n. 1, 637 n. 4.
v. Somersworth, 10 N. H. 369: §140 n. 3.
v. Worcester etc. R. R. Co., 105 Mass. 199: §497 n. 1.

Piercy *v.* Morris, 2 Ired. L. 168: §540 n. 2.

Pierpont *v.* Harrisville, 9 W. Va. 215: §§631 n. 1, 632 n. 1.

Pillsbury *v.* Springfield, 16 N. H. 565: §§520 n. 2, 655 n. 1.

Pinchin *v.* London etc. Ry. Co., 24 L. J. n. s. Ch. 417: §278 n. 10.
v. London etc. Ry. Co., 5 De G. McN. & G. 851: §284 n. 3.

Pine Grove *v.* Talcott, 19 Wall. 666: §155 n. 5.

Pinkerton *v.* Boston etc. R. R. Co., 109 Mass. 527: §§319 n. 1.

Pinkham *v.* Chelmsford, 109 Mass. 225: §§435 n. 1, 437 n. 6, 648 n. 7, 8.

v. Chelmsford, 110 Mass. 224: §480 n. 2.

Piper *v.* Connerville etc. Co., 12 Ind. 400: §§311 n. 2, 419 n. 3.

Pifer *v.* Union Pac. R. R. Co., 14 Kan. 568: §505 n. 15.

Piollet *v.* Simmons, 106 Pa. S. 95: §589 n. 3, 10.

Pipkin *v.* Wynam, 2 Dev. 402: §141 n. 6.

Piscataqua Bridge Co. *v.* N. H. Bridge Co., 7 N. H. 35: §§10 n. 2, 137 n. 1, 8, 4; 138 n. 2, 275 n. 1, 452 n. 6, 458 n. 8, 642 n. 1.

Pitcher *v.* United States, 1 Ct. of Cl. 7: §153 n. 4.

Pitkin *v.* Springfield, 112 Mass. 509: §§261 n. 1, 477 n. 1.

Pittsburgh *v.* Cluley, 74 Pa. S. 262: §605 n. 1.

v. Irwin's Exs. 85 Pa. S. 420: §617 n. 1.

v. Scott, 1 Pa. S. 309: §§158 n. 1, 164 n. 5, 177 n. 4, 254 n. 4, 456 n. 2, 457 n. 4, 606 n. 7.

Pittsburg, District of City of, 2 W. & S. 320: §10 n. 4.

Pittsburgh Bank *v.* Shoenberger, 111 Pa. S. 95: §279 n. 2.

Pittsburgh etc. R. R. Co. *v.* Bentley, 88 Pa. S. 178: §488 n. 3.

v. Bruce, 102 Pa. S. 23: §§141 n. 13, 254 n. 1, 278 n. 3, 596 n. 1, 2; 647 n. 16.

v. Patterson, 107 Pa. S. 461: §§443 n. 7, 480 n. 8, 487 n. 1, 5.

v. Com'th, 101 Pa. S. 192: §653 n. 2.

v. Com'th., §104 Pa. S. 583: §140 n. 3.

v. Gilleland, 56 Pa. S. 445: §§565 n. 1, 567 n. 2, 571 n. 1, 574 n. 1.

v. Hall, 25 Pa. S. 336: §§327 n. 2, 515 n. 4.

v. Jones, 59 Pa. S. 433: §647 n. 4, 16.

v. Jones, 111 Pa. S. 204: §§136 n. 4, 484 n. 2.

v. McClosky, 110 Pa. S. 436: §§469 n. 10, 497 n. 1, 498 n. 1.

v. Reich, 101 Ills. 157: §§225 n. 3, 475 n. 12.

v. Reide, 101 Ills. 157: §§225 n. 1.

Pittsburgh etc. R. R. Co. *v.* Robinson, 95 Pa. S. 426: 346 n. 8, 435 n. 1, 437 n. 15, 476 n. 5.

v. Rose, 74 Pa. S. 362: §219 n. 6.

v. Swinney, 97 Ind. 586: §§320 n. 2, 655 n. 1, 658 n. 3.

v. Vance, 115 Pa. S. 325: §§487 n. 12, 443 n. 7, 478 n. 2, 8.

Pittsfield etc. R. R. Co. *v.* Foster, 1 Cush. 480: §410 n. 4.

Pitzer *v.* Williams, 2 Rob. Va. 241: §379 n. 1.

Plainfield *v.* Packer, 11 Conn. 576: §358 n. 2.

Plank Road Co. *v.* Ramage, 20 Pa. S. 95: §§453 n. 1, 3; 496 n. 1, 498 n. 1.

v. Rea, 20 Pa. S. 97: §469 n. 10.

v. Thomas, 20 Pa. S. 91: §§433 n. 3, 453 n. 1, 3, 5.

Plant *v.* Long Island R. R. Co., 10 Barb. 26: §§109 n. 4, 111 n. 5, 147 n. 2.

Platt *v.* Bright, 29 N. J. Eq. 128: §§324 n. 1, 4; 628 n. 4.

v. Penn. Co., 43 Ohio St. 228: §470 n. 7.

Platter *v.* Seymour, 86 Ind. 323: 103 n. 4.

Pleasant *v.* Kost, 29 Ills. 490: §5 n. 1.

Plecker *v.* Rhodes, 30 Gratt. 795: 168 n. 1.

Plimmons *v.* Frisby, Winston Law, 201: §167 n. 2.

Plott *v.* Western N. C. R. R. Co., 65 N. C. 74: §623 n. 3.

Plum *v.* Morris Canal Co., 10 N. J. Eq. 256: §96 n. 1.

Plumer *v.* Wausau Boom Co., 49 Wis. 449: §338 n. 4.

Plummer *v.* Sturtevant, 32 Me. 325: §149 n. 1.

v. Waterville, 32 Me. 566: §§601 n. 1, 602 n. 1.

Plymouth *v.* County Comrs. 16 Gray, 341: §419 n. 3.

v. Russell Mills, 7 Allen, 438: §652 n. 4.

Plympton *v.* Woburn, 11 Gray, 415: §494 n. 3.

Pocopson Road, 16 Pa. S. 15: §167 n. 21.

Pollack *v.* Trustees, 48 Cal. 490: §134 n. 4.

Pollard *v.* Ferguson, 1 Litt. 196: §423 n. 2, 7.

v. Moore, 51 N. H. 188: §655 n. 6.

Pollard's Lessee v. Hagan: 3 How. 212: §§1 n. 1, 76 n. 7.

Polly v. Saratoga etc. R. R. Co., 9 Barb. 449: §§10 n. 2, 145 n. 3, 367 n. 1, 418 n. 1.

Pomeroy v. Chicago etc. Ry. Co., 25 Wis. 641: §§318 n. 4, 507 n. 13.

v. Milwaukee etc. R. R. Co., 16 Wis. 640: §113 n. 3.

Pond v. Met. El. R. R. Co., 42 Hun, 567: §§123 n. 9, 493 n. 7.

v. Milford, 35 Conn. 32: §406 n. 1.

Pontchartrain R. R. Co. v. La Fayette etc. R. R. Co., 10 La. An. 741: §257 n. 2.

Pontiac v. Carter, 32 Mich. 164: §§96 n. 1, 97 n. 1, 3; 107 n. 2.

Pool v. Breese, 114 Ills. 594: §§541 n. 3, 631 n. 9.

v. Trexler, 76 N. C. 297: §§185 n. 2, 186 n. 2, 6; 188 n. 4, 195 n. 2.

Poor v. Blake, 123 Mass. 543: §§583 n. 3, 662 n. 3.

Port Huron etc. Ry. Co. v. Callanan, 61 Mich. 12: §311 n. 7.

v. Voorhies, 50 Mich. 506: §§416 n. 10, 475 n. 9.

Porter v. Allen, 8 Ind. 1: §72 n. 12.

v. County Comrs., 13 Met. 479: §366 n. 7.

v. Durham, 74 N. C. 767: §§88 n. 1, 2.

v. North Mo. R. R. Co., 33 Mo. 128: §111 n. 2.

v. Stout, 73 Ind. 3: §§335 n. 11, 605 n. 5.

Portland v. Kamm, 5 Or. 362: §541 n. 8.

v. Kamm, 10 Or. 383: §§436 n. 7, 481 n. 2, 570 n. 1.

v. Lee Sam, 7 Or. 397: §663 n. 4.

Portland etc. R. R. Co. v. Comrs., 64 Me. 505: §555 n. 8.

v. County Comrs., 65 Me. 292: §532 n. 2.

v. Deering, 78 Me. 61: §§156 n. 28, 491 n. 6.

v. Grand Trunk Ry. Co., 46 Me. 69: §246 n. 2.

Post v. Kreischer, 32 Hun, 49: §85 n. 12.

Poston v. Terry 5 J. J. Marsh, 220: §410 n. 1.

Potter v. Ames, 43 Cal. 75: §§376 n. 4, 456 n. 1, 649 n. 2, 664 n. 1.

Pott's Appeal, 15 Pa. S. 414: §530

Poughkeepsie etc. R. R. Co., Matter of, 63 Barb. 151: §475 n. 15.

Powell v. Alabama, 31 Ala. 552: §156 n. 31.

v. Clelland, 82 Ind. 24: §626 n. 1.

v. Hitchner, 32 N. J. L. 211: §§353 n. 2, 525 n. 4.

v. Lash, 64 N. C. 456: §67 n. 9.

Powelton Ave., *In re*, 11 Phila. 447: §308 n. 7.

Power v. Athens, 99 N. Y. 592; 26 Hun, 282: §§136 n. 1, 137 n. 4, 642 n. 2.

Powers v. Armstrong, 19 Ga. 427: §456 n. 2.

v. Bears, 12 Wis. 213: §§313 n. 5, 456 n. 2, 458 n. 1, 631 n. 2.

v. Council Bluffs, 45 Ia. 652: §§625 n. 2, 666 n. 2.

v. Council Bluffs, 50 Ia. 197: §103 n. 7.

v. Harment, 51 Mo. 136: §606 n. 2.

v. Irish, 23 Mich. 429: §§348 n. 1, 428 n. 7.

v. Railway Co., 33 Ohio St. 429: §§301 n. 1, 2; 304 n. 6, 391 n. 3, 480 n. 11.

Powers' Appeal, 29 Mich. 504: §§378 n. 13, 393 n. 2.

Poynder v. Great Northern Ry. Co., 2 Phillips, 330: §631 n. 1.

Prather v. Ellison, 10 Ohio, 396: §590 n. 8.

v. Jeffersonville etc. R. R. Co., 52 Ind. 16: §§12 n. 6, 259 n. 2, 456 n. 2, 3.

v. Western Union Tel. Co., 89 Ind. 501: §277 n. 2.

Pratt v. Brown, 8 Wis. 603: §§3 n. 7, 180 n. 12, 247 n. 3.

v. Buffalo City Ry. Co., 19 Hun, 30: §§114 n. 5, 635 n. 4.

v. Des Moines N. W. Ry. Co., 72 Ia. 249: §667 n. 6.

v. People, 13 Hun, 664: §603 n. 4.

Preble v. Portland, 45 Me. 241: §366 n. 1.

Prentiss v. Parks, 65 Me. 559: §§369 n. 2, 604 n. 2.

Presbrey v. Old Colony etc. R. R. Co., 103 Mass. 1: §§447 n. 1, 2; 586 n. 4.

Prescott v. Beyer, 34 Minn. 498: §§297 n. 8, 603 n. 4, 631 n. 1, 8.

v. Curtes, 42 Me. 64: §350 n. 6.

v. Patterson, 44 Mich. 525: §§369 n. 2, 382 n. 1, 649 n. 2.

President etc. v. Diffebach, 1 Yates, 367: §303 n. 2, 4.

President etc. v. Mifflin, 1 Leates, 430: §509 n. 11.
v. State, 45 Ala. 399: §155 n. 5.

Preston *v.* Dubuque etc. R. R. Co., 11 Ia. 15: §§587 n. 2, 5, 8.

Price *v.* Knott, 8 Oreg. 438: §§105 n. 4, 638 n. 1.
v. Milwaukee etc. Ry. Co., 27 Wis. 98: §§481 n. 1, 488 n. 2, 496 n. 7.
v. Povton, 1 Bush. (Ky.) 387: §§ n. 7.
v. Southbury, 29 Conn. 490: §513 n. 4.
v. Weehawken Ferry Co., 31 N. J. Eq. 31: §§289 n. 1, 507 n. 2.

Princeton *v.* Templeton, 71 Ills. 68: §500 n. 6.

Private Road, 1 Ashmead, 417: §500 n. 4.

Private Road etc., 112 Pa. S. 183: 369 n. 1, 382 n. 1, 3.

Proctor *v.* Andover, 42 N. H. 348: §167 n. 1.

Proetz *v.* St. Paul Water Co., 17 Minn. 163: §507 n. 15.

Propeller Genesee Chief, 12 How. 443: §72 n. 3.

Proprietors of Toll Bridge, Petitioners, 11 Me. 263: §§614 n. 6, 650 n. 11.

Proprietors etc. *v.* Jones, 36 N. J. L. 206: §389 n. 1.
v. Lowell, 7 Gray, 223: §§271 n. 10, 276 n. 3.
v. Nashua etc. R. R. Co., 10 Cush. 385: §§220 n. 8, 319 n. 2, 336 n. 2, 5.

v. Nashua etc., R. R. Co., 104 Mass. 1: §584 n. 8.

Prospect Park etc. R. R. Co., *v.* Williamson, 91 N. Y. 552: §§266 n. 6, 276 n. 9, 643 n. 2.

Matter of, 13 Hun, 345: §§113 n. 3, 493 n. 2.

Matter of, 16 Hun, 261: §493 n. 2.

Matter of, 24 Hun, 199: §524 n. 9.

Matter of, 67 N. Y. 371: §302 n. 4.

Matter of, 85 N. Y. 489: §536 n. 1.

P:osser *v.* Davis, 18 Ia. 367: §141 n. 6.
v. Wapello, 18 Ia. 262: §§141 n. 6, 436 n. 15.

Protsman *v.* Indianapolis etc. R. R. Co., 9 Ind. 467: §§113 n. 3, 114 n. 4, 115 n. 4, 117 n. 2, 624 n. 1.

Providence *v.* Droon, 20 Ind. 238: §540 n. 1.

Providence etc. R. R. Co. *v.* Nor-wich etc. R. R. Co., 138 Mass. 277: §§267 n. 4, 276 n. 3.

Provolt *v.* Chicago etc. R. R. Co., 57 Mo. 256: §§298 n. 1, 648 n. 1.
v. Chicago etc. R. R. Co., 69 Mo. 633: §§618 n. 1, 2; 620 n. 2, 621 n. 1, 2; 634 n. 2.

Pruyn *v.* Graham, 1 Wend. 370: §394 n. 4.

Public Roads, 5 Harr. 174: §§378 n. 18, 405 n. 1.

Public Road in Bensinger, 115 Pa. S. 436: §529 n. 1.

Pueblo etc. R. R. Co., *v.* Rudd, 5 Col. 270: §§509 n. 5, 520 n. 1.

Pulling *v.* London etc. Ry. Co., 33 Beav. 644; 3 De G. J. & S. 661: §284 n. 3.

Pumfilly *v.* Green Bay Co., 13 Wall. 166: §§11 n. 1, 59 n. 1, 67 n. 2, 71 n. 2, 87 n. 2, 91 n. 5, 182 n. 2, 183 n. 1.

Purdy *v.* Martin, 31 Mich. 455: §§382 n. 3, 549 n. 3.

Pusey *v.* Allegheny, 98 Pa. S. 522: §§223 n. 1, 6, 481 n. 2, 570 n. 2.
v. Wright, 31 Pa. S. 387: 296 n. 8.

Pusey's Appeal, 83 Pa. S. 67: §§313 n. 7, 427 n. 1.

Putnam *v.* Douglass Co., 6 Or. 328: §470 n. 8.

Pye *v.* Mankato, 36 Minn. 373: §89 n. 4.

Q.

Quayle *v.* Missouri etc. Ry. Co., 63 Mo. 465: §§419 n. 5, 603 n. 1.

Queen *v.* Birmingham etc. Ry. Co., 4 Eng. L. & Eq. 276; 6 Ry. Cas. 628: §660 n. 1.

v. Brown, 2 L. R. Q. B. 630: §479 n. 10.

v. Cambria Ry. Co., L. R. 6 Q. B. 422: §228 n. 2.

v. Cambria Ry. Co., 40 L. J. Q. B. 169: §138 n. 4.

v. Comrs., 15 A. & E. N. S. 761: §660 n. 1.

v. Darlington Local Board, 35 L. J. Q. B. 45: §607 n. 7.

v. Eastern Counties Ry. Co., 2 A. & E. n. s. 347: §223 n. 1.

v. Eastern Counties Ry. Co., 2 A. & E. n. s. 347: §225 n. 1.

v. Lancaster etc. Ry. Co., 6 A. & E. n. s. 759: §401 n. 6.

v. London etc. Ry. Co., 3 A. & E. n. s. 166: §284 n. 3.

Queen *v.* London etc. Ry. Co., 23 N. J. Q. B. 185: §440 n. 4.
v. London etc. Ry. Co., 3 E. & B. 443: §516 n. 3.
v. London etc. Ry. Co., 16 A. & E. n. s. 864: §614 n. 3.
v. Vaughan, 38 L. J. Q. B. 71: §483 n. 21.
v. Vaughan, 4 L. R. Q. B. 190: §487 n. 1.
v. Vestry of St. Luke's etc., L. R. 6 Q. B. 572; 7 *Ibid.* 148: §223 n. 1.
v. Wallasey Local Board of Health, L. R. 4 Q. B. 351: §223 n. 1.
v. York etc. Ry. Co., 16 A. & E. n. s. 886; §614 n. 3.
Quick *v.* White Water, 7 Ind. 570: §10 n. 3.
Quigley's Case, 3 P. & W. 139: §469 n. 10.
Quimby *v.* Vt. Cent. R. R. Co., 23 Vt. 387: §278 n. 7.
Quincy *v.* Jones, 76 Ills. 231: §§96 n. 1, 97 n. 2, 101 n. 2, 151 n. 2, 569 n. 2.
Quincy etc. R. R. Co. *v.* Kellogg, 54 Mo. 334: §§336 n. 11, 350 n. 6, 7.
v Ridge, 57 Mo. 599: §469 n. 6.
v Taylor, 43 Mo. 35: §371 n. 2.
Quinn *v.* C. B. & Q. R. R. Co., 63 Ia. 510: §152 n. 6.
Quinton *v.* Burton, 61 Ia. 471: §589 n. 5, 11.

R.

Radcliff *v.* Brooklyn, 4 N. Y. 195: §§95, 96 n. 1, 97 n. 2, 3; 98 n. 12, 101 n. 2, 111 n. 2, 569 n. 1.
Radnor *v.* Road, 5 Binn. 612: §405 n. 1.
Railway Co. *v.* Alling, 99 U. S. 463: §306 n. 5.
v. Bohn, 34 Ohio St. 114: §353 n 1.
v. Boyer, 13 Pa. S. 497: §§326 n. 1, 335 n. 3, 336 n. 2, 4.
v. Bucher, 7 Watts, 33: §327 n. 1.
v. Calderwood, 15 La. An. 481: §468 n. 3.
v. Carr, 38 Ohio St. 448: §66 n. 11.
v. Cobb, 35 Ohio St. 94: §499 n. 12.
v. County Comrs., 79 Me. 386: §156 n. 29.
v. Foreman, 24 W. Va. 662: §§436 n. 10, 467 n. 5, 580 n. 1, 3.
v. Gesner, 20 Pa. S. 240: §§499 n. 1, 524 n. 3.

Railway Co. *v.* Gilson, 8 Watts, 243: §§469 n. 10, 474 n. 3, 496 n. 8.
v. Hambleton, 40 Ohio St. 496: §§115 n. 4, 424 n. 1, 625 n. 7.
v. Lawrence, 38 Ohio St. 41: §635 n. 6.
v. Longworth, 30 Ohio St. 108: §479 n. 10.
v. Railroad Co., 36 Ohio S. 239: §124 n. 6, 490 n. 1, 3.
v. Railway Co., 30 Ohio St. 604: §§268 n. 1, 489 n. 2.
v. Renwick, 49 Ia. 664: §84 n. 2.
v. Renwick, 102 U. S. 180: §§75 n. 3, 84 n. 2.
v. Richmond, 96 U. S. 521: §56 n. 23.
v. Robbins, 35 Ohio St. 531: §623 n. 1.
v. Schurmeier, 7 Wall. 272: §72 n. 21.
v. State, 9 Bax. 522: §252 n. 1.
v. Tyrce, 7 W. Va. 693: §467 n. 5.
v. Williams, 35 Ohio St. 168: §§111 n. 2, 113 n. 3.
v. Yeiser, 8 Pa. S. 366: §497 n. 1.
Raleigh etc. R. R. Co. *v.* Davis, 2 Dev. & B. L. 451: §§3 n. 7, 10 n. 2, 11 n. 1, 277 n. 1, 311 n. 2, 313 n. 1, 456 n. 2, 3.
v. Jones, 1 Ired. L. 24: §552 n. 2.
v. Wicher, 74 N. C. 220: §§89 n. 1, 469 n. 9.
Ramsden *v.* Manchester etc. Ry. Co., 1 Exch. 723: §649 n. 2.
Ramsey *v.* Stees, 28 Minn. 326: §279 n. 2.
Rand *v.* Townshend, 26 Vt. 670: §§318 n. 4, 336 n. 2.
Randall *v.* Texas Cent. Ry. Co., 63 Tex. 586: §§289 n. 5, 322 n. 5.
Randle *v.* Pacific R. R. Co., 65 Mo. 325: §§115 n. 2, 4; 117 n. 2, 8; 435 n. 1, 3; 493 n. 5, 13.
Randolph *v.* Comrs., 8 Ills. App. 128: §353 n. 1.
Raritan Water Power Co. *v.* Veghte, 21 N. J. Eq. 463: §298 n. 4.
Rathke *v.* Gardner, 134 Mass. 14: §89 n. 3.
Ravenswood *v.* Flemings, 22 W. Va. 52: §§72 n. 19, 83 n. 3, 85 n. 6.
Rawstrow *v.* Taylor, 11 Exch. 367: §90 n. 1.
Ray *v.* Atchison etc. R. R. Co., 4 Neb. 439: §§618 n. 1, 2; 631 n. 2.

Ray *v.* Fletcher, 12 Cush. 200: §300 n. 2.

Raymond *v.* Clay Co., 68 Ia. 130: §538 n. 15.

- v.* County Comrs., 63 Me. 110: §414 n. 1, 2.
- v.* County Comrs., 63 Me. 112: §348 n. 3.
- v.* Fish, 51 Conn. 80: §156 n. 3.
- v.* Griffin, 23 N. H. 340: §525 n. 1.

Read *v.* Cambridge, 126 Mass. 427: §324 n. 1.

Reading *v.* Althouse, 93 Pa. S. 400: §2:9 n. 3, 5.

- v.* Keppleman, 61 Pa. S. 233: §96 n. 1.

Readington *v.* Dilley, 24 N. J. L. 209: §§496 n. 4, 498 n. 1, 549 n. 9.

Reardon *v.* San Francisco, 66 Cal. 492: §§223 n. 1, 232 n. 2, 236 n. 1.

Reckner *v.* Warner, 22 Ohio St. 275: §§312 n. 1, 3; 652 n. 6, 664 n. 1, 6.

Red River Bridge Co. *v.* Clarks-ville, 1 Sneed, 176: §§271 n. 1, 274 n. 1, 615 n. 1, 642 n. 1.

Red River etc. R. R. Co. *v.* Sture, 32 Minn. 95: §§264 n. 4, 330 n. 2, 514 n. 12.

Reddall *v.* Bryan, 14 Md. 444: §§173 n. 2, 203 n. 3.

Reddin *v.* Met. Board of Works, 31 L. J. Ch. 660: §284 n. 3.

Redmen *v.* Phila. etc. Ry. Co., 33 N. J. Eq. 165: §§454 n. 2, 5; 631 n. 2.

Reed *v.* Acton, 117 Mass. 384: §512 n. 4.

- v.* Acton, 120 Mass. 130: §§517 n. 11, 519 n. 5.
- v.* Chicago etc. Ry. Co., 25 Fed. R. 886: §§315 n. 3, 477 n. 8, 532 n. 9.
- v.* Hanover Branch R. R. Co., 105 Mass. 303: §§321 n. 2, 336 n. 2, 6; 477 n. 1, 14; 499 n. 14.
- v.* Leeds, 19 Conn. 182: §589 n. 3.
- v.* Louisville Bridge Co., 8 Bush, 69: §393 n. 4.

Rees *v.* Addams, 16 S. & R. 40: §629 n. 2.

- v.* Chicago, 38 Ills. 322: §§606 n. 1, 5.

Reeves *v.* Treasurer, 8 Ohio St. 333: §§149 n. 1, 196 n. 1.

- v.* Wood Co., 8 Ohio St. 333: §188 n. 4.

Regina *v.* Met. Board of Works, 3 B. & S. 710: §90 n. 2.

- v.* Met. Board of Works, 38 L. J. Q. B. 210: §229 n. 2.
- v.* State, L. R. 1; Q. B. 529: §483 n. 21.
- v.* Met. Board of Works, L. R. 4; Q. B. 358: §229 n. 2, 3.

Reid *v.* Atlanta, 73 Ga. 523: §36 n. 7.

- v.* Wall Township, 34 N. J. L. 275: §612 n. 3.

Reiff *v.* Conner, 10 Ark. 241: §534 n. 3.

Reisner *v.* Strong, 24 Kan. 410: §§391 n. 2, 618 n. 5.

- v.* Union Depot etc. Co., 27 Kan. 382: §§472 n. 3, 475 n. 9, 499 n. 8.

Reitenbaugh *v.* Chester Valley R. R. Co., 21 Pa. S. 100: §§301 n. 1, 304 n. 1, 357 n. 2, 364 n. 1, 369 n. 1, 509 n. 8.

Remy *v.* Municipality No. 2, 12 La. An. 500: §416 n. 8.

Rensselaer *v.* Leopold, 106 Ind. 29: §§96 n. 1, 100 n. 2, 134 n. 11, 265 n. 7.

Renssalaer etc. R. R. Co., *v.* Davis, 43 N. Y. 137: §§170 n. 4, 5, 9; 393 n. 4, 9; 561 n. 1.

Matter of, 4 Paige, 553: §498 n. 8.

Renthorp *v.* Bourg, 4 Martin O. S. 97: §11 n. 1.

Rentz *v.* Detroit, 48 Mich. 544: §§515 n. 3, 5; 556 n. 1.

Renwick *v.* D. & N. W. Ry. Co., 49 Ia. 664: §§82 n. 3, 483 n. 12.

- v.* D. & N. W. Ry. Co., 102 U. S. 180: §82 n. 3.

Reock *v.* Newark, 33 N. J. L. 129: §624 n. 4.

Republican Valley R. R. Co., *v.* Arnold, 13 Neb. 485: §§435 n. 1, 436 n. 17, 437 n. 5.

- v.* Fink, 18 Neb. 82: §§608 n. 1, 2; 649 n. 2.
- v.* Hayes, 13 Neb. 489: §§436 n. 17, 441 n. 1.
- v.* Linn, 15 Neb. 234: §435 n. 1.

Rerick *v.* Kern, 14 S. & R. 267: §298 n. 1.

Respublica *v.* Sparhawk, 1 Dall. 357: §8 n. 4.

Rettinger *v.* Passaic, 45 N. J. L. 146: §606 n. 7.

Reusch *v.* C. B. & Q. R. R. Co., 57 Ia. 687: §170 n. 10.

TABLE OF CASES CITED.

ci

Rexford v. Knight, 15 Barb. 627:
 §§278 n. 4, 470 n. 6,
 v. Knight, 11 N. Y. 308: §§456 n.
 2, 596 n. 3, 664 n. 1, 5.

Reynolds v. Dunkirk etc. R. R. Co.,
 17 Barb. 613: §289 n. 11.
 v. Reynolds, 15 Conn. 83: §§167
 n. 3, 17; 532 n. 1.
 v. Shreeveport, 13 La. An. 426:
 §§96 n. 1, 97 n. 3, 107 n. 2.
 v. Shults, 106 Ind. 291: §540 n. 1.
 v. Spears, 1 Stew. 34: §254 n. 1.

Rheimer v. Stillwater etc. Co., 29
 Minn. 147: §524 n. 2.

Rhine v. McKinney, 53 Tex. 354:
 §§311 n. 2, 313 n. 2, 6; 631 n. 4.

Rhineback etc. R. R. Co., Matter of,
 8 Hun. 34: §§532 n. 10, 656 n. 11.

Rhineback etc. R. R. Co., Matter of,
 67 N. Y. 242: §656 n. 11.

**Rhodes v. Airedale Drainage
 Comrs.**, L. R. 1 C. P. Div. 402:
 §§229 n. 4, 610 n. 12.
 v. Cleveland, 10 Ohio, 159: §§98
 n. 6, 7; 103 n. 3.
 v. Comrs., 45 L. J. Com. Pleas,
 337: §326 n. 2.

Rice v. Alley, Sneed, 51: §167 n. 2.
 v. Barre Turnpike Co., 4 Pick.
 130: §627 n. 13.
 v. Danville etc. Co., 7 Dana, 81:
 §§468 n. 2, 551 n. 1.
 v. Evansville, 108 Ind. 7: §86 n. 5.
 v. Rindge, 53 N. H. 580: §166 n. 7.
 v. Ruddiman, 10 Mich. 125: §§72
 n. 14, 76 n. 6, 83 n. 1.

Rich v. Chicago, 59 Ills. 286: §§311
 n. 2, 363 n. 2.
 v. Gow, 19 Ills. App. 81: §646 n. 2.

**Richards v. Des Moines Valley R.
 R. Co.**, 18 Ia. 259: §§618 n. 1,
 634 n. 2.

Richardson v. Curtis, 2 Cush. 341:
 §427 n. 1.
 v. Vt. Cent. R. R. Co., 25 Vt. 465:
 §§115 n. 4, 118 n. 4, 151 n. 3.

Riche v. Bar Harbor Water Co., 75
 Me. 91: §§161 n. 1, 173 n. 2, 378
 n. 11, 456 n. 2.

Richman v. Supervisors, 70 Ia. 627:
 §§346 n. 1, 544 n. 3, 549 n. 2.

**Richmond v. James River etc. Co.,
 12 Leigh**, 278: §270 n. 8.
 v. Lexington etc. Road Co., 1 Du-
 vall, 135: §484 n. 2.

**Richmond Manufacturing Co., v.
 Atlantic De Laine Co.**, 10 R. I.
 106: §65 n. 1.

**Richmond etc. R. R. Co. v. Louisa
 R. R. Co.**, 13 Hun. 71: §139 n. 5.
 v. Wicker, 13 Gratt. 375: §281 n. 5.

Rickett v. Met. Ry. Co., 5 B. & S.
 140: §227 n. 3.
 v. Met. Ry. Co., L. R. 2 H. L. 175:
 §§222 n. 3, 227 n. 3.

Riddell v. Animas etc. Road Co., 5
 Col. 230: §307 n. 1.

Ridenour v. Saffin, 1 Handy, 464:
 §5 n. 4.

Ryder v. Stryker, 2 Hun, 115: §457
 n. 8.
 v. Stryker, 63 N. Y. 136: §§456 n.
 2, 457 n. 8.

Ridge Ave, In re, 99 Pa. S. 469:
 §214 n. 1.

Ridge Street, In re, 29 Pa. S. 391:
 §§96 n. 1, 481 n. 2, 570 n. 2.

Ridge Turnpike Co. v. Sloerer, 6
 W. & S. 378: §§591 n. 1, 3; 649
 n. 7.

Riffe v. Chicago etc. R. R. Co., 22
 Minn. 44: §582 n. 1.

Rigney v. Chicago, 102 Ills. 64:
 §§227 n. 4, 235 n. 3, 232 n. 2, 236
 n. 1.

Riker v. New York, 3 Daly, 174:
 §505 n. 3.

Rinehart v. Cowell, 44 N. J. L. 360:
 §545 n. 7.

Ring v. Mississippi Bridge Co., 57
 Mo. 496: §623 n. 1.

Rio Grande R. R. Co. v. Brownsville, 45 Tex. 88: §§119 n. 3, 257
 n. 1.

**Ripley v. Great Northern Ry. Co.,
 L. R. 10 Ch. App. 435**: §222 n. 1.

**Rising Sun etc. Turnpike, v. Ham-
 ilton**, 50 Ind. 580: §350 n. 6.

Road Case, 6 Phila. 143: §845 n. 9.
 4 W. & S. 39: §§280 n. 5, 511 n. 1.
 4 Yates, 514: §§167 n. 3, 351 n. 7.

Road Leading etc., 1 Brown, 210:
 §§405 n. 28, 419 n. 2, 3.

Road Notices, 4 Harr. 324: §373 n. 1.

Roads, 2 T. B. Mon. 91: §379 n. 5.

Road at May Town, 4 Yeats, 479:
 §405 n. 1.

Road from App's Tavern, 17 S. &
 R. 388: §§363 n. 6, 406 n. 2, 419
 n. 3.

Road from McClaysburg, 4 S. & R.
 200: §405 n. 1.

Road from McCord's, 13 S. & R. 83:
 §511 n. 13.

Road from Mrs. Cully's, 13 S. & R.
 25: §419 n. 15.

Road in Allen Township, 18 Pa. S. 463: §§405 n. 8, 407 n. 1.

Road in Baldwin Township, 36 Pa. S. 9: §517 n. 10.

Road in Bucks County, 3 Whart. 105: §578 n. 3.

Road in Byberry, 6 Phila. 384: §§517 n. 3, 5; 525 n. 2.

Road in Chartier's Township, 34 Pa. S. 276: §405 n. 26.

Road in Charlestown, 2 Phila. 126: §409 n. 1.

Road in Chester Co. 4 Yeates, 433: §546 n. 4.

Road in East Donegal, 90 Pa. S. 190. §413 n. 2.

Road in Franklin Co., 2 Yeates, 53: §530 n. 8.

Road in Indiana Co., 51 Pa. S. 296: §530 n. 11.

Road in Kiskiminitas, 32 Pa. S. 9: §551 n. 6.

Road in Lancaster City, 68 Pa. S. 396: §§335 n. 10, 369 n. 1, 385 n. 1.

Road in Lathrop Township, 84 Pa. S. 126: §532 n. 3.

Road in Lewiston, 84 Pa. S. 410: §530 n. 10.

Road in Little Britain, 27 Pa. S. 69: §§408 n. 6, 419 n. 14.

Road in Lower Merion, 58 Pa. S. 66: §511 n. 17.

Road in Lower Salford, 25 Pa. S. 524: §394 n. 2.

Road in Lower Windsor, 29 Pa. S. 18: §405 n. 14.

Road in Macungie, 26 Pa. S. 221: §§412 n. 11, 548 n. 2.

Road in Norristown etc. 4 Pa. S. 337: §513 n. 6.

Road in O'Hara, 87 Pa. S. 366: §512 n. 9.

Road in Pitt Township, 1 Pa. S. 356: §532 n. 4.

Road in Plum Creek Township, 110 Pa. S. 544: §382 n. 3.

Road in Plymouth, 5 Rawle, 150: §421 n. 2.

Road in Reserve Township, 2 Grant's Cas. 204: §517 n. 6.

Road in Salem, 103 Pa. S. 25: §517 n. 3, 7.

Road in South Abington, 109 Pa. S. 118: §§364 n. 1, 368 n. 1, 382 n. 1, 522 n. 2.

Road in Springdale, 91 Pa. S. 260: §278 n. 4.

Road in Sterritt Township, 114 Pa. S. 627: §§351 n. 5, 367 n. 1, 511 n. 18.

Road in Sussex & Morris, 13 N. J. L. 157: §§347 n. 1, 2; 381 n. 5, 382 n. 1, 3.

Road in Township of Lackawanna, 112 Pa. S. 212: §532 n. 4, 5.

Road in Upper Hanover, 44 Pa. S. 277: §378 n. 8.

Road to Ewing's Mill, 32 Pa. S. 282: §419 n. 15, 527 n. 11.

Roake v. Am. Tel. Co., 41 N. J. Eq. 35: §181 n. 1, 637 n. 4.

Roanoke City v. Berkowitz, 80 Va. 616: §§3 n. 7, 237 n. 4, 238 n. 1, 278 n. 10, 11; 407 n. 5, 505 n. 12.

Roath v. Driscoll, 20 Conn. 532: §§90 n. 1, 3, 4.

Robb v. Maysville etc. Road Co., 3 Met. (Ky.) 117: §478 n. 5.

Robbins v. Bridgewater, 6 N. H. 524: §§542 n. 5, 604 n. 4, 609 n. 3, 610 n. 1.

v. Lexington, 8 Cush. 292: §542 n. 5.

v. Milwaukee etc. R. R. Co., 6 Wis. 636: §§440 n. 2, 442 n. 2, 456 n. 2, 457 n. 1, 467 n. 6, 492 n. 1.

v. St. Paul etc. R. R. Co., 22 Minn. 286: §502 n. 1.

v. St. Paul etc. R. R. Co., 24 Minn. 191: §533 n. 2.

Roberts v. Boston, 19 Ohio St. 78: §346 n. 9.

v. Boston etc. R. R. Co., 115 Mass. 57: §555 n. 7.

v. Chicago, 26 Ills. 249: §§96 n. 1, 105 n. 1.

v. Comrs., 21 Kan. 247: §§469 n. 2, 476 n. 1.

v. Easton, 19 Ohio St. 78: §636 n. 3.

v. Reed, 16 East, 215: §666 n. 2.

v. Sadler, 37 Hun, 377: §590 n. 3.

v. Sadler, 104 N. Y. 229: §§590 n. 3, 4, 5; 637 n. 9.

v. Stark, 47 N. H. 228: §379 n. 1.

v. Williams, 13 Ark. 355: §§415 n. 1, 543 n. 8.

v. Williams, 15 Ark. 43: §§166 n. 3, 167 n. 1, 10; 253 n. 1, 333 n. 5, 514 n. 3.

Robinson v. Logan, 31 Ohio St. 466: §525 n. 9.

v. Matherick, 5 Met. 252: §§382 n. 1, 605 n. 4.

Bobinson v. New York etc. R. R. Co., 27 Barb. 512: §§66 n. 1, 2, 4; 91 n. 1, 3; 154 n. 1.
v. Rippey, 111 Ind. 112: §§248 n. 4, 347 n. 6, 379 n. 1.
v. Robinson, 1 Duvall, 162: §§509 n. 5, 512 n. 3.
v. Swope, 12 Bush, 21: §§157 n. 2, 3; 167.
v. West Penna. Ry. Co., 72 Pa. S. 316: §596 n. 3.
v. White, 42 Me. 209: §76 n. 2.
Rockland Water Co. v. Fillson, 69 Me. 255: §§294 n. 2, 298 n. 8.
Rodemacher v. Milwaukee etc. R. R. Co., 41 Ia. 297: §§574 n. 1, 577 n. 4.
Rochester v. Sledge, 52 Ky. 344: §511 n. 29.
Rochester City, Matter of, 40 Hun, 588: §435 n. 1.
Rochester etc. R. R. Co. v. Beckwith, 10 How. Pr. 168: §§419 n. 3, 528 n. 5.
v. Budlong, 6 How. Pr. 467: §§416 n. 11, 436 n. 6.
v. Budlong, 10 How. Pr. 289: §436 n. 6, 20.
v. New York etc. Ry. Co., 44 Hun, 206: §306 n. 5.
Matter of, 45 Hun, 126: §361 n. 3.
Rochester Water Comrs. Matter of, 66 N. Y. 413: §§272 n. 2, 333 n. 2.
Rochester Water Works Co. v. Wood, 60 Barb. 137; 41 How. Pr. 53: §529 n. 1.
Rochette v. Chicago etc. Ry. Co., 32 Minn. 201: §118 n. 6.
Rockford etc. R. R. Co. v. Coffinger, 66 Ills. 510: §533 n. 2.
v. McKinley, 64 Ills. 338: §414 n. 1.
v. Shunick, 65 Ills. 223: §294 n. 4.
Rock Island etc. R. R. Co. v. Lynch, 23 Ills. 645: §§405 n. 21, 498 n. 12.
Roehrborn v. Schmidt, 16 Wis. 519: §§605 n. 2, 606 n. 4.
Rogers v. Dock Co., 34 L. J. Eq. 165: §326 n. 2.
v. Kennebec etc. R. R. Co., 35 Me. 319: §651 n. 1.
v. St. Charles, 3 Mo. App. 41: §661 n. 4.
Rogers Ex parte, 7 Cow. 526: §§419 n. 3, 613 n. 2.
Roll v. Augusta, 34 Ga. 326: §§103 n. 4, 115 n. 4.
Rome v. Omberg, 28 Ga. 46: §§101 n. 2, 569 n. 1.
v. Perkins, 30 Ga. 154: §623 n. 1.
Rominger v. Simmons, 88 Ind. 453: §§272 n. 10, 527 n. 12, 540 n. 4.
Rondout etc. R. R. Co. v. Dego, 5 Lans. 298: §§416 n. 4, 509 n. 9.
v. Field, 38 How. Pr. 187: §528 n. 5.
Rooker v. Perkins, 14 Wis. 79: §506 n. 2.
Rooney v. Sacramento Valley R. R. Co., 6 Cal. 638: §627 n. 10.
Roosa v. Henderson Co., 59 Ills. 446: §551 n. 10.
Roosevelt v. Godard, 52 Barb. 533: §§6 n. 2, 156 n. 6.
Rosa v. Missouri etc. Ry. Co., 18 Kan. 124: §§143 n. 1, 330 n. 1.
Rose v. Groves, 5 M. & G. 613: §§82 n. 3.
v. Taunton, 119 Mass. 99: §443 n. 21.
Ross v. Adams, 28 N. J. L. 160: §616 n. 6.
v. Chicago etc. R. R. Co., 77 Ills. 127: §§290 n. 6, 296 n. 1, 9; 299 n. 6.
v. Clinton, 46 Ia. 606: §103 n. 7.
v. Davis, 97 Ind. 79: §§161 n. 2, 186 n. 6, 190 n. 3, 470 n. 5.
v. Elizabethtown etc. R. R. Co., 2 N. J. Eq. 422: §§618 n. 5, 631 n. 2.
v. Elizabethtown etc. R. R. Co., 20 N. J. L. 230: §§326 n. 1, 3; 378 n. 3, 515 n. 6.
v. Faust, 54 Ind. 471: §72 n. 12.
Rounds v. Mumford, 2 R. I. 154: §§96 n. 1, 97 n. 1, 107 n. 2.
Rout v. Mountjoy, 3 B. Mon. 300: §§167 n. 3, 14; 369 n. 1, 378 n. 15, 509 n. 13.
Rowe v. Addison, 34 N. H. 306: §103 n. 7.
v. Granite Bridge Corporation, 21 Pick. 344: §66 n. 1, 2.
Royston v. Royston, 21 Ga. 161: §323 n. 5.
Rozell v. Anderson, 91 Ind. 591: §86 n. 5.
Rubottom v. McClure, 4 Blackf. 505: §456 n. 2, 3.
Rude v. St. Louis, 93 Mo. 408: §227 n. 7.
Rudisill v. State, 40 Ind. 485: §454 n. 3.
Ruehl v. Voight, 28 Wis. 153: §§664 n. 1, 2.

Ruepert *v.* Chicago etc. R. R. Co., 43 Ia. 490: §§15 n. 4.

Ruggles *v.* Lesun, 24 Pick. 187: §298 n. 1.

Ruhland *v.* Supervisors, 55 Wis. 664: §418 n. 2.

Rundle *v.* Delaware etc. Canal Co., 14 How. 80: §75 n. 2.

Runner *v.* Keokuk, 11 Ia. 543: §540 n. 2.

Runshart *v.* Railroad Co., 54 Ga. 579: §618 n. 5.

Rusch *v.* Milwaukee etc. Ry. Co., 54 Wis. 136: §515 n. 1.

Rush *v.* McDermott, 50 Cal. 471: §289 n. 9.

Russell *v.* Burlington, 30 Ia. 262: §§96 n. 1, 103 n. 7, 8; 107 n. 2.

v. New Bedford, 5 Gray, 31: §664 n. 1, 5.

v. New York, 2 Denio, 461: §7 n. 1, 3, 4.

v. St. Paul etc. Ry. Co., 33 Minn. 210: §479 n. 8.

v. Turner, 62 Me. 496: §§349 n. 4, 361 n. 10.

Russell Mills *v.* County Comrs., 16 Gray, 347: §609 n. 2.

Ruston *v.* Grimwood, 30 Ind. 364: §510 n. 4.

Rutherford *v.* Davis, 95 Ind. 245: §§601 n. 1, 602 n. 1.

Rutherford's Case, 72 Pa. S. 82: §§364 n. 1, 368 n. 1, 6.

Rutland *v.* County Comrs., 20 Pick. 71: §379 n. 7.

v. Supervisors, 55 Wis. 664: §415 n. 4.

Rutledge *v.* Drainage Comrs., 16 Ills. App. 655: §§599 n. 4, 640 n. 2.

Ryan *v.* Boston, 118 Mass. 248: §209 n. 3, 494 n. 9.

v. Brown, 18 Mich. 196: §156 n. 7.

v. Hoffman, 26 Ohio St. 109: §§613 n. 2, 656 n. 26.

v. Miss. Valley etc. R. R. Co., 62 Miss. 162: §300 n. 1.

Ryckman *v.* Gillis, 6 Lans. 79: §151 n. 5.

Ryers, Matter of, 72 N. Y. 1: §§185 n. 1, 188 n. 1, 194 n. 1, 201 n. 1.

Ryerson *v.* Brown, 35 Mich. 333: §§162 n. 1, 180 n. 15.

Ryker *v.* McElroy, 28 Ind. 179: §167 n. 3.

S.

Sabin *v.* Vt. Cent. R. R. Co., 25 Vt. 363: §§146 n. 1, 4; 573 n. 1, 3.

Sabine *v.* Johnson, 35 Wis. 185: §§318 n. 6, 7; 334 n. 4.

Sabine etc. R. R. Co. *v.* Johnson, 65 Tex. 389: §89 n. 1.

Sacramento etc. R. R. Co. *v.* Harlan, 24 Cal. 334: §§314 n. 13, 552 n. 4.

v. Moffatt, 6 Cal. 74: §498 n. 1.

v. Moffatt, 7 Cal. 577: §627 n. 10.

Sadd *v.* Maddon Ry. Co., 6 Exch. 143: §279 n. 3.

Sadler *v.* Langham, 34 Ala. 311: §§157 n. 2, 158 n. 1, 2; 167 n. 2, 8; 180 n. 12, 181 n. 1, 3; 206 n. 2, 238 n. 1, 456 n. 1, 2.

Sage *v.* Brooklyn, 89 N. Y. 189: §§456 n. 2, 457 n. 8, 9; 458 n. 9, 609 n. 2, 611 n. 3.

Salem *v.* Eastern R. R. Co., 98 Mass. 431: §182.

Salem etc. Corp. *v.* Essex Co., 100 Mass. 282: §311 n. 2.

Salem etc. Co. *v.* Lyme, 18 Conn. 451: §§136 n. 3, 137 n. 1, 275 n. 2.

Salisbury *v.* Gt. Northern Ry. Co., 17 A. & E. N. S. 840; 79 E. C. L. R. 840: §660 n. 1.

Salisbury Mills *v.* Forsaith, 57 N. H. 124: §251 n. 4.

Salt Co. *v.* Brown, 7 W. Va. 191: §§160 n. 2, 162 n. 1, 164 n. 6, 171 n. 8.

Salter *v.* Met. District Ry. Co., 39 L. J. Eq. 567: §284 n. 2.

Samon *v.* Trenton, 47 N. J. L. 489: §382 n. 3.

Sampson *v.* Bradford, 6 Cush. 303: §334 n. 1.

Samuels *v.* County of Dubuque, 13 Ia. 536: §153 n. 5.

San Francisco *v.* Scott, 4 Cal. 114: §456 n. 1.

San Francisco etc. Co. *v.* Almeda Water Co., 36 Cal. 639: §306 n. 10.

San Francisco etc. R. R. Co. *v.* Caldwell, 31 Cal. 367: §§170 n. 1, 462 n. 2, 463 n. 1, 470 n. 2.

v. Mahoney, 29 Cal. 112: §§417 n. 5, 477 n. 5, 551 n. 1.

San Jose *v.* Freyschlog, 56 Cal. 8: §500 n. 6.

v. Reed, 65 Cal. 241: §441 n. 1, 3.

San Mateo Water Co. *v.* Sharpstein, 50 Cal. 284: §§456 n. 1, 459 n. 1, 578 n. 4.

Sanborn *v.* Belden, 51 Cal. 266: §§456 n. 1, 458 n. 5.

v. Meredith, 58 N. H. 150: §378 n. 2.

TABLE OF CASES CITED.

CIV

Sanders *v.* McCracken, Hardin, 266: §339 n. 1.
 Sanders *Ex parte*, 4 Cow. 544: §650 n. 2.
 Sanderson *v.* Haverstick, 8 Pa. S. 294: §590 n. 7.
 Sandford *v.* Martin, 31 Ia. 67: §256 n. 25.
 Sandy Lick Creek Road, 51 Pa. S. 94: §167 n. 21.
 Sangamon Co. *v.* Brown, 13 Ills. 207: §§426 n. 2, 540 n. 3.
 Sanger *v.* Comrs., 25 Me. 291: §650 n. 4.
 Saratoga etc. R. R. Co., Matter of, 66 How. Pr. 43: §578 n. 4.
 Sargent *v.* Machias, 65 Me. 591: §318 n. 9.
v. Ohio etc. R. R. Co., 1 Handy (Ohio), 52: §219 n. 4.
 Sater *v.* Burlington etc. Road Co., 1 Ia. 386: §§462 n. 2, 472 n. 9.
 Satterfield *v.* Crow, 8 B. Mon. 553: §338 n. 1.
 Satterly *v.* Winne, 101 N. Y. 218: §§351 n. 4, 511 n. 30.
 Saunders *v.* Lowell, 131 Mass. 387: §396 n. 11.
 Savage *v.* Comrs., 10 Ills. App. 204: §§452 n. 3, 549 n. 1.
 Savannah *v.* Hancock, 91 Me. 54: §§158 n. 1, 166 n. 1.
v. Hartridge, 37 Ga. 113: §468 n. 1.
 Savannah etc. R. R. Co. *v.* Savannah, 45 Ga. 602: §§119 n. 1, 124 n. 1, 125 n. 5.
v. Shields, 33 Ga. 601: §§115 n. 4, 117 n. 2, 635 n. 6.
 Saver *v.* Philadelphia, 35 Pa. S. 231: §631 n. 2.
 Savings etc. Ass. *v.* Schmidt, 15 Ia. 213: §§601 n. 1, 633 n. 1.
 Sawyer *v.* Boston, 144 Mass. 470: §§435 n. 1, 443 n. 3.
v. Hamilton, 1 Murphy (N. C.) 253: §364 n. 1.
v. Keene, 47 N. H. 173: §218 n. 1.
 Scarborough *v.* Comrs., 41 Me. 604: §§309 n. 1, 358 n. 2.
 Schattner *v.* City of Kansas, 53 Mo. 162: §§107 n. 2, 109 n. 5.
 Schatz *v.* Pfeil, 58 Wis. 429: §§166 n. 4, 606 n. 1, 5.
 Scheh *v.* Detroit, 45 Mich. 626: §167 n. 25.
 Schermeely *v.* Stillwater etc. R. R. Co., 16 Minn. 506: §540 n. 6.
 Schmidt *v.* Densmore, 42 Mo. 225: §§237 n. 3, 240 n. 1, 423 n. 7, 649 n. 1.
 Schmied *v.* Keeney, 72 Ind. 309: §540 n. 1.
 Schoff *v.* Upper Conn. etc. Co., 57 N. H. 110: §§350 n. 8, 355 n. 1.
 School District *v.* Copeland, 2 Gray, 414: §369 n. 2.
 Schreiber *v.* Chicago etc. R. R. Co., 115 Ills. 340: §§326 n. 4, 483 n. 16.
 Matter of, 53 How. Pr. 359: §253 n. 1.
 Schroeder *v.* DeGraff, 28 Minn. 299: §649 n. 2.
v. Detroit etc. Ry. Co., 44 Mich. 387: §§417 n. 3, 548 n. 4.
 Schuller *v.* Northern Liberties, 3 Whart. 555: §580 n. 1.
 Schulte *v.* North Pac. Tr. Co., 50 Cal. 592: §115 n. 4.
 Schumacher *v.* St. Louis, 3 Mo. App. 297: §211 n. 2.
 Schurmeier *v.* St. Paul etc. R. R. Co., 8 Minn. 113: §635 n. 8.
v. Railroad Co., 10 Minn. 82: §§72 n. 19, 113 n. 3, 114 n. 2, 115 n. 4; 635 n. 2.
 Schushardt *v.* New York, 59 Barb. 295: §505 n. 3.
 Schuylkill Falls Road, 2 Binn, 250: §406 n. 2.
 Schuylkill etc. Nav. Co. *v.* Decker, 2 Watts, 343: §§655 n. 1, 656 n. 1.
v. Farr, 4 W. & S. 362: §§336 n. 2, 6; 487 n. 1, 3; 663 n. 7.
v. Freedley, 6 Whart. 109: §483 n. 3.
v. Kittera, §562 n. 7.
v. Thoburn, 7 S. & R. 411: §§324 n. 1, 469 n. 10, 477 n. 12, 487 n. 1.
 Schwede *v.* Burnstown, 35 Minn. 468: §537 n. 17.
 Scott *v.* Bruckett, 89 Ind. 413: §381 n. 8.
v. Lasell, 71 Ia. 180: §§314 n. 19, 537 n. 14.
v. St. Paul etc. Ry. Co., 21 Minn. 322: §§277 n. 1, 473 n. 3.
v. Wilson, 3 N. H. 321: §72 n. 6.
 Scovil *v.* Geddings, 7 Ohio, Pt. 2, 211: §98 n. 3.
 Scoville *v.* Cleveland, 1 Ohio St. 126: §5 n. 4.
 Scraper *v.* Pipes, 59 Ind. 158: §§352 n. 4, 540 n. 6.
 Scudder *v.* Trenton etc. Co., 1 N. J. Eq. 694: §§157 n. 2, 158 n. 1, 180 n. 5, 181 n. 6, 311 n. 2.
 Scuffletown etc. Co. *v.* McAllister, 12 Bush, 312: §205 n. 1.

Seaman *v.* Smith, 24 Ills. 521: §§72 n. 13, 76 n. 1.

Seating *v.* Saratoga Springs, 39 Hun, 307: §86 n. 1.

Searl *v.* School District No. 2, 114 U. S. 197: §315 n. 3.

Searle *v.* Lackawana etc. R. R. Co., 33 Pa. S. 57: §486 n. 6.

Sears *v.* Marshalltown St. Ry. Co., 65 Ia. 742: §219 n. 2.

Secomb *v.* Milwaukee etc. R.R. Co., 49 How. Pr. 75: §§170 n. 1, 237 n. 4, 265 n. 6, 649 n. 2.

Second St., Harrisburg, 66 Pa. S. 132: §499 n. 10.

Sedalia *v.* Missouri etc. R. R. Co., 17 Mo. App. 105: §§505 n. 9, 14; 524 n. 3.

Sedalia etc. Ry. Co. *v.* Abell, 18 Mo. App. 632: §§480 n. 10, 498 n. 7.

Sedgeley Ave., *In re*, 88 Pa. S. 509: §§144 n. 1, 656 n. 22, 663 n. 3.

Seeteld *v.* Chicago etc. Ry. Co., 67 Wis. 96: §§425 n. 5, 442 n. 3, 449 n. 1, 499 n. 4.

Seely *v.* Sebastian, 4 Or. 25: §§164 n. 3, 185 n. 1, 188 n. 4.

Seibert *v.* Linton, 5 W.Va. 57: §261 n. 1.

Seifert *v.* Brooklyn, 101 N. Y. 136: §§59 n. 1, 89 n. 4, 103 n. 3.

v. Brooks, 34 Wis. 443: §§364 n. 1, 366 n. 2, 368 n. 1, 11.

Selden *v.* Delaware etc. Canal Co., 24 Barb. 362: §§87 n. 2, 298 n. 1.

Sellards *v.* Zomes, 5 Bush (Ky.) 90: §8 n. 8.

Selma etc. R. R. Co. *v.* Camp, 45 Ga. 180: §474 n. 2.

v. Gammage, 63 Ga. 604: §§499 n. 5, 524 n. 3.

v. Keith, 53 Ga. 178: §§446 n. 2, 468 n. 1, 478 n. 7, 571 n. 3, 585 n. 5.

Semon *v.* Trenton, 47 N. J. L. 489: §417 n. 1.

Seneca Road Co. *v.* Auburn etc. R. R. Co., 5 Hill, 170: §§135 n. 4, 136 n. 4, 649 n. 5.

Senior *v.* Met. Ry. Co., 2 H. & C. (Ech.) 258: §227 n. 3.

Sennott *v.* St. Johnsbury etc. R. R. Co., 59 Vt. 226: §§620 n. 4, 621 n. 1.

Sessions *v.* Crunkelton, 20 Ohio St. 349: §§185 n. 1, 196 n. 5.

Setzler *v.* Pennsylvania etc. Ry. Co., 112 Pa. S. 56: §§450 n. 1, 469 n. 10, 492 n. 1.

Seventeenth St., Matter of, 1 Wend. 262: §500 n. 1.

Severin *v.* Cole, 38 Ia. 463: §§324 n. 1, 2; 335 n. 4, 628 n. 5.

Sexton *v.* North Bridgewater, 116 Mass. 200: §§137 n. 11, 435 n. 1, 5; 476 n. 2.

Seymour *v.* Carter, 2 Met. 520: §§298 n. 1, 396 n. 4.

v. State, 19 Wis. 240: §283 n. 7.

Shackelford *v.* Bailey, 35 Ills. 491: §290 n. 2.

Shackleford's Heirs *v.* Coffee, 4 J. J. Marsh. 40: §§178 n. 2, 369 n. 1, 382 n. 1, 402 n. 3, 509 n. 5.

Shafer *v.* Bordener, 19 Ind. 294: §540 n. 4.

Shaffer *v.* Weech, 34 Kan 595: §347 n. 1.

Shafferstown Road, 3 Watts, 475: §345 n. 3.

Shaffner *v.* Fogelman, Busbee L. 280: §540 n. 1.

v. St. Louis, 31 Mo. 264: §384 n. 9.

Shand *v.* Henderson, 2 Dow, 519: §640 n. 2.

Shane *v.* Kansas City, St. Joe & C. B. R. R. Co., 71 Mo. 237: §89 n. 1.

Sharett's Road, 8 Pa. S. 89: §§252 n. 2, 345 n. 3.

Sharp *v.* Dunavan, 17 B. Mon. 223: §155 n. 8.

v. Johnson, 4 Hill, 92: §§246 n. 8, 602 n. 3.

Sharpless *v.* West Ches'rr, 1 Grant's Cas. 257; 2 Phila. 100: §454 n. 2.

Shattner *v.* City of Kansas, 53 Mo. 162: §96 n. 1.

Shattuck *v.* Stoneham Branch R. R. Co., 6 Allen, 115: §§435 n. 1, 436 n. 4, 443 n. 3, 476 n. 4.

v. Waterville, 27 Vt. 600: §520 n. 8.

v. Wilton R. R. Co., 23 N. H. 269: §499 n. 6.

Shaubut *v.* St. Paul & S. C. R. R. Co., 21 Minn. 502: §118 n. 6.

Shaver *v.* Starrett, 4 Ohio St. 494: §§167 u. 1, 313 n. 7.

Shaw *v.* Charlestown, 3 Allen, 538: §656 n. 23.

v. Charlestown, 2 Gray, 107: §§435 n. 1, 436 n. 4.

v. Crocker, 4 Cal. 435; §102 n. 1.

v. Mills, 9 Cush. 503: §509 n. 2.

v. Wells, 5 Cush. 537: §607 n. 2.

Shawneetown *v.* Mason, 82 Ills. 337: §§100 n. 3, 109 n. 9, 223 n. 3, 494 n. 10.

Sheaff v. People, 87 Ills. 189: §§166 n. 4, 606 n. 1.
Shearer v. Comrs., 13 Kan. 145: §652 n. 6, 664 n. 8.
Sheldon v. Kalamazoo, 24 Mich. 383: §649 n. 9.
v. Minneapolis etc. Ry. Co., 29 Minn. 318: §§434 n. 1, 445 n. 3, 475 n. 10.
Shelley v. St. Charles Co., 17 Ted. R. 909: §§185 n. 2, 199 n. 1.
Shenango etc. R. R. Co. v. Braham, 79 Pa. S. 447: §§469 n. 10, 478 n. 1.
Shepard v. Third Municipality etc., 6 Rob. La. 349: §332 n. 2.
Shepardson v. Milwaukee etc. R. R. Co., 6 Wis. 605: §§247 n. 6, 456 n. 2, 631 n. 2.
Shepherd v. New Orleans, 6 Rob. La. 349: §85 n. 5.
Sherlock v. Bainbridge, 41 Ind. 35: §72 n. 12.
Sherman v. Buick, 32 Cal. 241: §§167 n. 1, 11; 238 n. 1.
v. Fall River Iron Works Co., 5 Allen, 213: §90 n. 5, 6.
v. Kane, 46 N. Y. Supr. Ct. 310: §204 n. 3.
v. Milwaukee etc. R. R. Co., 40 Wis. 645: §§113 n. 3, 649 n. 5.
v. St. Paul etc. Ry. Co., 30 Minn. 227: §§435 n. 1, 436 n. 5, 479 n. 10.
v. Tobey, 3 Allen, 7: §256 n. 2.
Sherwood v. St. Paul etc. Ry. Co., 21 Minn. 122: §§475 n. 9, 505 n. 10, 515 n. 2, 663 n. 6.
v. St. Paul etc. Ry. Co., 21 Minn. 127: §§435 n. 1, 3; 436 n. 5, 442 n. 2, 515 n. 2.
Shields v. Justices of Green Co., 2 Coldw. 60: §543 n. 7.
v. McMahan, 101 Ind. 491: §348 n. 2.
v. Ohio, 95 U. S. 319: §246 n. 2.
Shinkle v. Magill, 58 Ills. 422: §§382 n. 2, 525 n. 6.
Shipley v. Baltimore etc. R. R. Co., 34 Md. 336: §467 n. 1.
v. Continental R. R. Co., 13 Phila. 128: §636 n. 3.
Shirley v. Bishop, 67 Cal. 543: §§83 n. 2, 641 n. 9.
Shoals v. State, 2 Chand. 182: §153 n. 6.
Shoenberger v. Mulholland, 8 Pa. 134: §§171 n. 1, 442 n. 2.
Sholl v. German Coal Co., 118 Ills. 427: §§3 n. 6, 7; 164 n. 6, 171 n. 12, 237 n. 3, 242 n. 1.
Sholty v. Dale Township, 63 Ills. 209: §394 n. 1.
Shoobred v. Charleston, 2 Bay, 63: §613 n. 1.
Shough Ex parte, 16 N. J. L. 264: §419 n. 7.
Shrunk v. Schuylkill Nav. Co., 14 S. R. 71: §§72 n. 17, 220 n. 12.
Shue v. Comrs., 41 Mich. 638: §382 n. 1.
Shute v. Chicago etc. R. R. Co., 26 Ills. 436: §§456 n. 1, 631 n. 2.
v. Decker, 51 Ind. 241: §352 n. 2.
Sidener v. Essex, 22 Ind. 201: §§470 n. 5, 511 n. 1.
v. Norristown etc. T. Co., 23 Ind. 623: §§599 n. 2, 640 n. 2.
Sigafoos v. Talbot, 25 Ia. 214: §540 n. 7.
Silver Creek Nav. Co. v. Mangum, 64 Miss. 682: §§67 n. 2, 496 n. 5.
Siman v. Rhodes, 24 Minn. 25: §324 n. 1.
Simar v. Canaday, 53 N. Y. 298: §323 n. 5, 11.
Simmons v. Camden, 26 Ark. 276: §§96 n. 1, 97 n. 2.
v. Mumford, 2 R. I. 172: §519 n. 8.
v. Passaic 42 N. J. L. 619: §453 n. 1.
v. St. Paul etc. R. R. Co., 18 Minn. 184: §436 n. 5, 469 n. 4.
Simms v. Memphis etc. R. R. Co., 12 Heisk, 621: §664 n. 1 3.
Simon v. Rhoades, 24 Minn. 25: §369 n. 1.
Simplot v. Chicago etc. Ry. Co., 5 McCrary, 158: §115 n. 4.
v. Worcester, 5 McCrary, 158: §315 n. 3.
Simpson v. Lancaster etc. Ry. Co., 45 Sim. 580: §259 n. 7.
v. Oxford, 41 N. H. 228: §309 n. 3.
v. Seavy, 8 Me. 138: §72 n. 5.
v. South Staffordshire W. W. Co., 34 L. J. Eq. 380: §254 n. 1.
Singleton v. Comrs., 2 Nott & McC. 526: §167 n. 3.
Sinnickson v. Johnson, 17 N. J. L. 129: §67 n. 2.
Sioux City etc. R. R. Co. v. Brown, 13 Neb. 317: §499 n. 5.
v. Chicago etc. Ry. Co., 27 Fed. R. 770: §306 n. 7, 8.
Sixth Ave. Ry. Co. v. Gilbert El. Ry. Co., 43 N. Y. Supr. Ct. 292; 41 N. Y. Supr. Ct. 489: §123 n. 2.
v. Kerr, 45 Barb. 138: §269 n. 8.
v. Kerr, 72 N. Y. 330: §269 n. 8.

Skinner v. Hartford Bridge Co., 29 Conn. 523: §97 n. 1.
v. Lake View Ave. Co., 57 Ills. 151: §§345 n. 4, 379 n. 1.
Slack v. Maysville etc. R. R. Co., 13 B. Mon. 1: §10 n. 3.
Slatten v. Des Moines Valley R. R. Co., 29 Ia. 148: §115 n. 4.
Sleight v. Kingston, 11 Hun, 594: §86 n. 4.
Slingluff v. Wissahickon T. Co., 1 Phila. 379: §583 n. 3.
Slipper v. Totterham etc. Ry. Co., 36 L. J. Eq. 841: §483 n. 21.
Small v. Pennell, 31 Me. 267: §§309 n. 1, 601 n. 1.
Smart v. Portsmouth etc. R. R. Co., 20 N. H. 233: §§609 n. 3, 612 n. 4, 656 n. 18.
Smeaton v. Martin, 57 Wis. 364: §§166 n. 13, 238 n. 1, 456 n. 2, 457 n. 1.
Smedley v. Erwin, 51 Pa. S. 445: §§242 n. 11, 252 n. 3.
Smith v. Adams, 6 Paige, 435: §90 n. 4.
v. Alexandria, 33 Gratt. 208: §§96 n. 1, 106 n. 1.
v. Alexandria, 24 Ind. 454: §379 n. 1.
v. Atlanta, 75 Ga. 110: §86 n. 1.
v. Atlantic etc. R. R. Co., 25 Ohio St. 91: §§196 n. 8, 200 n. 5, 313 n. 8.
v. Boston, 7 Cush. 254: §134 n. 5.
v. Boston, 1 Gray, 72: §512 n. 4.
v. Chicago etc. R. R. Co., 67 Ills. 191: §§318 n. 1, 339 n. 1, 385 n. 1, 647 n. 2.
v. Cincinnati, 4 Ohio, 515: §98 n. 2.
v. Comrs., 42 Me. 395: §549 n. 12.
v. Coanelly's Heirs, 1 T. B. Mon. 58: §§178 n. 2, 510 n. 2.
v. Conway, N. H. 586: §§271 n. 1, 351 n. 5, 525 n. 12.
v. Corporation of Washington, 20 How. 135: §§96 n. 1, 97 n. 2.
v. Ferris, 6 Hun, 553: §§319 n. 1, 335 n. 5.
v. Gould, 59 Wis. 631: §§62 n. 6, 607 n. 2.
v. Gould, 61 Wis. 31: §62 n. 6.
v. Goulding, 6 Cush. 154: §298 n. 1, 8.
v. Helmer, 7 Barb. 416: §456 n. 2.
v. Inge, 80 Ala. 283: §§452 n. 10, 647 n. 1.
Smith v. McAdam, 3 Mich. 506: §§311 n. 2, 456 n. 2, 457 n. 2, 594 n. 1, 664 n. 1, 5.
v. Milwaukee, 18 Wis. 63: 103 n. 8.
v. Olmstead, 5 Blackf. 37: §619 n. 1.
v. Point Pleasant etc. R. R. Co., 23 W. Va. 451: §§454 n. 2, 493 n. 4, 635 n. 3.
v. Rochester, 38 Hun, 612: §§62 n. 14, 641 n. 2.
v. Rochester, 92 N. Y. 463: §§62 n. 1, 14; 69 n. 3, 70 n. 3, 72 n. 22, 76 n. 1, 4.
v. Rogers, Litt. Select Cas. (Ky.) 117: §515 n. 1.
v. Rome, 19 Ga. 89: §§590 n. 4, 637 n. 9.
v. Scearce, 34 Ind. 2-5: §551 n. 13.
v. School Dist. 40 Mich. 143: §407 n. 2.
v. Sherry, 50 Wis. 210: §155 n. 12.
v. Supervisors, 66 Wis. 199: §62 n. 6.
v. Taylor, 34 Tex. 589: §314 n. 2.
v. Trenton Del. Falls Co., 17 N. J. L. 5: §§401 n. 1, 419 n. 2, 7, 515 n. 3.
v. Weldon, 73 Ind. 454: §§352 n. 5, 632 n. 2.
Smith, Jr. v. Chicago etc. R. R. Co., 105 Ills. 511: §§390 n. 3, 393 n. 5, 428 n. 1.
Sneaker v. Justices, 4 Snead, 116: §560 n. 3.
Snoddy v. County of Pettis, 45 Mo. 361: §§347 n. 3, 6; 515 n. 4, 532 n. 1.
Snow v. Boston etc. R. R. Co., 65 Me. 230: §§424 n. 3, 435 n. 1, 436 n. 3.
v. Provincetown, 109 Mass. 123: §209 n. 5.
v. Whitehead, 27 L. R. Ch. Div. 588: §90 n. 6.
Snowden v. Wilas, 19 Ind. 10: §607 n. 2.
Snyder v. Penna. R. R. Co., 55 Pa. S. 340: §§113 n. 3, 115 n. 4, 117 n. 5.
v. Plass, 28 N. Y. 465: §283 n. 9.
v. Rockport, 6 Ind. 237: §96 n. 1.
v. Trumpebour, 38 N. Y. 355: §§283 n. 9, 374 n. 4.
v. Warford, 11 Mo. 513: §167 n. 24.
v. Western Union R. R. Co., 25 Wis. 60: §§436 n. 11, 496 n. 2.
Snyder Ave., 14 Phila. 346: §144 n. 1.

Sommerville *v.* Wimbush, 7 Gratt. 205: §§136 n. 3.

Sommerville etc. R. R. Co., *v.* Doughty, 22 N. J. L. 495: §§496 n. 7, 497 n. 1, 524 n. 3, 7.

Souch *v.* London Ry. Co., 42 L. J. 477: §226 n. 1.

South Carolina R. R. Co. *v.* Blake, 9 Rich. 228: §§388 n. 1, 390 n. 1, 393 n. 4, 6; 397 n. 1, 399 n. 3.

v. Columbia etc. R. R. Co., 13 Rich. Eq. S. C. 339: §238 n. 1.

v. Steiner, 44 Ga. 546: §§111 n. 2, 114 n. 4, 115 n. 1, 2, 4; 121 n. 1, 452 n. 8, 493 n. 5, 13.

South Carolina R. R. Co., *Ex parte*, 2 Rich. L. S. C. 434: §258 n. 1.

South Chester Road, 80 Pa. S. 370: §250 n. 1.

South Chicago Ry. Co. *v.* Dix, 109 Ills. 237: §§329 n. 1, 393 n. 5, 7.

South Park *v.* Todd, 112 Ills. 379: §324 n. 1.

South Park Comrs. *v.* Dunlevy, 91 Ills. 49: §§429 n. 10, 477 n. 4, 6; 499 n. 10.

v. Trustees of Schools, 107 Ills. 489: §§426 n. 2, 524.

South Seventh St., Matter of, 48 Barb. 12: §405 n. 20.

South Staffordshire Ry. Co. *v.* Hall, 1 Sim. n. s. 373: §645 n. 1.

South Western R. R. Co. *v.* Southern etc. Tel. Co., 46 Ga. 43: §§311 n. 2, 454 n. 2, 643 n. 4.

Southard *v.* Ricker, 43 Me. 575: §§369 n. 1, 382 n. 1, 3.

Southern Boulevard, Matter of, 3 Abb. Pr. n. s. 447: §405 n. 16.

Southern etc. R. R. Co. *v.* Stoddard, 6 Minn. 150: §286 n. 4.

Southern Pacific R. R. Co. *v.* Reed, 41 Cal. 256: §§111 n. 2, 113 n. 3, 115 n. 4, 117 n. 4.

v. Wilson, 49 Cal. 396: §577 n. 13.

Southington *v.* Clark, 13 Conn. 370: §§309 n. 1, 358 n. 2.

Southside R. R. Co. *v.* Daniel, 20 Gratt. 344: §577 n. 1.

Sower *v.* Phila., 35 Pa. S. 231: §308 n. 6.

Sowle *v.* Cisner, 56 Ind. 276: §362 n. 1.

Spader *v.* N. Y. El. R. R. Co., 3 Abb. N. C. 467: §123 n. 2.

Spangler's Appeal, 64 Pa. S. 387: §641 n. 2.

Sparhawk *v.* Walpole, 20 N. H. 317: §610 n. 8.

Sparrow *v.* Oxford etc. Ry. Co., 2 DeG. McN. & G. 94: §§149 n. 2, 284 n. 3.

Spaulding *v.* Arlington, 126 Mass. 492: §576 n. 1.

v. Milwaukee etc. Ry. Co., 57 Wis. 304: §538 n. 7.

v. Nourse, 143 Mass. 490: §261 n. 1.

Spear *v.* Allison, 20 Pa. S. 200: §595 n. 1.

v. Drainage Comrs., 113 Ills. 632: §486 n. 2.

Spears *v.* New York, 87 N. Y. 359; 10 Hun, 160: §630 n. 1.

Spear's Road, 4 Binn. 174: §509 n. 14.

Specht *v.* Detroit, 20 Mich. 168: §375 n. 4.

Spencer *v.* Hartford etc. R. R. Co., 10 R. I. 14: §§66 n. 9, 482 n. 3, 4; 567 n. 2, 571 n. 1.

v. Point Pleasant etc. R. R. Co., 23 W. Va. 406: §§115 n. 4, 454 n. 2, 493 n. 4, 12; 635 n. 3.

Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70: §314 n. 13.

Spelman *v.* Roanoke Nav. Co., 74 N. C. 675: §87 n. 3.

Spoofford *v.* B. & B. R. R. Co., 66 Me. 26: §§254 n. 1, 348 n. 1, 350 n. 6, 393 n. 1, 544 n. 7, 545 n. 7.

Spoehr *v.* Schofield, 66 Ind. 168: §511 n. 14.

Sprague *v.* Worcester, 13 Gray, 193: §§88 n. 5, 103 n. 6.

Spring *v.* Lowell, 1 Mass. 422: §§411 n. 1, 413 n. 1.

Spring Garden Road, 43 Pa. S. 144: §548 n. 4.

Spring Garden Street, Case of, 4 Rawle, 192: §416 n. 5.

Spring Valley Water Works *v.* San Francisco, 22 Cal. 434: §440 n. 4.

v. San Mateo Water Works, 64 Cal. 123: §393 n. 4.

Springbrook Road, 64 Pa. S. 451: §§423 n. 4, 529 n. 4.

Springer *v.* Russell, 7 Me. 273: §72 n. 5.

Springfield *v.* Conn. Riv. R. R. Co., 4 Cush. 63: §§111 n. 2, 116 n. 1, 270 n. 1, 276 n. 3, 7.

v. Griffith, 21 Ills. App. 93: §494 n. 6.

v. Schmook, 68 Mo. 394: §§446 n. 6, 447 n. 1, 469 n. 6, 476 n. 1.

Springfield *v.* Sleeper, 115 Mass. 587: §427 n. 2.

Springfield Road, 73 Pa. S. 127: §511 n. 16.

Springfield etc. Ry. Co. *v.* Calkins, 90 Mo. 538: §§435 n. 1, 437 n. 7, 475 n. 17.

v. Hall, 67 Ills. 99: §245 n. 1.

v. Rhea, 44 Ark. 258: §§426 n. 1, 448 n. 1, 472 n. 3, 496 n. 1, 3; 524 n. 3.

v. Turner, 68 Ills. 187: §533 n. 3.

Spurrier *v.* Wirtner, 48 Ia. 486: §539 n. 10.

Squire *v.* Somerville, 120 Mass. 579: §444 n. 1.

Squires *v.* Nesuah, 24 Wis. 588: §393 n. 2.

St. Albans *v.* Seymour, 41 Vt. 579: §320 n. 1.

St. Francois Co. *v.* Marks, 14 Mo. 539: §613 n. 2.

v. Peers, 14 Mo. 537: §613 n. 2.

St. Charles *v.* Rogers, 49 Mo. 530: §543 n. 4.

v. Stewart, 49 Mo. 132: §543 n. 4.

St. Helena Water Co. *v.* Forbes, 62 Cal. 182: §§62 n. 1, 2; 173 n. 2.

St. Joseph *v.* Hamilton, 43 Mo. 282: §§655 n. 1, 656 n. 1.

St. Joseph etc. R. R. Co. *v.* Callender, 13 Kan. 496: §§647 n. 3, 10; 648 n. 4.

v. Orr, 8 Kan. 419: §§446 n. 1, 472 n. 3, 477 n. 8.

St. Julien *v.* Morgan's La. etc. R. R. Co., 35 La. An. 924: §648 n. 2.

St. Louis *v.* Bissell, 46 Mo. 157: §296 n. 8.

v. Cruikshank, 16 Mo. App. 495: §308 n. 9.

v. Frank, 9 Mo. App. 579: §§348 n. 1, 397 n. 2.

v. Franks, 78 Mo. 41: §§253 n. 1, 308 n. 1, 9.

v. Gleason, 93 Mo. 33; 89 Mo. 67: §310 n. 4.

v. Gleason, 15 Mo. App. 25: §§310 n. 4, 346 n. 8, 384 n. 8.

v. Gurno, 12 Mo. 414: §§96 n. 1, 103 n. 4.

v. Stern, 3 Mo. App. 48: §§6 n. 2, 156 n. 9.

v. Stoddard, 15 Mo. App. 173: §249 n. 2.

St. Louis Gas etc. Co. *v.* St. Louis Gas etc. Co., 16 Mo. App. 52: §137 n. 9.

St. Louis etc. R. R. Co. *v.* Almeroth, 63 Mo. 348: §528 n. 5.

v. Anderson, 39 Ark. 167: §§435 n. 1, 437 n. 1, 5; 472 n. 3, 496 n. 1, 497 n. 1, 498 n. 1.

v. Belleville, 20 Ills. App. 580: §116 n. 2.

v. Brown, 58 Ills. 61: §475 n. 1.

v. Capps, 67 Ills. 607; 72 Ills. 188: §219 n. 5.

v. Evans etc. Brick Co., 85 Mo. 307: §§551 n. 1, 556 n. 5, 580 n. 1.

v. Evans etc. Brick Co., 15 Mo. App. 152: §§556 n. 5, 580 n. 1.

v. Haller, 82 Ills. 208: §§219 n. 5, 270 n. 1, 443 n. 1.

v. Harris, 47 Ark. 340: §§66 n. 6, 293 n. 7.

v. Hurst, 14 Ills. App. 419: §293 n. 1.

v. Karnes, 101 Ills. 402: §606 n. 1.

v. Kirby, 104 Ills. 345: §§470 n. 19, 498 n. 9.

v. Lux, 63 Ills. 523: §536 n. 4.

v. Martin, 29 Kan. 750: §§562 n. 9, 563 n. 3.

v. Mollett, 59 Ills. 235: §446 n. 4.

v. Mitchell, 47 Ills. 165: §§481 n. 4, 498 n. 11.

v. N. W. St. Louis Ry. Co., 69 Mo. 65: §§137 n. 4, 642 n. 3.

v. Richardson, 25 Mo. 466: §469 n. 6.

v. Smith, 42 Ark. 265: §444 n. 1.

v. Springfield etc. R. R. Co., 96 Ills. 274: §268 n. 1.

v. Teters, 68 Ills. 144: §§496 n. 7, 533 n. 2, 656 n. 1, 3.

v. Walbrink, 47 Ark. 330: §§293 n. 6, 498 n. 16.

v. Wilder, 17 Kan. 239: §§319 n. 1, 533 n. 3, 656 n. 1.

St. Paul etc. Co. *v.* St. Paul, 30 Minn. 359: §266 n. 6.

St. Paul etc. R. R. Co. *v.* Covell, 2 Dak. 483: §416 n. 4.

v. Matthews, 16 Minn. 341: §§442 n. 2, 511 n. 16.

v. Minneapolis, 35 Minn. 141: §§266 n. 1, 314 n. 2, 367 n. 1.

v. Murphy, 19 Minn. 500: §§426 n. 1, 469 n. 4, 475 n. 6, 496 n. 2, 4, 6.

In re, 34 Minn. 227: §§158 n. 1, 265 n. 1, 390 n. 1, 393 n. 4, 551 n. 1.

St. Peter *v.* Denison, 58 N. Y. 416: §§145 n. 10, 146 n. 2, 4; 243 n. 7, 599 n. 9.

St. Thomas Hospital *v.* Charing Cross Ry. Co., 1 J. & H. 400: §284 n. 3.

Stacey *v.* Vt. Cent. R. R. Co., 27 Vt. 39: §656 n. 1.

Stack *v.* East St. Louis, 85 Ills. 377: §§223 n. 5, 230 n. 1, 625 n. 6.

Stackpole *v.* Healy, 16 Mass. 33: §590 n. 1.

Stadler *v.* Milwaukee, 34 Wis. 98: §217 n. 6.

Stafford *v.* Albany, 7 Johns. 541; 6 Johns. 1: §656 n. 14.

v. Providence, 10 R. I. 567: §§477 n. 1, 501 n. 1.

Stamford Water Co. *v.* Stanley, 39 Hun, 424: §§62 n. 1, 2; 173 n. 2, 316 n. 2.

Stamps *v.* Birmingham etc. Ry. Co., 2 Phillips, 673: §259 n. 7.

Stanchfield *v.* Newton, 142 Mass. 110: §86 n. 7.

Standish *v.* Liverpool, 1 Drewry, 1. §583 n. 1.

Stanford *v.* Worn, 27 Cal. 171: §§349 n. 12, 369 n. 1, 378 n. 15.

Stange *v.* Dubuque, 62 Ia. 303: §493 n. 9.

v. Hill etc. Ry. Co., 54 Ia. 669: §§124 n. 1, 125 n. 2.

Stanley *v.* Davenport, 54 Ia. 463: §§114 n. 2, 124 n. 1, 125 n. 12.

Stark *v.* McGown, 1 Nott & McC. 397: §10 n. 2.

v. Sioux City etc. R. R. Co., 43 Ia. 501: §280 n. 3.

Starr *v.* Camden etc. R. R. Co., 24 N. J. L. 592: §§113 n. 3, 118 n. 1, 649 n. 5.

v. London, 7 L. R. Eq. Cas. 236: §427 n. 1.

v. Rochester, 6 Wend. §564: §282 n. 7.

State *v.* Anderson, 39 Ia. 274: §369 n. 2.

v. Anthoine, 40 Me. 435: §273 n. 1.

v. Armwell, 8 Kan. 288: §599 n. 7.

v. Atkinson, 27 N. J. L. 420: §§405 n. 4, 525 n. 7.

v. Ayers, 15 N. J. L. 479: §411 n. 1. 4.

v. Bailey, 6 Wis. 291: §417 n. 2.

v. Barlow, 61 Ia. 572: §345 n. 1.

v. Barnes, 13 N. J. L. 268: §411 n. 1.

v. Bayonne, 35 N. J. L. 332: §310 n. 1.

v. Bayonne, 35 N. J. L. 476: §§310 n. 1, 406 n. 1, 411 n. 1, 412 n. 10.

State *v.* Beackmo, 8 Blackf. 246: §460 n. 4.

v. Beeman, 35 Me. 242: §367 n. 1.

v. Bennett, 25 N. J. L. 329: §512 n. 5.

v. Bergen, 21 N. J. L. 342: §§359 n. 6, 418 n. 1.

v. Bergen, 33 N. J. L. 39: §308 n. 3.

v. Bergen, 33 N. J. L. 72: §§253 n. 1, 308 n. 3, 310 n. 2.

v. Berry, 12 Ia. 58: §§343 n. 1, 382 n. 1, 601 n. 1.

v. Bishop, 39 N. J. L. 226: §§166 n. 6, 239 n. 2.

v. Blake, 35 N. J. L. 208: §5 n. 4.

v. Blake, 36 N. J. L. 442: §§5 n. 4, 185 n. 2, 186 n. 6, 562 n. 8.

v. Blauvelt, 33 N. J. L. 36: §514 n. 9.

v. Blauvelt, 34 N. J. L. 261: §549 n. 12.

v. Board of Park Comrs., 33 Minn. 524: §§618 n. 2, 656 n. 1.

v. Brown, 27 N. J. L. 13: §291 n. 1.

v. Bruggerman, 31 Minn. 493: §261 n. 1..

v. Burnet, 14 N. J. L. 385: §§419 n. 7, 525 n. 2.

v. Calais, 48 Me. 456: §519 n. 3.

v. Carragan, 36 N. J. L. 52: §144 n. 1.

v. Canterbury, 28 N. H. 195: §§72 n. 6, 271 n. 1, 274 n. 1, 601 n. 1.

v. Canterbury, 40 N. H. 307: §525 n. 8.

v. Chicago etc. R. R. Co., 68 Ia. 135: §367 n. 6.

v. Clark, 1 N. J. L. 226: §511 n. 6.

v. Clark, 38 N. J. L. 102: §545 n. 7.

v. Clarke, 25 N. J. L. 54: §248 n. 1.

v. Cincinnati etc. R. R. Co., 17 Ohio St. 103; §§532 n. 1, 656 n. 1, 657 n. 3.

v. City Council, 12 Rich. 702: §5 n. 3.

v. City of Kansas, 89 Mo. 34: §469 n. 6, 547 n. 2.

v. Comrs., 23 N. J. L. 510: §170 n. 5.

v. Comrs., 39 Ohio St. 58: §289 n. 8.

v. Conover, 7 N. J. L. 203: §520 n. 4.

v. Cooper, 23 N. J. L. 381: §512 n. 5.

v. Crane, 36 N. J. L. 394: §405 n. 17, 40.

v. Cruser, 14 N. J. L. 401: §530 n. 11.

State *v.* Davis, 13 N. J. L. 10: §411 n. 1, 4.
v. Dawson, 3 Hill S. C. 101: §§10 n. 2, 451 n. 1.
v. Delesdernier, 11 Me. 473: §405 n. 1, 16.
v. Demarest, 32 N. J. L. 528: §155 n. 4.
v. Dickson, 3 Mo. App. 464: §580 n. 1.
v. Digby, 5 Blackf. 542: §474 n. 3.
v. Driggs, 45 N. J. L. 91: §193 n. 11.
v. Dover, 10 N. H. 394: §532 n. 1.
v. Easton etc. R. R. Co., 36 N. J. L. 181: §§321 n. 1, 335 n. 7, 8; 339 n. 1.
v. Eau Claire, 40 Wis. 533: §§173 n. 2, 206 n. 1.
v. Elizabeth, 32 N. J. L. 357: §§308 n. 2, 376 n. 7, 405 n. 29.
v. Emmons, 24 N. J. L. 45: §511 n. 25.
v. English, 22 N. J. L. 291, 713: §509 n. 10.
v. Essex Road Board, 37 N. J. L. 273: §509 n. 1.
v. Evans, 2 Scam. 208: §470 n. 4.
v. Findley, 67 Wis. 86: §419 n. 2.
v. Fischer, 26 N. J. L. 129: §§327 n. 2, 515 n. 1, 4.
v. Fond du Lac, 42 Wis. 287: §§364 n. 1, 366 n. 7, 367 n. 4, 5; 368 n. 11.
v. Franklin Falls Co., 49 N. H. 240; §10 n. 2.
v. French, 24 N. J. L. 736: §525 n. 5.
v. Garretson, 23 N. J. L. 388: §515 n. 7.
v. Glenn, 7 Jones L. 321: §§6 n. 3, 75 n. 3, 156 n. 22.
v. Gill, 84: Mo. 248: §541 n. 8.
v. Gilmanton, 9 N. H. 461: §§72 n. 6, 76 n. 2.
v. Graves, 19 Md. 351: §658 n. 2.
v. Graves, 19 Md. 351: §656 n. 1.
v. Green, 15 N. J. L. 88: §511 n. 24.
v. Green, 18 N. J. L. 179: §§376 n. 3, 545 n. 8.
v. Hall, 17 N. J. L. 374: §419 n. 8.
v. Hanna, 97 Ind. 469: §557 n. 1.
v. Hart, 17 N. J. L. 185: §§411 n. 1, 4; 511 n. 21.
v. Hoboken, 35 N. J. L. 205: §116 n. 1.
v. Hoetz, 67 Wis. 84: §412 n. 7.
v. Hopping, 18 N. J. L. 423: §511 n. 10.
v. Horn, 34 Kan. 556: §§415 n. 1, 603 n. 6.
v. Hudson Co. Ave., 37 N. J. L. 12: §144 n. 2.
v. Hudson Tunnel R. R. Co., 38 N. J. L. 548: §§257 n. 1, 387 n. 2, 391 n. 3.
v. Hudson Tunnel R. R. Co., 38 N. J. L. 17: §§387 n. 2, 391 n. 3.
v. Hug, 44 Mo. 116: §§533 n. 3, 656 n. 1, 661 n. 5.
v. Hulick, 33 N. J. L. 307: §§323 n. 3, 511 n. 10, 525 n. 7.
v. Hutchinson, 10 N. J. L. 242: §411 n. 1.
v. Jacksonville etc. R. R. Co., 20 Fla. 616: §§456 n. 2, 582 n. 6.
v. Jersey City, 24 N. J. L. 662: §368 n. 2.
v. Jersey City, 25 N. J. L. 309: §§253 n. 1, 308 n. 3, 379 n. 2, 406 n. 1, 509 n. 4.
v. Justice, 24 N. J. L. 413: §382 n. 2, 421 n. 1.
v. Kinne, 41 N. H. 238: §559 n. 1.
v. Kinney, 39 Ia. 226: §§601 n. 1, 603 n. 1.
v. Langer, 29 Wis. 68: §379 n. 1.
v. Lawrence, 5 N. J. L. 850: §411 n. 1.
v. Leslie, 30 Minn. 533: §512 n. 7.
v. Lewis, 22 N. J. L. 564: §§382 n. 2, 601 n. 1, 604 n. 4.
v. Lippincott, 25 N. J. L. 434: §511 n. 12.
v. Longstreet, 38 N. J. L. 312: §557 n. 3.
v. Lord, 26 N. J. L. 140: §§509 n. 1, 549 n. 9.
v. Lubke, 15 Mo. App. 152; 85 Mo. 307: §581 n. 2.
v. Maine, 27 Conn. 641: §§140 n. 3, 141 n. 1, 168 n. 2.
v. McDonald, 28 Minn. 445: §§347 n. 9, 520 n. 1.
v. McIver, 88 N. C. 686: §§456 n. 2, 3; 457 n. 3.
v. Messenger, 27 Minn. 119: §§454 n. 4, 457 n. 3.
v. Miller, 23 N. J. L. 383: §§422 n. 4, 469 n. 8, 524 n. 3.
v. Mills, 29 Wis. 322: §§533 n. 2, 656 n. 1.
v. Mobile, 5 Porter, 279: §132 n. 1.
v. Molly, 18 Ia. 525: §§525 n. 2, 603 n. 3.
v. Montclair R. R. Co., 35 N. J. L. 328: §272 n. 1.
v. Morse, 50 N. H. 98: §343 n. 1

State *v.* Nelson, 57 Wis. 147: §§347 n. 7, 407 n. 1.
v. Newark, 25 N. J. L. 399: §368 n. 2.
v. Newark, 28 N. J. L. 491: §250 n. 3.
v. Newark, 28 N. J. L. 529: §271 n. 9.
v. Newark, 35 N. J. L. 168: §5 n. 4.
v. Northrup, 18 N. J. L. 271: §§350 n. 3, 351 n. 5.
v. Noyes, 47 Me. 189: §§135 n. 3, 136 n. 3, 156 n. 33.
v. Officer, 4 Or. 180: §§382 n. 3, 604 n. 2.
v. Oliver, 24 N. J. L. 129: §§359 n. 1, 514 n. 7.
v. Orange, 32 N. J. L. 49: §§321 n. 1, 346 n. 6, 369 n. 1, 382 n. 1.
v. Otoe Co., 6 Neb. 129: §§343 n. 1, 369 n. 1, 2; 373 n. 2, 381 n. 5, 382 n. 1, 3.
v. Phipps, 4 Ind. 515: §270 n. 7.
v. Plainfield, 41 N. J. L. 138: §§301 n. 1, 6; 374 n. 2, 376 n. 6, 384 n. 4.
v. Pierson, 37 N. J. L. 363: §525 n. 1.
v. Pitman, 38 Ia. 252: §348 n. 2.
v. Pownal, 10 Me. 24: §309 n. 1.
v. Potts, 4 N. J. L. 347: §453 n. 1.
v. Prine, 25 Ia. 231: §§382 n. 2, 604 n. 3.
v. Reckless, 38 N. J. L. 393: §421 n. 1.
v. Reed, 38 N. H. 59: §§285 n. 1, 364 n. 1.
v. Richmond, 26 N. H. 232: §601 n. 1.
v. Runyan, 24 N. J. L. 256: §512 n. 6.
v. Rye, 35 N. H. 368: §§520 n. 8, 525 n. 1, 601 n. 1.
v. Sargent, 45 Conn. 358: §§83 n. 3, 156 n. 6.
v. Sayer, 41 N. J. L. 158: §212 n. 2.
v. Schanck, 9 N. J. L. 107: §511 n. 28.
v. Schieb, 47 Ia. 611: §510 n. 5.
v. Scott, 23 Neb. 628: §242 n. 10.
v. Scott, 9 N. J. L. 17: §§415 n. 1, 509 n. 3.
v. Seymour, 35 N. J. L. 47: §§144 n. 2, 145 n. 3, 452 n. 4, 453 n. 2.
v. Shreeve, 15 N. J. L. 57: §549 n. 3.

State *v.* Shreve, 4 N. J. L. 297: §§350 n. 3, 376 n. 1, 419 n. 9.
v. Sioux City etc. R. R. Co., 43 Ia. 501: §584 n. 2.
v. Smith, 21 N. J. L. 91: §511 n. 11.
v. Snow, 3 R. I. 64: §156 n. 13.
v. Stiles, 13 N. J. L. 172: §§525 n. 12, 526 n. 1.
v. St. Louis, 62 Mo. 244: §469 n. 6.
v. St. Paul etc. Ry. Co., 35 Minn. 131: §256 n. 9.
v. Stockhouse, 14 S. C. 417: §§167 n. 25, 256 n. 4.
v. Tapp, 37 Conn. 392: §519 n. 1.
v. Ten Eyck, 18 N. J. L. 373: §545 n. 7.
v. Trenton, 35 N. J. L. 485: §412 n. 3.
v. Trenton, 36 N. J. L. 79: §116 n. 2.
v. Trenton, 36 N. J. L. 198: §§248 n. 1, 601 n. 1.
v. Trenton, 36 N. J. L. 499: §§301 n. 1, 6; 364 n. 1, 367 n. 1, 368 n. 1, 2.
v. Troth, 36 N. J. L. 422: §281 n. 3.
v. Union, 37 N. J. L. 268: §405 n. 16.
v. Vanbuskirk, 21 N. J. L. 86: §§418 n. 1, 525 n. 2.
v. Vandevere, 25 N. J. L. 233: §548 n. 4.
v. Van Geison, 15 N. J. L. 339: §§253 n. 1, 413 n. 4, 419 n. 7, 509 n. 1.
v. Wabash etc. Ry. Co., 83 Mo. 144: §156 n. 33.
v. Waldron, 17 N. J. L. 369: §663 n. 8.
v. West Hoboken, 37 N. J. L. 77: §§359 n. 1, 452 n. 1.
v. Weimer, 64 Ia. 243: §382 n. 1.
v. Wetzel, 62 Wis. 184: §§514 n. 4, 606 n. 5.
v. Wheeling etc. Bridge Co., 18 How. 421: §69 n. 5.
v. Willingborough Road, 1 N. J. L. 128: §408 n. 5.
v. Wilson, 17 Wis. 687: §§407 n. 1, 613 n. 6.
v. Wilton R. R. Co., 19 N. H. 521: §255 n. 4.
v. Witherspoon, 75 N. C. 222: §601 n. 1.
v. Woodruff, 36 N. J. L. 204: §§511 n. 19, 514 n. 6, 10; 545 n. 7.

State *v.* Woodward, 9 N. J. L. 21: §545 n. 15.
v. Yauger, 29 N. J. L. 384: §509 n. 3.

State Bank *v.* State, 1 Blackf. 267: §139 n. 12.

State Reservation, Matter of, 102 N. Y. 734; 15 Abb. N. C. 159, 395. §457 n. 11.

State Road, 6 Whart. 352: §403 n. 9.

State Road etc., 60 Pa. S. 330: §419 n. 3, 4.

State St., *In re*, 8 Pa. S. 435: §525 n. 1.

Staten Island etc. Co., Matter of, 38 Hun, 381: §391 n. 1.
 Matter of, 41 Hun, 392: §423 n. 4.
 Matter of, 103 N. Y. 251: §279 n. 4.

Steamboat etc. *v.* Marshall, 39 Miss. 109: §72 n. 15.
v. Phœbus, 11 Peters, 175: §72 n. 2.

Stearns *v.* Deerfield, 51 N. H. 372: §526 n. 2.

Steele *v.* Western etc. Nav. Co., 2 Johns. 283: §§496 n. 3, 574 n. 1.

Steele's Petition, 44 N. H. 220: §407 n. 3.

Stein *v.* Ashby, 24 Ala. 521; 30 Ala. 363: §62 n. 1.
v. Burden, 24 Ala. 130: §62 n. 1, 11.
v. Burden, 29 Ala. 127: §62 n. 1.
v. Mobile, 24 Ala. 591: §155 n. 5.

Steinmeyer *v.* St. Louis, 3 Mo. App. 256: §103 n. 4.

Stephen *v.* Comrs., 36 Kan. 664: §379 n. 1.

Stephens *v.* Marshall, 3 Chand. Wis. 222: §247 n. 3.

Sterling's Appeal, 111 Pa. S. 35: §§129 n. 2, 637 n. 6.

Stetson *v.* Bangor, 60 Me. 313; 73 Me. 357: §500 n. 1.
v. Chicago etc. R. R. Co., 75 Ills. 74: §§225 n. 1, 635 n. 5.
v. Faxon, 19 Pick. 147: §227 n. 8.

Stevens *v.* Danbury, 53 Conn. 9: §§656 n. 1, 658 n. 5.
v. Duck Riv. Nav. Co., 1 Sneed, 237: §8402 n. 4, 655 n. 1, 4; 658 n. 1.
v. Erie R. R. Co., 21 N. J. Eq. 259: §§273 n. 6, 641 n. 9.
v. Goffstown, 21 N. H. 454: §531 n. 5.
v. King, 76 Me. 197: §607 n. 6.
v. Manchester, 63 N. H. 390: §281 n. 7.
v. Middlesex Canal, 12 Mass. 466: §607 n. 2.

Stevens *v.* Paterson etc. R. R. Co., 34 N. J. L. 532: §§77 n. 1, 79 n. 2, 83 n. 1, 84 n. 2.
v. Stevens, 11 Met. 251: §298 n. 1.
v. Supervisors, 41 Ia. 341: §348 n. 2.

Stevens Pt. Boom Co. *v.* Reilly, 44 Wis. 295: §§69 n. 7, 240 n. 3.
v. Reilly, 46 Wis. 237: §69 n. 7.

Stewart *v.* Baltimore, 7 Md. 500: §312 n. 1, 2.
v. Baltimore, 62 Md. 371: §144 n. 1.
v. Board of Police, 25 Miss. 479: §§314 n. 2, 363 n. 4, 5.
v. Clinton, 79 Mo. 603: §103 n. 4.
v. County, 2 Pa. S. 340: §§499 n. 10, 663 n. 1.
v. Hartman, 46 Ind. 331: §167 n. 2, 8.
v. Palmer, 74 N. Y. 183: §364 n. 1.
v. Raymond R. R. Co., 7 S. & M. 568: §§324 n. 1, 618 n. 1, 631 n. 2.
v. Supervisors, 30 Ia. 9: §155 n. 5.
v. Wallis, 30 Barb. 344: §§253 n. 1, 419 n. 11, 605 n. 3, 650 n. 7.

Stewart's Appeal, 56 Pa. S. 413: §243 n. 1.

Stickford *v.* St. Louis, 75 Mo. 309; 7 Mo. App. 217: §§211 n. 1, 223 n. 2.

Stillman *v.* Northern Pacific etc. R. R. Co., 34 Minn. 420: §497 n. 1.

Stiltz *v.* Indianapolis, 55 Ind. 515: §155 n. 13.

Stinson *v.* Chicago etc. Ry. Co., 27 Minn. 284: §§443 n. 8, 479 n. 5.
v. Dunbarton, 46 N. H. 385: §530 n. 7.

Stockett *v.* Nicholson, Walker (Miss.) 75: §§253 n. 1, 605 n. 3.

Stockley *v.* Robbstown Bridge Co., 5 Watts, 546: §590 n. 3.

Stockport etc. Ry. Co., *In re*, 33 L. J. Q. B. 251: §497 n. 1.

Stockton etc. Gravel Co. *v.* Stodden etc. R. R. Co., 53 Cal. 11: §492 n. 3.

Stockton etc. Ry. Co. *v.* Brown, 9 H. L. 246: §393 n. 3.
v. Galgiani, 49 Cal. 139: §§487 n. 7, 529 n. 1.
v. Stockton, 41 Cal. 147: §158 n. 1.

Stodghill *v.* Chicago etc. R. R. Co., 43 Ia. 26: §§293 n. 3, 571 n. 4, 585 n. 5.

v. Chicago etc. R. R. Co., 53 Ia. 341: §625 n. 2.

Stondinger *v.* Newark, 28 N. J. Eq. 187; 28 N. J. Eq. 446: §127 n. 1.

Stone *v.* Boston, 2 Met. 220: §549 n.3.
v. Cambridge, 6 Cush. 270: §510
 n. 5.
v. Commercial Ry. Co., 9 Sim.
 621: §284 n. 3.
v. Heath, 135 Mass. 561: §498 n.1, 7.
v. Fairbury etc. R. R. Co., 68 Ills.
 394: §§225 n. 1, 230 n. 2.
v. Mississippi, 101 U. S. 814: §156
 n. 20.

Stoneham *v.* London etc. Ry. Co.,
 7 L. R. Q. B. 1: §331 n. 1.

Storer *v.* Hobbs, 52 Me. 144: §649
 n. 2.

Storm *v.* Manchaug Co., 13 Allen,
 10: §182 n. 1.

Storm Lake *v.* Iowa Falls etc. R.R.
 Co., 62 Ia. 218: §326 n. 2.

Story *v.* New York El. R. R. Co.,
 90 N. Y. 122: §§59 n. 1, 114 n.
 5, 6, 8; 115 n. 1, 4; 123, 126 n. 1,
 129 n. 1, 142 n. 3.
v. N. Y. El. R. R. Co., 3 Abb. N.
 C. 478: §123 n. 2.

Story St., *In re*, 11 Phila. 456: §500
 n. 1.

Stout *v.* Freeholders, 25 N. J. L.
 202: §239 n. 4.
v. Hopping, 17 N. J. L. 471: §650
 n. 11.

Stowell *v.* Flagg, 11 Mass. 364: §178
 n. 2, 607 n. 2.
v. Milwaukee, 31 Wis. 523: §§217
 n. 6, 436 n. 11, 494 n. 2, 7.

Strachan *v.* Brown, 39 Mich. 168:
 364 n. 1, 366 n. 7, 368 n. 1, 549 n. 3.

Strahan *v.* County Court, 65 Mo.
 644: §650 n. 8.

Strang *v.* New York Rubber Co.,
 1 Sweeney 78: §483 n. 21.

Stratton *v.* Elliott, 83 Ind. 425: §140
 n. 2.
v. Great Western etc. Ry. Co., 40
 L. J. Eq. 50: §§618 n. 1, 3; 634
 n. 2, 648 n. 6.

Stratton's Petition, 21 N. H. 44:
 §309 n. 5.

Street Railway *v.* Cumminsville, 14
 Ohio St. 523: §§124 n. 1, 125
 n. 11.
v. West Side Ry. Co., 48 Mich.
 433: §§117 n. 4, 139 n. 7, 275 n. 3.

Striker *v.* Kelley, 7 Hill, 9; 2 Denio,
 323: §5 n. 3.

Strong *v.* Beloit etc. R. R. Co., 16
 Wis. 635: §405 n. 25.
v. Brooklyn, 68 N. Y. 1: §§141 n.
 12, 278 n. 1, 3; 596 n. 2, 647 n. 7.

Strong *v.* Brooklyn, 12 Hun, 453:
 §647 n. 17.
v. Clem, 12 Ind. 37: §323 n. 4.
v. Makeever, 102 Ind. 578: §511
 n. 1.

Strout *v.* Millbridge Co., 45 Me. 76:
 §607 n. 10.

Struthers *v.* Dunkirk etc. Ry. Co.,
 87 Pa. S. 282: §115 n. 4.

Stuart *v.* Baltimore, 7 Md. 500: §145
 n. 3.
v. Palmer, 74 N. Y. 183: §§365 n.
 1, 2.

Stuber's Road, 28 Pa. S. 199: §167
 n. 21.

Studler *v.* Milwaukee, 34 Wis. 98:
 487 n. 1.

Sturs *v.* Brooklyn, 101 N. Y. 51: §§83
 n. 3.

Sturtevant *v.* Milwaukee etc. R. R.
 Co., 11 Wis. 63: §§618 n. 1, 634
 n. 2.
v. Plymouth Co., 12 Met. 7: §294
 n. 3.

Suburban R. T. Co., Matter of, 16
 Abb. N. C. 152: §§357 n. 3, 395
 n. 2.
 Matter of, 38 Hun, 553: §§357 n.
 3, 395 n. 2, 397 n. 5.

Sudd *v.* Malden Ry. Co., 6 Exch.
 148: §393 n. 8.

Sudder *v.* Trenton Del. Falls Co., 1
 N. J. Eq. 694: §179 n. 1.

Suits *v.* Murdock, 63 Ind. 73: §§511
 n. 29, 603 n. 1.

Suffield *v.* Hatheway, 44 Conn. 521:
 §589 n. 8.

Suffolk *v.* Parker, 79 Va. 660: §152
 n. 6.

Sugar Refining Co. *v.* Jersey City,
 26 N. J. Eq. 247: §§77 n. 1, 85
 n. 7.

Sullivan *v.* La Fayette Co., 61 Miss.
 271: §§479 n. 9, 528 n. 5.
v. Phillips, 110 Ind. 320: §§103 n.
 3, 641 n. 7.
v. Supervisors, 58 Miss. 790: §271
 n. 3, 507 n. 2.

Summerville *v.* Wimbush, 7 Gratt.
 205: §405 n. 39.

Summit St. Matter of, 3 How. Par.
 26: §419 n. 11.

Sumner *v.* County Comrs., 37 Me.
 112: §§350 n. 3, 379 n. 7, 549 n. 4.

Sunbury etc. R. R. Co. *v.* Hummell,
 27 Pa. S. 99: §497 n. 1,
 Sunderland Bridge Case, 122 Mass.
 459: §526 n. 3.

Sunier *v.* Miller, 105 Ind. 393: §§379 n. 1, 601 n. 1.
 Supervisors *v.* Gorrell, 20 Gratt. 484: §§240 n. 8, 252 n. 4, 286 n. 3, 377 n. 9.
v. Magoon, 109 Ills. 142: §§418 n. 6, 544 n. 1, 545 n. 1.
v. McFadden, 57 Miss. 618: §271 n. 4.
v. Stout, 9 W. Va. 703: §§12 n. 5, 407 n. 2, 524 n. 4.
 Surgi *v.* Snetchman, 11 La. An. 387: §5 n. 3.
 Surocco *v.* Geary, 3 Cal. 69: §7 n. 2.
 Susanna Root's Case, 77 Pa. S. 276: §§469 n. 10, 473 n. 8.
 Susquehanna Canal Co., *v.* Wright, 9 W. & S. 9: §75 n. 1.
 Sutherland *v.* Holmes, 78 Mo. 399: §§316 n. 1, 351 n. 6, 371 n. 1, 406 n. 2, 540 n. 4.
 Sutliff *v.* Johnson, 17 Neb. 575: §334 n. 3.
 Sutton *v.* Clark, 6 Tamiton, 28: §§92 n. 4, 5.
 Sutton etc. Co., *v.* Hitchens, 1 De G. M. N. & G. 161; 21 L. J. Ch. N. S. 73: §645 n. 1.
 Sutton's Heirs *v.* Louisville, 5 Dana, 28: §§5 n. 3, 468 n. 2, 5.
 Swan *v.* Middlesex Co., 101 Mass. 173: §§436 n. 4, 437 n. 4.
v. Williams, 2 Mich. 427: §§170 n. 1, 237 n. 4, 238 n. 1, 364 n. 1, 368 n. 1, 5, 7.
 Swayze *v.* New Jersey etc. R. R. Co., 36 N. J. L. 295: §§469 n. 8, 523 n. 4.
 Sweeney *v.* United States, 62 Wis. 396: §318 n. 6.
 Sweet *v.* Buffalo etc. Ry. Co., 79 N. Y. 293: §§277 n. 1, 596 n. 3.
v. Buffalo etc. Ry. Co., 13 Hun, 643: §596 n. 3.
 Swenson *v.* Lexington, 69 Mo. 157: §§117 n. 2, 442 n. 1.
 Swett *v.* Cutts, 50 N. H. 439: §88 n. 4.
 Swift *v.* Given's Appeal, 111 Pa. S. 516: §281 n. 4.
 Swindon etc. Co., *v.* Wills etc. Co., L. R. 7 E. & I. App. 697: §62 n. 1, 11.
 Symonds *v.* Cincinnati, 14 Ohio, 147: §§462 n. 2, 470 n. 7.
 Syracuse etc. R. R. Co., Matter of, 4 Hun, 311: §§563 n. 3, 655 n. 2.

T.

Talbott *v.* Hudson, 16 Gray, 417: §§157 n. 3, 158 n. 1, 161 n. 1, 164 n. 5, 182, 201 n. 4, 238 n. 1, 456 n. 2, 457 n. 2.
 Tait *v.* Hall, 71 Cal. 149: §631 n. 1.
v. Matthews, 33 Tex. 112: §§170 n. 1, 456 n. 1, 458 n. 8, 468 n. 4, 649 n. 2.
 Tait's Exr. *v.* Central Lunatic Asylum (Va.), 4 S. E. R. 697: §§238 n. 1, 265 n. 6, 464 n. 1.
 Tamon *v.* Kellogg, 49 Mo. 118: §627 n. 1.
 Tappan's Petition, 24 N. H. 43: §520 n. 8.
 Tarrington *v.* Nash, 17 Conn. 197: §358 n. 2.
 Tarrytown *v.* Cobb, 14 Abb. N. C. 493: §543 n. 1.
 Tasper *v.* Comrs., 27 Kan. 39: §469 n. 2.
 Tate *v.* Ohio etc. R. R. Co., 7 Ind. 479: §§100 n. 2, 114 n. 4, 115 n. 4, 117 n. 2.
v. Sacramento, 50 Cal. 242: §631 n. 7.
 Taylor *v.* Armstrong, 24 Ark. 102: 589 n. 3.
v. Baltimore, 45 Md. 576: §§277 n. 2, 278 n. 13, 502 n. 5.
v. Black, 3 Bibb, 78: §554 n. 3.
v. Burnap, 39 Mich. 739: §382 n. 3.
v. Cedar Rapids etc. R. R. Co., 25 Ia. 371: §292 n. 6.
v. Chicago etc. R. R. Co. 63 Wis. 327: §648 n. 1.
v. Clemson, 11 C. & F. 610: §§303 n. 4, 379 n. 1.
v. County Comrs., 18 Pick. 309: §388 n. 3.
v. County Comrs., 105 Mass. 225: §405 n. 9.
v. Marcy, 25 Ills. 518: §§578 n. 2, 649 n. 2.
v. Met. El. Ry. Co., 50 N. Y. Supr. Ct. 311: §§493 n. 9, 624 n. 1, 625 n. 3.
v. Nashville etc. R. R. Co., 6 Cold. 646: §8 n. 10.
v. New York etc. R. R. Co., 38 N. J. L. 28: §587 n. 2.
v. Plymouth, 8 Met. 462: §7 n. 3.
v. Porter, 4 Hill, 140: §§157 n. 2, 4; 167 n. 2, 7.
v. St. Louis, 14 Mo. 20: §103 n. 4, 8.

Tearney v. Smith, 86 Ills. 391: §§103 n. 2, 572 n. 3.

Teese Ex parte, 4 Pa. S. 69: §517 n. 1.

Tehama Co. v. Bryan, 68 Cal. 57: §477 n. 5.

Telephone etc. Co. v. Forke, 2 Tex. App. Civil Cas. p. 318: §§326 n. 2, 436 n. 9, 486 n. 2.

Templin v. Iowa City, 14 Ia. 59: §103 n. 7.

Ten Broeck v. Sherrill, 71 N. Y. 276: §243 n. 7.
v. **Jahke**, 77 Pa. S. 392: §318 n. 2, 3.

Ten Eyke v. Delaware etc. Canal Co., 18 N. J. L. 200: §66 n. 1, 2.

Tennessee etc. R. R. Co. v. Adams, 3 Head, 596: §257 n. 1.

Terpening v. Smith, 46 Barb. 208: §§369 n. 2, 649 n. 2.

Terre Haute v. Turner, 36 Ind. 522: §96 n. 1.

Terre Haute etc. R. R. Co. v. Bissell, 108 Ind. 113: §113 n. 3, 4.
v. **Crawford**, 100 Ind. 550: §532 n. 1.
v. **McKinley**, 33 Ind. 274: §§66 n. 3, 6; 154 n. 1.
v. **Scott**, 74 Ind. 29: §664 n. 16.

Terrill v. Rankin, 2 Bush. (Ky.) 453: §8 n. 11.

Terry v. New York etc. R. R. Co., 67 How. Pr. 439: §596 n. 7.
v. **Waterbury**, 35 Conn. 526: §§390 n. 1, 394 n. 3.

Texas etc. R. R. Co. v. Cella, 42 Ark. 528: §§497 n. 1, 498 n. 1, 501 n. 1, 524 n. 3.
v. **Clifton**, 2 Tex. App. Civil Cas. 433: §§89 n. 1, 572 n. 3, 625 n. 2.
v. **Durrett**, 57 Tex. 48: §§289 n. 4, 496 n. 2.
v. **Eddy**, 42 Ark. 527: §§448 n. 1, 524 n. 3.
v. **Farrell**, 60 Tex. 267: §648 n. 1.
v. **Goldberg**, 68 Tex. 685: §225 n. 1.
v. **Kirby**, 44 Ark. 103: §§435 n. 1, 436 n. 1, 437 n. 1.
v. **Long**, 1 Tex. App. Civ. Cas. p. 281: §625 n. 2.
v. **Matthews**, 60 Tex. 215: §§468 n. 4, 486 n. 1.

Texas & Pac. Ry. Co. v. Rosedale Ry. Co., 64 Tex. 80: §§124 n. 1, 636 n. 2.

Thatcher v. Dartmouth Bridge Co., 18 Pick. 501: §§240 n. 4, 649 n. 1.

Thayer v. Burger, 100 Ind. 262: §§348 n. 6, 527 n. 1, 540 n. 4.

Thayer v. New Bedford R. R. Co., 125 Mass. 253: §§77 n. 1, 84 n. 2.
v. **Rochester City etc. R. R. Co.**, 15 Abb. N. C. 52: §§124 n. 3, (3); n. 3.

Thebordereaux v. Maggioli, 4 La. An. 73: §504 n. 3.

Theilan v. Porter, 14 Lea, 622: §156 n. 3.

Thein v. Voegtlander, 3 Wis. 461: §180 n. 12.

Thetford v. Kilburn, 36 Vt. 179: §§329 n. 1, 364 n. 1.

Thickness v. Lancaster Canal Co., 4 M. & W. 471: §607 n. 2.

Third Ave. R. R. Co. v. N. Y. El. R. R. Co., 19 Abb. N. C. 261: §§123 n. 9, 635 n. 4.

Thirty-fourth St., 10 Phila. 197: §§256 n. 21.
Matter of, 37 Hun, 442; 102 N. Y. 343: §§387 n. 2, 404 n. 1.

Thirty-second St., Matter of, 19 Wend. 128: §500 n. 1.

Thomas v. Ford, 63 Md. 346: §589 n. 3.

Thomas Jefferson, The, 10 Wheat. 428: §72 n. 2.

Thompson v. Hodgson, 2 Hun, 146: §§129 n. 1, 133 n. 4.

Thompson v. Androscoggin etc. Co., 54 N. H. 545: §§59, 64 n. 1, 2.
v. **Booneville**, 61 Mo. 282: §106 n. 1.
v. **Conway**, 53 N. H. 622: §523 n. 2.
v. **Crabb**, 6 J. J. Marsh. 222: §§411 n. 1, 413 n. 2.
v. **Deprez**, 96 Ind. 67: §438 n. 1.
v. **Grand Gulf R. R. Co.**, 3 How. Miss. 240: §§454 n. 2, 458 n. 8.
v. **Keokuk**, 61 Ia. 187: §494 n. 2, 3.
v. **McElarney**, 82 Pa. S. 174: §298 n. 1.
v. **Milwaukee etc. Ry. Co.**, 27 Wis. 93: §481 n. 1, 494 n. 5.
v. **Multnomah Co.**, 2 Or. 34: §§369 n. 1, 382 n. 1, 3; 405 n. 2, 509 n. 3, 542 n. 4.
v. **New York etc. R. R. Co.**, 3 Sandf. Ch. 625: §198 n. 1.
v. **Treasurer etc.**, 11 Ohio St. 678: §194 n. 3.

Matter of, 43 Hun, 416: §146 n. 5.
Matter of, 45 Hun, 261: §524 n. 3.

Thorp v. Witham, 65 Ia. 566: §§312 n. 1, 2; 557 n. 2, 633 n. 1.

v. **Rutland etc. R. R. Co.**, 27 Vt. 140: §156 n. 24.

Thorpe *v.* County Comrs., 9 Gray, 57: §§525 n. 9, 545 n. 1.
 Thorn *v.* Sweeney, 12 Nev. 251: §173 n. 2.
 Thorndike *v.* County Comrs., 117 Mass. 566: §384 n. 9.
 Thornton *v.* Town Council, 6 R. I. 433: §415 n. 14.
 Threat *v.* Middletown, 8 Conn. 243: §358 n. 2.
 Thunder Bay etc. Co. *v.* Speechly, 31 Mich. 336: §64 n. 2.
 Thurman *v.* Emmerson, 4 Bibb, 279: §516 n. 6.
 Thurston *v.* Hancock, 12 Mass. 220: §§94 n. 1, 151 n. 1.
v. Portland, 63 Me. 149: §440 n. 2.
v. St. Joseph, 51 Mo. 510: §§59 n. 1, 100 n. 2, 103 n. 3, 4; 114 n. 4, 5, 9.
 Tibbitts *v.* Knox etc. R. R. Co., 62 Me. 437: §146 n. 1, 573 n. 1.
 Tide Water Canal Co. *v.* Archer, 9 G. & J. 479: §§242 n. 3, 412 n. 1, 467 n. 1, 480 n. 4, 515 n. 6, 658 n. 8.
 Tide Water Co. *v.* Coster, 18 N. J. Eq. 518: §§193 n. 3, 200 n. 1, 4, 6.
 Tieck *v.* Board of Comrs., 11 Minn. 292: §607 n. 2.
 Tiedt *v.* Carstensen, 61 Ia. 334: §548 n. 3.
 Tiffany *v.* U. S. etc. Co., 51 N. Y. Supr. Ct. 280; 67 How. Pr. 73: §§181 n. 1, 687 n. 4.
 Tiff *v.* Buffalo, 82 N. Y. 204: §§594 n. 3, 596 n. 3.
 Tift *v.* Dougherty, 74 Ga. 340: §646 n. 1.
 Tileston *v.* Brookline, 134 Mass. 438: §665 n. 11.
 Tillman *v.* Kircher, 64 Ind. 104: §190 n. 2.
 Tingle *v.* Tingle, 12 Bush, 160: §511 n. 26.
 Tingley *v.* Providence, 8 R. I. 493: §§435 n. 1, 3; 436 n. 19, 20.
v. Providence, 9 R. I. 388: §379 n. 1.
 Tinicum Fishing Co. *v.* Carter, 61 Pa. S. 21; 90 Pa. S. 85: §85 n. 3.
 Tinsman *v.* Belvidere etc. R. R. Co., 26 N. J. L. 148: §67 n. 6.
 Tinsman *v.* National Bank, 100 U. S. 6: §426 n. 5.
 Tintsville etc. R. R. Co. *v.* Warren etc. R. R. Co., 12 Phila. 642: §306 n. 7.
 Tobie *v.* Comrs., 20 Kan. 14: §469 n. 2.
 Todd *v.* Crustin, 34 Conn. 78: §§1 n. 1, 3 n. 1, 9 n. 1, 164 n. 5, 180 n. 1.
v. Kankakee etc. R. R. Co., 78 Ills. 530: §473 n. 6.
v. Rome, 2 Me. 55: §518 n. 1.
 Todernier *v.* Aspinwall, 43 Ills. 401: §§323 n. 3, 511 n. 10, 14.
 Toledo etc. Ry. Co. *v.* Dunlap, 47 Mich. 456: §§242 n. 6, 302 n. 5, 507 n. 7, 559 n. 5.
v. Green, 69 Ills. 199: §587 n. 4.
v. Morgan, 72 Ills. 155: §318 n. 8.
v. Morrison, 71 Ills. 616: §89 n. 3.
v. Munson, 57 Mich. 42: §§253 n. 1, 352 n. 15, 505 n. 5.
 Tomlin *v.* Dubuque etc. R. R. Co., 32 Ia. 106: §§72 n. 18, 77 n. 1, 83 n. 4, 84 n. 2.
 Tompkins *v.* Augusta etc. R. R. Co., 21 S. C. 420: §§289 n. 10, 648 n. 1.
 Toney *v.* Johnson, 26 Ind. 382: §607 n. 2.
 Tonica etc. R. R. Co. *v.* Unsicker, 22 Ills. 221: §§496 n. 1, 498 n. 1.
 Tootle *v.* Clifton, 22 Ohio St. 247: §88 n. 1.
 Toppan's Petition, 24 N. H. 43: §376 n. 3.
 Townsend, Matter of, 39 N. Y. 171: §§157 n. 6, 160 n. 2, 169 n. 1.
 Towamencin Road, 10 Pa. S. 195: §394 n. 1.
 Towanda Bridge Co., *In re*, 91 Pa. S. 216: §§242 n. 11, 271 n. 1, 274 n. 1.
 Tower *v.* Boston, 10 Cush. 235: §§220 n. 10, 607 n. 2.
 Towle *v.* Eastern R. R. Co., 17 N. H. 519: §118 n. 4.
v. Eastern R. R. Co., 18 N. H. 547: §246 n. 1.
 Town *v.* Blackberry, 29 Ills. 137: §606 n. 1.
v. Faulkner, 56 N. H. 255: §§625 n. 2, 665 n. 5.
 Townsend *v.* Chicago etc. R. R. Co., 91 Ills. 545: §§384 n. 2, 601 n. 1.
 Township Board *v.* Hackman, 48 Mo. 243: §§161 n. 3, 174 n. 1, 399 n. 2.
 Tracey *v.* Corse, 58 N. Y. 143: §365 n. 4.
 Tracy *v.* Elizabethtown etc. R. R. Co., 78 Ky. 309: §551 n. 1.
v. Elizabethtown etc. R. R. Co., 80 Ky. 259: §364 n. 1, 366 n. 7, 368 n. 1, 3, 4; 390 n. 1, 393 n. 4, 397 n. 2.

Trahern v. San Joaquin Co., 59 Cal. 320: §12 n. 3.
Transportation Co. v. Chicago, 99 U. S. 635: §§96 n. 1, 232 n. 1.
Transylvania University v. Lexington, 3 B. Mon. 25: §§100 n. 2, 114 n. 3, 134 n. 1, 2, 3.
Traphagen v. Jersey City, 29 N. J. Eq. 206: §127 n. 1.
Traver v. Merrick Co., 14 Neb. 327: §180 n. 11.
Treat v. Bates, 27 Mich. 390: §67 n. 2.
Tremain v. Cohoes Co., 2 N. Y. 163: §§14^b n. 2, 573 n. 1.
Trenton W. P. Co. v. Chambers, 9 N. J. Eq. 471: §§298 n. 4, 648 n. 1.
 v. Chambers, 13 N. J. Eq. 199: §565 n. 1.
 v. Raff, 36 N. J. L. 335: §§59 n. 1, 67 n. 1, 2, 6; 452 n. 6, 7.
Trickey v. Schlader, 52 Ills. 78: §606 n. 3.
Trinity Church v. Higgins, 4 Robb, 1: §308 n. 8.
Trinity College v. Hartford, 32 Conn. 452: §469 n. 1, 12.
Tripp v. County Comrs., 2 Allen, 556: §§402 n. 4, 421 n. 2.
 v. Overocker, 7 Col. 72: §§54 n. 4, 624 n. 4.
Trombley v. Humphrey, 23 Mich. 471: §203 n. 5.
Trook v. B. & P. R. R. Co., 3 McArthur, 392: §117 n. 8.
Trosper v. Comrs., 27 Kan. 391: §476 n. 2.
Troutman v. Barnes, 4 Met. Ky. 337: §§167 n. 14, 402 n. 2, 3.
Trowbridge v. Brookline, 144 Mass. 139: §§90 n. 3, 220 n. 5.
Troy v. Cheshire R. R. Co., 23 N. H. 83: §§119 n. 2, 625 n. 2.
 v. Coleman, 58 Ala. 570: §103 n. 3.
Troy etc. R. R. Co. v. Cleveland, 6 How. Pr. 238: §§336 n. 2, 403 n. 6.
 v. Lee, 13 Barb. 169: §§470 n. 6, 524 n. 1.
 v. Northern T. Co., 16 Barb. 100: §§147 n. 2, 435 n. 1, 492 n. 1, 2; 520 n. 7.
 v. Potter, 42 Vt. 265: §§586 n. 1, 587 n. 7.
True v. Freeman, 64 Me. 573: §§258 n. 4, 601 n. 1.
Truesdale v. Peoria Grape Sugar Co., 101 Ills. 561: §635 n. 5.
Trustees v. Auburn etc. R. R. Co., 3 Hill, 567: §§111 n. 3, 118 n. 1, 649 n. 5.
 v. Davenport, 7 Ia. 213: §§454 n. 2, 631 n. 2.
 v. Dennett, 5 N. Y. Supm. Ct. 217: §479 n. 2, 11.
 v. Howes' Heir, 6 Bush, 232: §590 n. 7.
 v. Salmund, 11 Me. 109: §370 n. 4.
 v. Spears, 16 Ind. 441: §67 n. 2.
 v. Walsh, 57 Ills. 363: §631 n. 5.
 v. Worcester Co., 1 Met. 437: §440 n. 3.
Trustees etc., Matter of, 1 Barb. 34: §614 n. 5.
Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co., 11 Leigh, 42: §§135 n. 1, 136 n. 3, 139 n. 10, 452 n. 2, 456 n. 2, 3.
Tucker v. Campbell, 36 Me. 346: §327 n. 3.
 v. Eldred, 6 R. I. 404: §590 n. 3.
 v. Erie etc. R. R. Co., 27 Pa. S. 281: §§345 n. 4, 565 n. 1.
 v. Mass. Cent. R. R. Co., 116 Mass. 124: §551 n. 7.
 v. Parker, 50 Mich. 5: §543 n. 1.
 v. Rankin, 15 Barb. 471: §419 n. 11.
 v. Tower, 9 Pick. 109: §591 n. 1.
 Petition of, 27 N. H. 405: 545 n. 10.
Tufts v. Charlestown, 4 Gray, 537: §§469 n. 5, 500 n. 4.
 v. Charlestown, 117 Mass. 401: §440 n. 2.
Tulley v. Northfield, 6 Ills. App. 356: §518 n. 1.
Tunbridge v. Tarbell, 19 Vt. 453: §396 n. 2, 6.
Turley v. Oldham, 68 Ind. 414: §540 n. 1, 2.
Turner v. Althaus, 6 Neb. 54: §§4 n. 3, 155 n. 11, 13, 14.
 v. Dartmouth, 13 Allen, 291: §103 n. 4.
 v. Holleran, 11 Minn. 253: §551 n. 5.
 v. Rising Sun etc. Co., 71 Ind. 547: §140 n. 2.
 v. Robbins, 133 Mass. 207: §483 n. 4.
 v. Sheffield etc. R. R. Co., 10 M. & W. 425: §§230 n. 1, 231 n. 1.
 v. Stanton, 42 Mich. 506: §§298 n. 7, 508 n. 1, 3.
 v. Whitehouse, 68 Me. 221: §338 n. 5.
 v. Williams, 10 Wend. 140: §§483 n. 20, 627 n. 2.

Turnpike Co. v. American etc. Co., 43 N. J. L. 381: §§172 n. 1, 271 n. 5, 350 n. 6.
v. Davidson Co., 3 Tenn. Ch. 396: §§6 n. 3, 156 n. 31.
v. State, 3 Wall. 210: §136 n. 3.

Turnpike Road Co. v. Brosi, 22 Pa. S. 29: §§326 n. 2, 335 n. 2.

Turnpike Road etc., 5 Binney, 481: §§419 n. 2, 3, 14; 548 n. 2.

Turrell v. Norman, 19 Barb. 262: §649 n. 3.

Tutt v. Port Royal etc. Ry. Co., 16 S. C. 365: §289 n. 7.

Twenty-ninth St., Matter of, 1 Hill, 189: §500 n. 1.

Twenty-second St., *In re*, 15 Phila. 409: §§272 n. 9, 274 n. 2.
In re, 102 Pa. S. 108: §272 n. 9.

Twenty-second St. etc., 23 Pa. S. 346: §281 n. 1.

Twenty-sixth St., Matter of, 12 Wend. 203: §405 n. 36.

Twombly v. Madbury, 27 N. H. 433: §537 n. 5.

Tyler v. Beacher, 44 Vt. 648: §§157 n. 2, 158 n. 1, 180 n. 17, 238 n. 1.
v. Bowen, 1 Pitts. 225: §378 n. 8, 10.
v. Mather, 9 Gray, 177: §396 n. 10.

Tyron v. Baltimore County, 28 Md. 510: §66 n. 13.

Tyson v. Milwaukee, 50 Wis. 78: §§217 n. 6, 7; 494 n. 2, 3, 7, 9; 499 n. 12, 667 n. 5.

U.

Uhrig v. St. Louis, 44 Mo. 458: §313 n. 3.

Uline v. New York etc. R. R. Co., 101 N. Y. 98: §§493 n. 9, 625 n. 3.

Ulster etc. R. R. Co. v. Gross, 31 Hun, 83: §§559 n. 5, 560 n. 8.

Unangst's Appeal, 55 Pa. S. 128: §298 n. 6.

Underhill v. Saratoga etc. R. R. Co., 20 Barb. 455: §292 n. 1.

Underwood v. Bailey, 59 N. H. 480: §166 n. 3.
v. North Wayne Sythe Co., 38 Me. 75: §506 n. 1.
v. North Wayne Sythe Co., 41 Me. 291: §607 n. 2.

Uniacke v. Chicago etc. Ry. Co., 67 Wis. 108: §§477 n. 8, 499 n. 4.

Union Canal Co. v. Keiser, 19 Pa. S. 184: §§548 n. 4, 665 n. 6.
v. Landis, 9 Watts, 228: §§72 n. 17, 75 n. 1.

v. O'Brien, 4 Rawle, 358: §356 n. 2.

Union Canal Co. v. Woodside, 11 Pa. S. 176: §314 n. 1.

Union Depot etc. Co. v. Brunswick, 31 Minn. 297: §§81 n. 4, 82 n. 3, 83 n. 2, 3; 84 n. 2, 478 n. 7, 479 n. 5, 501 n. 1.

Union Ferry Co., Matter of, 98 N. Y. 139: §§242 n. 11, 279 n. 1, 286 n. 1.

Union Pacific Ry. Co. v. Burlington etc. R. R. Co., 19 Neb. 386: §403 n. 7.
v. Burlington etc. R. R. Co., 1 McCrary, 452: §§268 n. 2, 419 n. 5.
v. Dyche, 31 Kan. 120: §§66 n. 4, 585 n. 5.
v. Hall, 91 U. S. 343: §257 n. 5.
v. Leavenworth etc. Ry. Co., 29 Fed. R. 728: §§268 n. 2, 364 n. 1, 390 n. 3.

Union Pass. Ry. Co. v. Continental Ry. Co., 11 Phila. 321: §139 n. 9.

Union Railroad etc. Co. v. Moore, 80 Ind. 458: §§434 n. 1, 481 n. 1, 503 n. 1.

Union etc. R. R. Co., Matter of, 53 Barb. 457: §497 n. 1.

Union Springs v. Jones, 58 Ala. 654: §§103 n. 3, 482 n. 4.

United R. R. etc. Co. v. Weldon, 47 N. J. L. 59: §245 n. 3.

United States v. Ames, 1 W. & M. 76: §§251 n. 3, 264 n. 2.
v. Block, 121, 3 Biss. 208: §315 n. 2.
v. Chicago, 7 How. 185: §264 n. 3.
v. Dumplin Island, 1 Barb. 24: §§333 n. 4, 509 n. 4.
v. Jones, 109 U. S. 513: §§10 n. 4, 313 n. 3, 364 n. 1, 366 n. 6.
v. Land etc. Co., 47 Cal. 515: §507 n. 8.
v. Oregon Ry. etc. Co., 9 Sawyer, 61: §§315 n. 2, 357 n. 3.
v. Railroad Bridge Co., 6 McLean, 517: §264 n. 1.
v. Reed, 56 Mo. 565: §§303 n. 3, 527 n. 10.
v. Suprs., 1 Pinney, 566: §§406 n. 1, 603 n. 5.

Matter of, 96 N. Y. 227; 67 How. Pr. 121: §177 n. 1.

University v. St. Paul etc. Ry. Co., 36 Minn. 447: §265 n. 1.

Updegraff v. Palmer, 107 Ind. 181: §§316 n. 3, 345 n. 6, 379 n. 1, 527 n. 8.

Upham v. Marsh, 128 Mass. 546: §590 n. 8.

Upham *v.* Worcester, 113 Mass. 97: §469 n. 5.

Upper Appomattox Co. *v.* Hardings, 11 Gratt. 1: §§388 n. 2.

Upton *v.* South Branch etc. R. R. Co., 8 Cush. 600: §§446 n. 5, 469 n. 5.

Uren *v.* Walsh, 57 Wis. 98: §632 n. 1.

Utica etc. R. R. Co., Matter of, 56 Barb. 456: §§435 n. 1, 436 n. 6, 23; 470 n. 6.

Uwchlan Township Road, 30 Pa. S. 156: §247 n. 5.

V.

Valentine *v.* Boston, 22 Pick. 75: §500 n. 1.

Valley City Salt Co. *v.* Brown, 7 W. Va. 191: §§157 n. 2, 184 n. 7.

Valley Ry. Co. *v.* Bohm, 29 Ohio St. 633: §338 n. 1.

v. Franz, 43 Ohio St. 623: §§625 n. 3, 666 n. 2.

Vail *v.* Fall Creek etc. Co., 32 Ind. 198: §541 n. 5.

v. Mix, 74 Ills. 127: §300 n. 2.

v. Morris etc. R. R. Co., 21 N. J. L. 189: §§343 n. 2, 510 n. 1.

Van Blaricum *v.* State, 7 Blackf. 209: §470 n. 5, 481 n. 1.

Van Bokelen *v.* Brooklyn City Ry. Co., 5 Blatch. 379: §124 n. 1.

Van Buskirk *v.* Harrod, 48 Mich. 258: §382 n. 1.

Vanderbright *v.* Delaware R. R. Co., 2 Houst. 257: §505 n. 5.

Vanderbuilt *v.* Adams, 7 Cow. 349: §6 n. 2.

Vanderstolph *v.* Comrs., 50 Mich. 330: §544 n. 6.

Vandusen *v.* Comstock, 9 Mass. 203: §348 n. 1.

Vanduser *v.* Comstock, 3 Mass. 184: §396 n. 1.

Van Horne's Lessee *v.* Dorrance, 2 Dale, 304: §205 n. 3.

Van Rensselaer *v.* Albany, 15 Abb. N. C. 457; 2 How. Pr. N. S. 42: §641 n. 8.

Van Riper *v.* Essex Road Board, 38 N. J. L. 23: §§212 n. 1, 481 n. 3, 570 n. 1.

Van Orsdol *v.* B. C. R. & N. R. Co., 56 Ia. 470: §625 n. 2.

Van Steenberg *v.* Bigelow, 3 Wend. 42: §604 n. 4.

Van Steenbury *v.* Bigelow, 3 Wend. 43: §419 n. 19.

Vantilburgh *v.* Shann, 24 N. J. L. 740: §§364 n. 1, 368 n. 1.

Van Schoick *v.* Delaware etc. Canal Co., 20 N. J. L. 249: §§565 n. 1, 2; 567 n. 2.

Van Valkenburgh *v.* Milwaukee, 43 Wis. 574: §658 n. 3, 18.

Vanwickle *v.* Camden etc. R. R. Co., 14 N. J. L. 162: §§416 n. 3, 523 n. 4, 524 n. 1.

Varick *v.* Smith, 5 Paige, 137: §169 n. 2.

Varner *v.* Martin, 21 W. Va. 534: §§157 n. 2, 158 n. 1, 162 n. 1, 164 n. 6, 167 n. 2, 7; 180 n. 18, 181 n. 1.

Vartie *v.* Underwood, 18 Barb. 561: §323 n. 11.

Vaugh *v.* Wetherell, 116 Mass. 138: §324 n. 1.

Vawter *v.* Gilliland, 55 Ind. 278: §514 n. 6.

Venard *v.* Cross, 8 Kan. 248: §§180 n. 8, 270 n. 7, 382 n. 2.

Ventura Co. *v.* Thompson, 51 Cal. 577: §473 n. 8.

Vermilyn *v.* Chicago etc. Ry. Co., 66 Ia. 606: §§299 n. 2, 587 n. 8.

Vermont etc. R. R. Co. *v.* Baxter, 22 Vt. 365: §243 n. 7.

v. Comrs., 10 Cush. 12: §653 n. 3.

Vick *v.* Rochester, 46 Hun, 607: §645 n. 2.

Vicksburg etc. R. R. Co. *v.* Dillard, 35 La. An. 1045: §§468 n. 3, 496 n. 2, 3.

Viele *v.* Troy etc. R. R. Co., 20 N. Y. 184: §429 n. 1.

Viers' Petition, Tappan, Ohio, 56: §664 n. 1, 7.

Vincennes *v.* Richards, 23 Ind. 381: §103 n. 4.

Vilas *v.* Milwaukee etc. R. R. Co., 15 Wis. 233: §634 n. 8.

v. Milwaukee etc. Ry. Co., 17 Wis. 497: §622 n. 5.

Vilhae *v.* Stockton etc. R. R. Co. 53 Cal. 208: §§456 n. 1, 458 n. 5.

Virginia etc. R. R. Co. *v.* Elliott, 5 Nev. 358: §§311 n. 2, 313 n. 1, 478 n. 1, 524 n. 3.

v. Henry, 8 Nev. 165: §§462 n. 1, 464 n. 1, 524 n. 4.

v. Lovejoy, 8 Nev. 100: §§259 n. 7, 501 n. 1.

v. Lynch, 13 Nev. 92: §115 n. 4.

Visscher *v.* Hudson Riv. R. R. Co., 15 Barb. 37: §534 n. 1.

Voegly v. Pittsburgh etc. R. R. Co.,
2 Grant's Cas. 243: §483 n. 9.

W.

Wabash v. Alber, 88 Ind. 428: §207
n. 6.

Wabash etc. Ry. Co. v. McDougal,
118 Ills. 229: §§318 n. 8, 481 n. 4.

Waddell v. New York, 8 Barb. 95:
§§96 n. 1, 97 n. 2, 107 n. 2.

Waddell's Appeal 84 Pa. S. 90:
§§157 n. 2, 167 n. 18, 20, 22; 171,
184 n. 6.

Wade v. Hennessey, 55 Vt. 207:
§§289 n. 1, 324 n. 1, 335 n. 4,
628 n. 5.

Wadham v. Northwestern Ry. Co.,
14 L. R. Q. B. 747: §227 n. 3.

v. *Lackawanna etc. R. R. Co.*, 42
Pa. S. 303: §582 n. 3.

Wadsworth v. Smith, 11 Me. 278:
§72 n. 5.

v. *Tillotson*, 15 Conn. 365: §61
n. 2.

*Waffle v. New York Central R. R.
Co.*, 58 Barb. 421: §90 n. 2.

Wager v. Troy Union R. R. Co., 25
N. Y. 526: §§113 n. 3, 116 n. 5,
647 n. 14.

Wagner v. Cleveland etc. R. R. Co.,
22 Ohio St. 563: §597 n. 2.

v. *Gage Co.* 3 Neb. 237: §467 n. 2.

v. *Long Island R. R. Co.*, 2 Hun,
633: §89 n. 5.

v. *Railway Co.*, 38 Ohio St. 32
§§579 n. 1, 631 n. 1.

Wainwright v. Ramsden, 5 M. &
W. 602: §483 n. 21.

Wakefield v. Boston etc. R. R. Co.,
63 Me. 385: §424 n. 2.

v. *Newell*, 12 R. I. 75: §103 n. 4.

Walker v. Board of Public Works,
16 Ohio, 540: §§62 n. 2, 68 n. 1,
73 n. 11.

v. *Boston*, 8 Cush. 279: §437 n. 6.

v. *Boston & M. R. R. Co.*, 3 Cush.
1: §407 n. 3.

v. *Caywood*, 31 N. Y. 51: §140 n. 2.

v. *Chicago etc. R. R. Co.*, 57 Mo.
275: §647 n. 1.

v. *City Council*, 1 Bailey, Ch. (S.
C.) 443: §652 n. 5.

v. *Corn*, 3 A. K. Marsh. 167: §§364
n. 1, 369 n. 1.

v. *Eastern Counties Ry. Co.*, 6
Harr. 594: §660 n. 1.

v. *Lickens*, 24 Mo. 293: §649 n. 13.

. v. *London etc. Ry. Co.*, 3 A. & E.
n. s. 744: §284 n. 3.

Walker v. London etc. Ry. Co., 43
E. C. L. R. 951: §284 n. 3.

v. *Mad River etc. R. R. Co.*, 8
Ohio, 38: §§286 n. 4, 633 n. 1.

v. *Manchester*, 58 N. H. 438: §500
n. 1.

v. *Old Colony etc. R. R. Co.*, 103
Mass. 10, 58: §§89 n. 5, 496
n. 3.

v. *Oxford Woolen Manf. Co.*, 10
Met. 203: §318 n. 7.

v. *Ware etc. Ry. Co.*, 35 L. J. Eq.
94: §§620 n. 1, 621 n. 1, 2.

Wall Street, Matter of, 17 Barb. 617:
663 n. 5.

Wallace v. Alvord, 39 Ga. 609: §8
n. 7.

v. *Karlennowefski*, 19 Barb. 118:
452 n. 10.

v. *Shelton*, 14 La. An. 503: §5 n. 3.

Waller v. Martin, 17 B. Mon. 181:
§§454 n. 2, 8; 649 n. 8.

v. *McConnell*, 19 Wis. 417: §348
n. 1.

*Waltmeyer v. Wisconsin etc. Ry.
Co.*, 71 Ia. 626: §440 n. 2.

v. *Wisconsin etc. Ry. Co.*, 64 Ia.
688: §539 n. 6.

Walter v. County Comrs., 35 Md.
385: §103 n. 6.

Walters v. Houck, 7 Ia. 72: §§411
n. 1, 413 n. 3, 523 n. 5.

Walther v. Warner, 25 Mo. 277:
§§145 n. 3, 457 n. 1, 458 n. 3, 9.

Wamesit Power Co. v. Allen, 120
Mass. 352: §§253 n. 1, 603 n. 4,
649 n. 2.

Ward v. Peck, 49 N. J. L. 42: §§149
n. 1, 452 n. 10.

v. *Marietta etc. Co.*, 6 Ohio St.
15: §591 n. 1.

v. *Minnesota etc. R. R. Co.*, 119
Ills. 287: §§304 n. 7, 391 n. 4.

v. *State*, 12 Lea, 469: §599 n. 1.

Wardens of etc. v. Woodward, 26
Me. 172: §519 n. 3.

Ware v. County Comrs., 38 Me.
492: §869 n. 1.

Waring v. Cherew etc. R. R. Co., 16
S. C. 416: §§664 n. 1, 4.

Warne v. Baker, 24 Ills. 351: §§347
n. 1, 10; 537 n. 5.

v. *Baker*, 35 Ills. 382: §347 n. 1,
10, 602 n. 3.

Warner v. Comrs., 9 Minn. 139:
§650 n. 6.

v. *Doran*, 30 Ia. 521: §664 n. 12.

v. *Franklin Co.*, 131 Mass. 348:
§359 n. 1.

Warner *v.* Hennepin Co., 9 Minn. 139: §§252 n. 3, 452 n. 9.
v. Railroad Co., 39 Ohio St. 70: §§290 n. 7, 631 n. 1, 8.

Warren *v.* Bunnell, 11 Vt. 600: §144 n. 1.
v. First Division, 18 Minn. 384: §454 n. 2.
v. First Div. etc. R. R. Co., 21 Minn. 424: §§477 n. 8, 14; 499 n. 3, 4.
v. Grand Haven, 30 Mich. 24: §127 n. 1.
v. Spencer Water Co., 143 Mass. 9: §§307 n. 4, 649 n. 2.
v. Spencer Water Co., 143 Mass. 155: §437 n. 1, 13.
v. St. Paul etc. R. R. Co., 18 Minn. 384: §§286 n. 1, 314 n. 14, 551 n. 12.
v. Wis. Valley R. R. Co., 6 Biss. 425: §315 n. 3.

Warrior Run Road, 3 Binn. 3: §509 n. 10.

Warts *v.* Hoagland, 114 U. S. 606: §311 n. 2.

Warwick Institute etc. *v.* Providence, 12 R. I. 144: §§324 n. 1, 377 n. 1.

Washburn *v.* Milwaukee etc. R. R. Co., 59 Wis. 364: §§425 n. 4, 5; 435 n. 1, 436 n. 11, 443 n. 6, 456 n. 6, 467 n. 6, 540 n. 12, 562 n. 6.
v. Milwaukee etc. R. R. Co., 59 Wis. 379: §538 n. 2.

Washington *v.* Fisher, 43 N. J. L. 377: §§250 n. 1, 512 n. 5, 514 n. 8.

Washington Ave., 69 Pa. S. 352: §4 n. 3.

Washington Bridge Co. *v.* State, 18 Conn. 56: §156 n. 30.

Washington Cem. *v.* Prospect Park etc., 7 Hun, 655: §§113 n. 3, 635 n. 2.
v. Prospect Park etc. R. R. Co., 58 N. Y. 591: §116 n. 3, 278 n. 1, 3; 635 n. 2.

Washington Ice Co. *v.* Tay, 103 Ind. 48: §§347 n. 3, 379 n. 1, 394 n. 6.

Washington Park, 1 Sandf. 283: §527 n. 1.

Washington etc. R. R. Co. *v.* Switzer, 26 Gratt. 661: §§416 n. 6, 527 n. 9.

Washington etc. Co. *v.* Balt. & O. R. R. Co., 10 G. & J. 392: §136 n. 3.

Water Comrs. *v.* Lansing, 45 N. Y. 19: §419 n. 2.
Matter of, 3 Edwards Ch. 290: §§77 n. 1, 85 n. 7, 259 n. 9, 303 n. 4, 486 n. 1, 501 n. 2.
Matter of, 96 N. Y. 351: §278 n. 10, 12.
Matter of, 31 N. J. L. 72: §§655 n. 1, 4, 658 n. 1.

Water Works Co. *v.* Burkhart, 41 Ind. 364: §§10 n. 4, 162 n. 3, 238 n. 1, 262 n. 1, 277 n. 1, 278 n. 4, 593 n. 1.

Waterbury *v.* Darien, 8 Conn. 161: §358 n. 2, 6.
v. Darien, 9 Conn. 252: §530 n. 1.
v. Dry Dock etc. R. R. Co., 54 Barb. 388: §306 n. 2.

Waterhouse *v.* County Comrs., 44 Me. 368: §403 n. 2.

Waterman *v.* Buck, 58 Vt. 519: §§65 n. 5, 641 n. 6.
v. Conn. etc. R. R. Co., 30 Vt. 610: §§89 n. 6, 154 n. 1.

Waters *v.* Bay View, 61 Wis. 642: §§88 n. 5, 103 n. 4.

Watertown *v.* Mayo, 109 Mass. 315: §§6 n. 2, 156 n. 5.

Watkins *v.* Pickering, 92 Ind. 332: §§349 n. 11, 452 n. 8, 623 n. 1.

Watson *v.* Acquacknouck Water Co., 36 N. J. L. 195: §§254 n. 1, 278 n. 16, 285 n. 4.
v. Crowsore, 93 Ind. 220: §§350 n. 6, 435 n. 1, 10.
v. Milwaukee etc. Ry. Co., 57 Wis. 332: §§427 n. 2, 428 n. 1, 443 n. 6, 445 n. 2, 446 n. 1, 479 n. 10, 480 n. 9, 538 n. 10.

v. New York Cent. R. R. Co., 47 N. Y. 157: §§325 n. 1, 335 n. 1.
v. New York Cent. R. R. Co., 1 Sheldon, 159: §325 n. 1.
v. Pittsburgh etc. R. R. Co., 37 Pa. S. 469: §220 n. 12.
v. Sewickley, 91 Pa. S. 330: §§322 n. 1, 380 n. 1.
v. Town Council, 5 R. I. 562: §166 n. 9.
v. Trustee, 21 Ohio St. 667: §§149 n. 1, 452 n. 1, 6; 631 n. 4.
v. Van Meter, 43 Ia. 76: §577 n. 1.

Watts *v.* Derry, 22 N. H. 498: §433 n. 1, 4.

Watuppa Reservoir Co. *v.* Fall River, 134 Mass. 267: §§62 n. 1, 14; 334 n. 6.

Waverly Water Works, 85 N. Y. 478: §§655 n. 2, 4; 658 n. 1.

Waverly Water Works, 16 Hun, 57: §§655 n. 2.

Wayland *v.* Comrs., 4 Gray, 500: §173 n. 2.

Wayne *v.* Comrs., 37 Me. 558: §549 n. 12.

Wearer *v.* Broom Co., 28 Minn. 534: §59 n. 9.

Weathersfield *v.* Humphry, 20 Conn. 218: §273 n. 3.

Weaver *v.* Gregg, 6 Ohio St. 547: §323 n. 4, 8.

v. Mississippi etc. Boom Co., 28 Minn. 534: §§67 n. 2, 3, 71 n. 6.

v. Mississippi etc. Boom Co., 30 Minn. 477: §67 n. 2, 3.

Weaver's Road, 45 Pa. S. 405: §545 n. 12.

Webb *v.* County Comrs., 77 Me. 180: §517 n. 8.

Weber *v.* Eastern R. R. Co., 2 Met. 147: §497 n. 1.

v. Santa Clara Co., 59 Cal. 265: §12 n. 3.

Webster *v.* Bridgewater, 63 N. H. 296: §361 n. 11.

v. Holland, 58 Me. 168: §§327 n. 3, 336 n. 2.

v. Washington Co, 26 Minn. 220: §405 n. 18.

Weckler *v.* Chicago, 61 Ills. 142: §359 n. 1.

Weeks *v.* Milwaukee, 10 Wis. 242: §103 n. 8.

Wegmann *v.* Jefferson, 61 Mo. 55: §106 n. 1.

Wehn *v.* Comrs., 5 Neb. 494: §56 n. 1.

Weir *v.* St. Paul etc. R. R. Co., 18 Minn. 155: §§237 n. 4, 241 n. 1, 366 n. 6, 469 n. 4, 473 n. 4, 537 n. 2, 582 n. 1.

Weirston *v.* Waggoner, 5 J. J. Marsh. 41: §401 n. 3.

Weis *v.* Madison, 75 Ind. 241: §103 n. 3.

Welch *v.* Boston, 126 Mass. 442: §§156 n. 11, 324 n. 1.

v. Milwaukee etc. Ry. Co., 27 Wis. 108: §475 n. 3, 10.

v. Piercy, 7 Ired. L. 365: §649 n. 8.

Welles *v.* Cowles, 4 Conn. 182: §627 n. 13, 656 n. 24.

Wellington *et al.* Petitioners, 16 Pick. 87: §272 n. 4.

Wells *v.* Bridgeport etc. Co., 30 Conn. 316: §§576 n. 1, 652 n. 6.

v. Chicago etc. Ry. Co., 19 Mo. App. 127: §469 n. 6.

Wells *v.* Hicks, 27 Ills. 343: §415 n. 2.

v. Somerset etc. R. R. Co., 47 Me. 345: §281 n. 4.

Wells Ave. Sewer, Matter of, 46 Hun, 534: §§655 n. 2, 4.

Wells Co. Road, Matter of, 7 Ohio St. 16: §§347 n. 14, 419 n. 2, 540 n. 2.

Welsh *v.* Chicago etc. Ry. Co., 19 Mo. App. 127: §623 n. 1.

Wentworth *v.* Farmington, 48 N. H. 207: §247 n. 5.

v. Farmington, 49 N. H. 119: §408 n. 3.

v. Farmington, 51 N. H. 128: §414 n. 1, 2.

v. Milton, 46 N. H. 448: §351 n. 1.

Werth *v.* Springfield, 78 Mo. 107: §§106 n. 1, 223 n. 1.

v. Springfield, 22 Mo. App. 12: §223 n. 10.

Wesson *v.* Washburn Iron Co., 13 Allen, 95: §227 n. 8.

West *v.* Bancroft, 32 Vt. 371: §§129 n. 1, 133 n. 1.

v. McGurn, 43 Barb. 198: §537 n. 7.

v. Milwaukee etc. Ry. Co., 56 Wis. 318: §§443 n. 6, 477 n. 8, 14; 499 n. 3.

West Boston Bridge Co. *v.* County Comrs., 10 Pick. 270: §271 n. 4.

West Branch etc. Canal Co. *v.* Mulliner, 68 Pa. S. 357: §87 n. 2.

West End etc. R. R. Co. *v.* Almeroth, 13 Mo. App. 91: §§313 n. 7, 390 n. 3, 397 n. 4.

West Jersey R. R. Co. *v.* Cape May etc. R. R. Co., 34 N. J. Eq. 164: §124 n. 1.

West Newbury *v.* Chase, 5 Gray, 421: §§435 n. 1, 3; 437 n. 8.

West Orange *v.* Field, 37 N. J. Eq. 600: §§89 n. 4, 103 n. 3, 641 n. 7.

West Pikeland Road, 63 Pa. S. 471: §166 n. 2.

West River Bridge Co. *v.* Dix, 6 How. 507: §§135 n. 3, 164 n. 6, 170 n. 6, 174 n. 4, 271 n. 1, 274 n. 1, 4; 276 n. 2.

v. Dix, 16 Vt. 446: §§239 n. 2, 271 n. 1, 274 n. 1.

West Roxbury *v.* Stoddard, 7 Allen, 158: §76 n. 3.

West Va. etc. Co. *v.* Ohio River etc. Co., 22 W. Va. 600: §137 n. 9.

v. Volcanic Coal etc. Co., 5 W. Va. 382: §§ 72 n. 2, 302 n. 2.

Western R. R. Co. v. Dickson, 30 Wis. 389: §§387 n. 2, 404 n. 1.
v. Owings, 15 Md. 199: §§631 n. 2, 632 n. 3.

Western etc. R. R. Co. v. Johnston, 59 Pa. S. 290: §§621 n. 1, 3; 622 n. 4.
v. Kerr, 41 Cal. 489: §143 n. 2.
v. Patterson, 37 Md. 125: §646 n. 2.
v. Reed, 35 Cal. 621: §§416 n. 8, 524 n. 4.
v. Tevis, 41 Cal. 480: §330 n. 1.

Western etc. R. R. Co.'s Appeal, 99 Pa. S. 155: §257 n. 1.

Western Union Tel. Co. v. Am. Union Tel. Co., 65 Ga. 160: §§137 n. 8, 269 n. 5, 275 n. 4.
v. Atlantic etc. Tel. Co., 7 Biss. 367: §265 n. 5.
v. Rich, 19 Kan. 517: §§141 n. 15, 584 n. 6.

Westport v. County Comrs., 9 Allen, 203: §§350 n. 3, 351 n. 7, 549 n. 17.

Wetherspoon v. State, M. & Y. 118: §456 n. 2.

Wetmore v. Story, 22 Barb. 414: §§124 n. 2, 125 n. 3, 636 n. 3.

Weyer v. Chicago etc. R. R. Co., 68 Wis. 180: §§478 n. 8, 496 n. 7.
v. Milwaukee etc. R. R. Co., 57 Wis. 329: §537 n. 1.

Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202: §§113 n. 3, 647 n. 14.

Whalley v. Lancashire etc. Ry. Co., 13 L. R. Q. B. 181; 16 Ibid. 227: §89 n. 4.

Wharton St., Matter of, 48 Pa. S. 487: §532 n. 3.

Wheatley v. Baugh, 25 Pa. S. 528: §90 n. 4.

Wheeler v. Essex Road Board, 39 N. J. L. 29: §505 n. 8.
v. Kirtland, 27 N. J. Eq. 534: §§323 n. 5, 9, 10; 629 n. 3.
v. Rochester etc. R. R. Co., 12 Barb. 227: §482 n. 1.
v. Spinola, 54 N. Y. 377: §76 n. 2.

Wheelock v. Young, 4 Wend. 647: §§278 n. 14, 452 n. 2, 456 n. 2, 457 n. 2.

Whistler v. Drain Comrs., 40 Mich. 591: §301 n. 1, 6.

Whitacre v. St. Paul etc. R. R. Co., 24 Minn. 311: §§477 n. 8, 499 n. 3.

Whitcher v. Benton, 48 N. H. 157: §§322 n. 1, 327 n. 1, 2; 380 n. 1.
v. Landaff, 48 N. H. 153: §394 n. 8.

White v. Boston etc. R. R. Co., 6 Cush. 420: §§449 n. 1, 505 n. 11.

White v. City Council, 2 Hill, S. C. 571: §7 n. 3.
v. Charlotte etc. R. R. Co., 6 Rich. 47: §470 n. 9.
v. Coleman, 6 Gratt. 138: §405 n. 3.
v. Ivey, 34 Ga. 186: §8 n. 11.
v. Landaff, 35 N. H. 128: §§520 n. 8, 601 n. 1.
v. McKeesport, 101 Pa. S. 394: §624 n. 4.
v. Memphis etc. R. R. Co., 64 Miss. 566: §§292 n. 7, 406 n. 1, 604 n. 2.
v. Nashville etc. R. R. Co., 7 Heisk. 518: §§8 n. 7, 618 n. 1, 621 n. 1, 3; 634 n. 10.
v. People, 94 Ills. 604: §5 n. 2.
v. South Shore R. R. Co., 6 Cush. 412: §271 n. 11.
v. Wabash etc. Ry. Co., 64 Ia. 281: §§580 n. 3, 6; 647 n. 3, 10, 11.
v. Yazoo City, 27 Miss. 357: §127 n. 1, 2.

White Deer etc. Co. v. Sassaman, 67 Pa. S. 415: §§68 n. 3, 436 n. 8.

White River T. Co. v. Vermont Cent. R. R. Co., 21 Vt. 590: §§185 n. 3, 136 n. 3, 271 n. 6, 274 n. 1.

White Water etc. Co. v. Ferris, 2 Ind. 331: §664 n. 1, 4.

White Water etc. R. R. Co. v. McClure, 29 Ind. 536: §§473 n. 2, 496 n. 1, 4.

Whiteborn v. Androscoggin R. R. Co., 52 Me 208: §146 n. 1.

Whiteford v. Probate Judge, 53 Mich. 130: §§347 n. 1, 2; 364 n. 1, 368 n. 1, 2, 11; 549 n. 3.

Whitehead v. Arkansas Cent. R. R. Co., 28 Ark. 460: §§12 n. 3, 313 n. 7, 649 n. 2.

Whiteley v. Platte Co., 73 Mo. 30: §§347 n. 1, 4; 378 n. 5, 382 n. 1, 3.

Whiteman's Exr. v. Wilmington etc. R. R. Co., 2 Harr. (Del.) 514: §§170 n. 1, 238 n. 1, 311 n. 2, 312 n. 1.

White's Case, 2 Overton, 109: §§239 n. 5, 549 n. 14.

Whiting v. New Haven, 45 Conn. 303: §324 n. 1.

Whittingham v. Bowen, 22 Vt. 317: §167 n. 1.

Whitman v. Boston etc. R. R. Co., 3 Allen, 133: §§320 n. 1, 428 n. 5, 442 n. 1, 470 n. 3, 480 n. 8, 487 n. 1.

Whitman v. Boston etc. R. R. Co., 7
 Allen, 313: §§437 n. 6, 11; 445
 n. 1, 469 n. 5, 499 n. 1.

Whitney v. Boston, 98 Mass. 312:
 §§437 n. 10, 469 n. 5, 475 n. 7.
 v. Gilman, 38 Me. 273: §348 n. 1.
 v. Lynn, 122 Mass. 338: §659 n. 3.
 v. Milwaukee, 57 Wis. 636: 627 n. 8.
 v. New York, 28 Barb. 233: §635
 n. 12.

Whittlesey v. Hartford etc. R. R.
 Co., 23 Conn. 421: §606 n. 1.

Whittier v. Portland etc. R. R. Co.,
 38 Me. 26: §118 n. 4.

Whittredge v. Concord, 36 N. H.
 530: §380 n. 5.

Whitworth v. Puckett, 2 Gratt. 531:
 §§343 n. 3, 529 n. 2, 577 n. 1.

Whyte v. City of Kansas, 22 Mo.
 App. 409: §§655 n. 1, 658 n. 16.

Wichita etc. R.R. Co. v. Fechheimer,
 36 Kan. 45: §623 n. 1, 4.

Widening Broadway, 61 Barb. 483;
 42 How. Pr. 220; 49 N. Y. 150:
 §§534 n. 2, 656 n. 9.

Widening Carlton St., 16 Hun, 497:
 §378 n. 12.

Widening Roffignac St., 4 Rob. La.
 357: §§559 n. 1, 655 n. 1.

Wiggin v. Exeter, 13 N. H. 304:
 §§343 n. 1, 350 n. 3.
 v. New York, 9 Paige, 16: §483
 n. 1.

Wight v. Packer, 114 Mass. 473:
 §618 n. 1, 2.

Wilbraham v. County Comrs., 11
 Pick. 322: §405 n. 6.

Wilbur v. Taunton, 123 Mass. 522:
 §209 n. 8.

Wilcox v. New Bedford, 140 Mass.
 570: §662 n. 2, 4.
 v. Oakland, 49 Cal. 29: §417 n. 5.
 v. St. Paul etc. Ry. Co., 35 Minn.
 439: §§441 n. 1, 2; 475 n. 11,
 655 n. 10.

Wild v. Deig, 43 Ind. 455: §§167 n.
 2, 5, 8, 23; 605 n. 1, 631 n. 4.

Wilder v. Hubbell, 43 Mich. 487:
 §§382 n. 3, 545 n. 5, 549 n. 3.

Wilkerson v. Buchanan Co., 12 Mo.
 328: §656 n. 16.

Wilkin v. First Division etc. 16
 Minn. 271: §§237 n. 4, 350 n. 6,
 374 n. 1.
 v. St. Paul, 33 Minn. 181: §§210
 n. 2, 638 n. 2.
 v. St. Paul etc. R. R. Co., 22 Minn.
 177: §538 n. 2.

Wilkinson v. Bixler, 88 Ind. 574:
 656 n. 1.
 v. Mayo, 3 H. & M. 565: §§531 n. 6.

Willamet Falls etc. Co., v. Kelly, 3
 Or. 99: §473 n. 7.

Willcheck v. Edwards, 42 Mich.
 105: §§382 n. 3, 545 n. 5, 549 n. 3.

Willetts v. Jeffries, 5 Kan. 470: §2
 n. 2.

Willey v. Effing, 16 N. H. 58: §656
 n. 23.
 v. Hunter, 57 Vt. 479: §67 n. 2.
 v. Norfolk Southern Ry. Co., 96
 N. C. 408: §142 n. 2.
 v. South Eastern Ry. Co., 1 McN.
 & G. 58: §631 n. 1.

William & A. Sts., Matter of, 19
 Wend. 678: §§323 n. 1, 483 n. 13,
 514 n. 8, 524 n. 2.

Williams v. Camden etc. Water Co.,
 79 Me. 543: §607 n. 2, 6.

v. Cammack, 27 Miss. 209: §200
 n. 6.
 v. County Comrs., 35 Me. 345:
 §247 n. 3.
 v. Courtney, 77 Mo. 587: §323 n. 5.
 v. Detroit, 2 Mich. 561: §5 n. 4.
 v. Etting Woolen Co., 33 Conn.
 353: §646 n. 2.
 v. Galveston etc. R. R. Co., 1 Tex.
 App. Civil Cas. 131: §225 n. 1.
 v. Hartford etc. R. R. Co., 13 Conn.
 397: §§301 n. 1, 2; 304 n. 5, 307
 n. 1.
 v. Holmes, 2 Wis. 1: 9: §§347 n.
 1, 602 n. 4, 605 n. 4.
 v. Jackman, 2 J. J. Marsh. 352:
 §560 n. 4.
 v. Mitchell, 49 Wis. 284: §§373 n.
 2, 405 n. 1.
 v. Natural Bridge etc. Co., 21 Mo.
 580: §140 n. 2, 4.
 v. Nelson 23 Pick. 141: §§182 n.
 1, 300 n. 2.
 v. New Orleans etc. R. R. Co., 60
 Miss. 689: §§621 n. 1, 656 n. 1.
 v. New York etc. R. R. Co., 16
 N. Y. 97: §§111 n. 2, 635 n. 2.
 v. New York etc. R. R. Co., 18
 Barb. 222: §111 n. 5.
 v. School District, 33 Vt. 271:
 §§161 n. 3, 174 n. 1.
 v. Stephenson, 103 Ind. 248: §381
 n. 9.
 v. Stonington, 49 Conn. 229: §421
 n. 4.

Williams *et al.* Petitioners, 59 Me. 517: §§329 n. 1, 364 n. 1, 368 n. 1, 3.

Williams' Exrs. *v.* Pittsburgh, 83 Pa. S. 71: §§313 n. 7, 427 n. 1.

Williamson *v.* Canal Co. 78 N. C. 156: §§195 n. 3, 452 n. 7.

v. Carlton, 51 Me. 449: §442 n. 1.

v. Cass Co., 84 Ills. 361: §§553 n. 1.

v. East Amwell, 28 N. J. L. 270: §523 n. 4.

Williamston etc. R. R. Co. *v.* Battle, 66 N. C. 540: §§292 n. 6, 296 n. 5, 297 n. 1.

Willing *v.* Baltimore R. R. Co., 5 Whart. 460: §524 n. 1.

Willis *v.* Sproule, 13 Kan. 257: §§347 n. 3, 604 n. 3, 605 n. 4.

Willoughby *v.* Shipman, 28 Mo. 50: §282 n. 2.

Willyard *v.* Hamilton, 7 Ohio pt. 2, 111: §§160 n. 3, 169 n. 1, 311 n. 2, 456 n. 2, 458 n. 6.

Wilmarth *v.* Knight, 7 Gray, 294: §§396 n. 1, 401 n. 10.

Wilmes *v.* Minneapolis etc. Ry. Co., 29 Minn. 242: §475 n. 1.

Wilmington etc. R. R. Co. *v.* Condon, 8 G. & J. 443: §§531 n. 2, 552 n. 2.

v. Dominguez, 50 Cal. 505: §513 n. 7.

v. Stauffer, 60 Pa. S. 374: §497 n. 1.

Wilson *v.* Campbell, 76 Me. 94: §607 n. 9.

v. Carpenter, 17 Wis. 512: §649 n. 2.

v. Cochran, 4 Harr. 88: §627 n. 13.

v. Des Moines etc. Ry. Co., 67 Ia. 509: §§493 n. 9, 13; 624 n. 5.

v. European etc. Ry. Co., 67 Me. 358: §§324 n. 1, 7; 335 n. 9, 649 n. 12.

v. Harvey, 3 Harr. 500: §627 n. 13.

v. Hatheway, 42 Ia. 173: §§314 n. 2, 367 n. 1.

v. Lynn, 119 Mass. 174: §603 n. 4, 649 n. 2.

v. Mineral Point, 39 Wis. 160: §§631 n. 1, 632 n. 1.

v. New Bedford, 108 Mass. 261: §87 n. 3.

v. New York, 1 Denio, 595: §§97 n. 3, 103 n. 6.

v. Northampton etc. Ry. Co., L. R. 9 Ch. 279: §296 n. 7.

v. Rockford etc. R. R. Co., 59 Ills. 273: §§473 n. 6, 523 n. 3.

v. Welch, 12 Or. 353: §82 n. 3.

Wilson *v.* Whitsell, 24 Ind. 306: §516 n. 6.

Winchester *v.* Capron, 63 N. H. 605: §§133 n. 3, 589 n. 16.

v. Hingdale, 12 Conn. 88: §529 n. 1.

v. Stevens Point, 58 Wis. 350: §§100 n. 3, 109 n. 9, 440 n. 2, 442 n. 2, 449 n. 9, 625 n. 3.

Winchester etc. R. R. Co. *v.* Washington, 1 Rob. Va. 67: §§505 n. 6, 516 n. 2.

Winder, *Ex parte*, L. R. 6 Ch. Div. 696: §381 n. 3.

Windham *v.* County Comrs. 26 Me. 406: §250 n. 3.

v. Cumberland Co. Comrs., 26 Me. 406: §525 n. 12.

v. Litchfield, 22 Conn. 226: §361 n. 1.

Windsor *v.* Field, 1 Conn. 279: §§354 n. 1, 509 n. 5, 527 n. 1.

v. McVeigh, 93 U. S. 274: §365 n. 4, 5.

Winebiddle *v.* Penn. R. R. Co., 2 Grant's Cas. 32: §417 n. 6.

Wing *v.* Tottenham etc. Ry. Co., 37 L. J. Ch. 654: §620 n. 1.

Wingfield *v.* Crenshaw, 3 H. & M. 245: §538 n. 6.

Winklemans *v.* Des Moines etc. Ry. Co., 62 Ia. 11: §§485 n. 1, 443 n. 2, 449 n. 1.

Winkler *v.* Winkler, 40 Ills. 176: §646 n. 2.

Winn *v.* Rutland, 52 Vt. 481: §86 n. 1.

Winnisimmet Co. *v.* Grueby, 111 Mass. 543: §§426 n. 1, 446 n. 4.

Winona etc. R. R. Co. *v.* Denman, 10 Minn. 267: §§462 n. 2, 469 n. 4, 477 n. 8, 498 n. 1, 8.

v. Waldron, 11 Minn. 515: §§10 n. 4, 435 n. 1, 469 n. 4, 471 n. 1, 498 n. 7.

Winslow *v.* Gifford, 6 Cush. 327: 145 n. 7.

v. Winslow, 95 N. C. 24: §§185 n. 2, 186 n. 6, 195 n. 3.

Winston *v.* Waggoner, 5 J. J. Marsh. 41: §513 n. 8.

Winter *v.* Petersen, 24 N. J. L. 524: §590 n. 7.

Wisconsin Cent. R. R. Co. *v.* Cornell University, 52 Wis. 537: §§393 n. 4, 397 n. 2.

Wisconsin River etc. Co. *v.* Lyons, 30 Wis. 61: §69 n. 6.

Wiseman *v.* Beckwith, 90 Ind. 185: §323 n. 4.

Wishmier *v.* State, 97 Ind. 160: §190 n. 3.
 Wistar *v.* Philadelphia, 8 Pa. S. 505: §5 n. 4.
 Witham *v.* Osburn, 4 Or. 318: §157 n. 2, 167 n. 2, 8, 23.
 Withers *v.* Buckley, 20 How. 84: §§11 n. 1, 71 n. 5.
 Withers *Ex parte*, 3 Brevard, 83: §§10 n. 2, 451 n. 1.
 Witt *v.* St. Paul etc. R. R. Co., 35 Minn. 404: §655 n. 10.
 Wofford *v.* McKinna, 23 Tex. 36: §290 n. 2.
 Wolcott *v.* Pond, 19 Conn. 597: §309 n. 4.
v. Whitcomb, 40 Vt. 40: §167 n. 1.
v. Woolen Manf. Co., 5 Pick. 292: §178 n. 2.
 Wolf *v.* Coffey, 4 J. J. Marsh. 41: 654 n. 2.
v. Covington etc. R. R. Co., 15 B. Mon. 404: §§115 n. 4, 120 n. 1.
 Womensley *v.* Church, 17 L. T. Rep. U. S. 190: §90 n. 5.
v. Campbell, 14 B. Mon. 389: §§401 n. 1, 418 n. 2, 509 n. 8, 511 n. 6, 513 n. 9.
v. Charing Cross Ry. Co., 33 Beav. 290: §618 n. 5.
v. Comrs., 122 Mass. 394: §§318 n. 2, 337 n. 1.
v. Comrs., 62 Ills. 391: §§415 n. 2, 418 n. 2.
v. Hudson, 114 Mass. 513: §469 n. 5.
v. Hustis, 17 Wis. 416: §607 n. 2.
v. Macon etc. R. R. Co., 68 Ga. 589: §272 n. 6.
v. Quincy, 11 Cush. 487: §555 n. 2.
v. Stourbridge Ry. Co., 16 Q. B. n. s. 222: §227 n. 3.
v. Truckee T. Co., 24 Cal. 474: §595 n. 1.
v. Westborough, 140 Mass. 403: §628 n. 4.
v. Wilson, 12 Ind. 657: §379 n. 6.
 Woodbridge *v.* Cambridge, 114 Mass. 483: §664 n. 15.
v. Detroit, 8 Mich. 274: §5 n. 1, 4.
 Woodbury *v.* Marblehead Water Co., 145 Mass. 509: §307 n. 4.
 Woodfolk *v.* Chattanooga etc. R. R. Co., 2 Swan, 422: §478 n. 1.
v. Nashville etc. R. R. Co., 2 Swan, 422: §467 n. 3, 7.
 Woodhouse *v.* Burlington, 47 Vt. 300: §5 n. 4.
 Woodman *v.* County Comrs., 24 Me. 151: §563 n. 1.
 Woodruff *v.* Fisher, 17 Barb. 224: §§194 n. 2, 201 n. 4.
v. Glendale, 23 Minn. 537: §631 n. 1.
v. Neal, 28 Conn. 165: §§133 n. 6, 590 n. 1, 647 n. 13.
v. Taylor, 20 Vt. 65: §365 n. 4.
 Woods *v.* Nashua Manf. Co., 4 N. H. 527: §607 n. 2.
 Woodring *v.* Forks Township, 28 Pa. S. 355: §589 n. 13.
 Woodstock *v.* Gallup, 28 Vt. 537: §§175 n. 4, 650 n. 10.
 Woodward *v.* Catlin, 54 Conn. 277: §156 n. 33.
v. Kilbourne Mfg. Co., 1 Abb. U. S. C. 158: §69 n. 6.
v. Seely, 11 Ills. 157: §298 n. 1.
v. Webb, 65 Pa. S. 254: §220 n. 12.
 Woolcott Woolen Manf. Co. *v.* Up-ham, 5 Pick. 292: §607 n. 2.
 Woolever *v.* Stewart, 36 Ohio St. 146: §156 n. 22.
 Woolsey *v.* Supervisors etc. 32 Ia. 130: §§382 n. 1, 2; 412 n. 10.
v. Tomkins, 23 Wend. 324: §§419 n. 3, 511 n. 14.
 Wooster *v.* Great Falls Manf. Co., 39 Me. 246: §§251 n. 4, 316 n. 1, 607 n. 6.
v. Sugar R. etc. R. R. Co., 57 Wis. 311: §§324 n. 1, 436 n. 11, 628 n. 3.
 Worcester *v.* Keith, 5 Allen, 17: §345 n. 2.
v. Norwich etc. R. R. Co., 109 Mass. 103: §243 n. 4.
v. Western R. R. Co., 4 Met. 564: §584 n. 7.
 Worcester etc. R. R. Co. *v.* Comrs., 118 Mass. 561: §§267 n. 1, 643 n. 1.
 Wordbury *v.* Parshley, 7 N. H. 237: §298 n. 1.
 Workman *v.* Mifflin, 30 Pa. S. 362: §§326 n. 5, 335 n. 6, 483 n. 8.
 Worthington *v.* Bicknell, 1 Bland, Md. 186: §§282 n. 3, 633 n. 3.
 Wovessey *v.* Board of Supvs., 32 Ia. 730: §371 n. 1.
 Wragg *v.* Penn Township, 94 Ills. 11: §662 n. 1.
 Wren *v.* Walsh, 57 Wis. 98: §631 n. 1.
 Wright *v.* Carter, 27 N. J. L. 76: §140 n. 2.
v. Chicago, 46 Ills. 44: §5 n. 1.
v. Georgetown, 4 Cranch, 534: §624 n. 5.

Wright *v.* Rowley, 44 Mich. 557:
 §§382 n. 3, 545 n. 9, 549 n. 3.
v. Wells, 29 Ind. 354: §§373 n. 1,
 381 n. 2, 382 n. 2.
v. Wilmington, 92 N. C. 156: §§86
 n. 5, 103 n. 4.
v. Wilson, 95 Ind. 408: §§350 n. 2,
 369 n. 1, 519 n. 11.
v. Wisconsin etc. R. R. Co., 29
 Wis. 341: §541 n. 5.
Wright etc. Co., *In re*, 1 A. & E.
 N. S. 98; 41 E. C. L. R. 454:
 §516 n. 3.
Wroe *v.* Harris, 2 Wash. 126: §402
 n. 4.
Wurts *v.* Hoagland, 114 U. S. 606:
 §§185 n. 2, 186 n. 6, 193 n. 12,
 313 n. 3, 364 n. 1.
Wyandotte etc. Ry. Co. *v.* Waldo, 70
 Mo. 629: §§469 n. 6, 475 n. 1, 17.
Wyatt *v.* Thomas, 29 Mo. 23: §601
 n. 1.
Wyman *v.* Lexington etc. R. R. Co.,
 18 Met. 316: §§405 n. 28, 435 n.
 2, 447 n. 1.
 v. New York, 11 Wend. 486: §500
 n. 1.
Wynehamer *v.* People, 13 N. Y.
 373: §§54 n. 4, 58.
Wyoming Coal etc. Co. *v.* Price, 81
 Pa. S. 156: §§278 n. 6, 596 n. 3.

Y.

Yates *v.* Milwaukee, 10 Wall. 497:
 §§80 n. 1, 82 n. 2, 3; 83 n. 3, 156
 n. 7.
 v. Van De Bogert, 56 N. Y. 526:
 §291 n. 1.
Yazoo etc. Levee Board *v.* Dancy
 (Miss.) 3 So. R. 568: §454 n. 2.
Yeager *v.* Carpenter, 8 Leigh, 454:
 §601 n. 1.
Yeamans *v.* County Comrs., 16 Gray,
 36: §532 n. 2.

Yeatman *v.* Crandall, 11 La. An.
 220: §5 n. 3.
York Co. *v.* Fewell, 21 S. C. 106:
 540 n. 1.
Yost *v.* Conroy, 92 Ind. 464: §§485
 n. 1, 4; 436 n. 14, 438 n. 1.
Yost's Report, 17 Pa. S. 524: §§242
 n. 2, 454 n. 6, 456 n. 2, 457 n. 3.
Young *v.* Buckingham, 5 Ohio 485:
 §§168 n. 1, 419 n. 2, 3.
 v. Chicago etc. Ry Co., 28 Wis.
 171: §653 n. 4.
v. Harrison, 6 Ga. 130: §§158 n. 1,
 456 n. 2, 457 n. 2, 618 n. 1, 631
 n. 2, 634 n. 10.
v. Harrison, 17 Ga. 30: §§468 n. 1,
 470 n. 10, 11, 14; 479 n. 9.
v. Laconia, 59 N. H. 534: §361 n. 5.
v. McKenzie, 3 Ga. 31: §§10 n. 2,
 11 n. 3, 160 n. 1, 253 n. 1, 264
 n. 5.
v. Sellers, 106 Ind. 101: §601 n. 1.
Youngstown *v.* Moore, 30 Ohio St.
 133: §98 n. 18.

Z.

Zabriskie *v.* Jersey City etc. R. R.
 Co., 13 N. J. Eq. 314: §635
 n. 8.
Zack *v.* Penna. R. R. Co., 25 Pa. S.
 394: §366 n. 5.
Zimmerman *v.* Canfield, 42 Ohio St.
 463: §§313 n. 2, 364 n. 1, 366 n.
 1, 454 n. 9.
 v. Snowden, 88 Mo. 218: §§347 n.
 1, 5; 364 n. 1, 369 n. 2, 604 n. 2.
v. Union Canal Co., 1 W. & S. 346:
 §§85 n. 4, 318 n. 8, 477 n. 12.
Zinc Co. *v.* La Salle, 117 Ills. 411:
 §593 n. 1.
Zoeller *v.* Kellogg, 4 Mo. Ap. 163:
 §5 n. 3.
Zweig *v.* Horicon Iron Manf. Co.,
 17 Wis. 362: §619 n. 1, 2.

EMINENT DOMAIN.

CHAPTER I.

THE POWER DEFINED AND DISTINGUISHED.

§ 1. The power defined.—Eminent domain is the right or power of a sovereign State to appropriate private property to particular uses, for the purpose of promoting the general welfare.¹ It embraces all cases where, by authority of the State and for the public good, the property of the individual is taken; without his consent, for the purpose of being devoted to some particular use, either by the State itself or by

§ 1.

¹The phrase *eminent domain* has received a great variety of definitions. “It is defined to be that *dominium eminens*, or superior right, which of necessity resides in the sovereign power, in all governments, to apply private property to public use, in those great public emergencies which can reasonably be met in no other way.” 1 Redfield on Railroads, p. 228. “The right of every government to appropriate, otherwise than by taxation and its police authority (which are distinct powers), private property for public use.” Dillon on Municipal Corporations, §584 (453). “It is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and

control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.” Cooley, Const. Limbs. p. 524. “The power of the sovereign to condemn private property for public use.” Mills on Em. Dom. § 1. “The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the *eminent domain*.” Vattel, b. 1, c. 20, §244. The same definition is adopted by the court in Pollard’s Lessee v. Hogan, 3 How. 223. And see Geizy v. C. & W. R. R. Co., 4 Ohio St. 308; Orr. v. Quimby, 54 N. H. 590, 611; Lake Merced Water Co. v. Cowles, 31 Cal. 215; The Boston and Roxbury Mill Co. v. Newman, 12 Pick. 467; Todd v. Austin, 34 Conn. 78.

a corporation, public or private, or by a private citizen. Apart from constitutional considerations, it is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature. It is sufficient that the use of the particular property is necessary to enable individual proprietors to cultivate and improve their land to the best advantage or to develop certain natural and exceptional resources incident thereto, such as a water privilege or a mine. In such cases the public welfare is promoted, though indirectly, by the increased prosperity which necessarily results from developing the natural resources of the country. Doubtless the definitions which restrict eminent domain to a taking for public use have been inspired by the constitutional provisions which prevail in the United States and impose this limitation on the exercise of the power.²

§ 2. Definitions considered.—From the definitions cited in the foregoing section, it will be seen that some writers and jurists have given to the phrase *eminent domain* a more extended signification than the one above laid down. Thus Judge Cooley defines it as “the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.”¹ No court has ever referred either the control and regulation of rights of a public nature or of individual property to the power of eminent

² We should say that Mr. Mill's definition is, for this reason, too narrow. Some States have, by constitutional provisions, authorized the taking of private property for private use in cases where the general welfare will thereby be promoted. This is as much an exercise

of the power of eminent domain as the taking for a railroad or street.

§ 2.

¹ Cooley, Const. Lifs. 524; and see Dyer v. Tuscaloosa Bridge Co., 2 Porter (Ala.) 296; Hartwell Matter, 2 *Nisi Prius Rep.* (Mich.) 97.

domain, and Judge Cooley himself treats of these matters, not under the head of eminent domain, but under the head of the police power. This enlarged definition finds sanction in the works of many theoretical writers and in the dicta of various judicial opinions, but, however well sanctioned, it is certainly objectionable; *first*, because it does not correspond to the practical application of the term, and, *second*, because it invests the term with a certain vagueness and elasticity, that preclude the formation of any definite conception. All exercises of sovereign power over private property, which have been judicially determined to fall under the right of eminent domain, have been cases in which there has been an appropriation of such property to particular uses.

The rights and powers which the State has in, or over, public property may be classified under a few heads, as follows:

First. The State may possess property in its individual or organic capacity which it holds for sale or profit, and in which the people distributively have no right whatsoever. In respect to property of this sort, the State stands in the same relation as any citizen to the property he possesses, and may use, enjoy, control and dispose of it in the same manner.

Second. The State possesses property of a public nature, such as forts, arsenals, public buildings and the like, which is employed for defense, or the transaction of the public business and affairs. In this class of property, also, individual citizens have no rights, and are only entitled to use it as they have dealings with the government, and then only subject to such regulations as the government may see fit to establish. The State can dispose of this property at pleasure, subject to such limitations as attached to its rights in the property at the time of its acquisition.

Third. The State possesses property which it holds as trustee for the public, such as navigable waters, highways and the like. This class of property is exclusively for the

public use, and the State, as the only representative of the public, may be said to be invested with the title thereto. The State may control and regulate the use of such property as the public welfare may demand, but cannot rightfully deprive any part of the public of the privilege of such use.

All property under the control of the State will be found to fall into one of these classes, and all acts of the State in respect to these classes of property may be referred, either to the right of proprietorship, the right of police regulation, or the general power of a State to do all such acts as are necessary for the public safety or conducive to the public good; none of such acts can properly be referred to the power of eminent domain.

If we turn now to the power of the State over *private* property, we shall see that all legitimate acts of power may be classified as follows:

First. The State may regulate the making of contracts between citizens in respect to property and prescribe generally as to their validity and effect, and may make such enactments as to the acquisition and disposition of property as the public welfare requires. Instances of this right are seen in the statute of frauds, statute of wills, recording acts, conveyancing acts, and the like.

Second. The State may deprive an individual of his property and vest it in another in order to compel the former to fulfill a moral or legal obligation which he owes the latter. Upon this right are founded the laws for the attachment and sale of property on civil process, the bastardy laws, laws making the support of wife and children compulsory, and so forth.²

Third. The State may deprive an individual of his prop-

²“ Beside the right of the State to take private property for public use under the right of eminent domain, the right of taxation and the right to assess fines and forfeitures for crimes, the State may also take the private property of one indi-

vidual, and transfer it to another whenever in equity and good conscience the former has no right to withhold it from the latter, or to enable the State to fulfill some moral obligation resting upon such individual which he refuses to ful-

erty, as a punishment for the violation of law. All laws imposing fines and forfeitures are examples of this power.

Fourth. The State may regulate the use of property in such manner as the public health, safety, convenience and welfare may require. The establishment of fire limits and building regulations in cities, and the prohibiting of certain noxious trades and manufactures within certain localities, are familiar illustrations of this power. It is known as the Police Power, or the Right of Police Regulation.

Fifth. The State may exact of the individual a contribution of a portion of his property based upon some rule of apportionment, or the possession of some privilege or franchise, or the exercise of some trade or calling, in order to provide a fund for defraying the necessary expenses of the government. This is known as the Right of Taxation.

Sixth. The State may deprive a person of his property, or of some right or interest therein, for the purpose of appropriating the same, or making it subservient, to particular uses. Thus private property is taken and held by the State, or vested in public corporations, for the public use, as in the case of highways, canals, parks, public buildings and the like; or private corporations, or individuals, are authorized to institute proceedings for the purpose of compelling a transfer of property to themselves, to be devoted to some particular use, either of a public nature, such as railroads, turnpikes, etc., or of a private nature, such as private ways, mills and the like.

The acts which are described and included under this last division are universally spoken of as pertaining to the eminent domain. All other exercises of power over private property and every species of right in, and control and regu-

fill. Thus the State may take the private property of an individual to fulfill his contract, to pay his debts, or to make compensation for injuries to person, reputation or

property, which he has caused; or to support his wife or children when he refuses to do so." Willatts v. Jeffries, 5 Kan. 470, 475. (Bastardy Case.)

lation over, property of a public nature, may properly be referred, as we have shown, to some other of the sovereign powers of the State. Therefore eminent domain is properly limited in its application to the appropriation by a sovereign State of private property to particular uses, as the public welfare demands. This definition strips the term of all ambiguity and uncertainty, without robbing it of any significance or application which it properly embraces, or has acquired by common usage.

§ 3. Nature of the power.—There has existed, and still exists, among jurists a difference of opinion as to the nature of the power of eminent domain. Some maintain that it is a kind of reserved right, or supereminent estate or interest in all property, vested in the sovereign power. Thus the Supreme Court of Connecticut says: “The right to take private property for public use, or of eminent domain, is *a reserved right* attached to every man’s land, and paramount to his right of ownership. He holds his land subject to that right, and cannot complain of injustice when it is lawfully exercised.” And again: “The true theory and principle of the matter is, that the legislature *resume dominion* over the property, and, having resumed it, instead of using it by their agents, to effect the intended public good, and to avoid entanglement in the common business of life, they revest it in other individuals or corporations, to be used by them, in such manner as to effect, directly or indirectly, or incidentally as the case may be, the public good intended.”¹ This view is favored by the etymology of the name, and was doubtless the view entertained by those who brought the name into use. But the name is of comparatively recent origin,² and

§ 3.

¹Todd *v.* Austin, 34 Conn. 78; see also Harding *v.* Goodlett, 3 Yerg. (Tenn.) 41; Beekman *v.* Saratoga and Schenectady R. R. Co., 3 Paige, 45.

²The name appears to have been brought into use by Grotius and other continental writers in the early part of the seventeenth century.

was applied to a power already existing and recognized, and we must look to the power, and not to the name, to determine its true significance. The implication which the name imports was perceived by writers contemporary with its introduction, who protested against the implication of its etymology, but accepted it as a convenient name for a power which was well defined.³

Whether the eminent domain is a reserved right or estate, is a theoretical question, as we have met with no decision which turns upon a distinction in that respect, but as wrong theories about the nature and foundation of a right or power may lead to incorrect and injurious practical results, it is a question which should not be passed by in a treatise on the subject.

We therefore offer some suggestions which seem to us decisive against the theory under consideration.

(1.) No State ever yet made any such reservation in the grant of property or in any way claimed or recognized such an estate.

(2.) A new sovereignty may arise, or an old sovereignty be extended, over territory which is already the subject of private ownership, and which, just before, was subject to the eminent domain of a sovereignty that has ceased to exist. But this territory is subject to the eminent domain

³Thus Puffendorf, writing in the seventeenth century, says: "The eminent domain (*dominium eminens*) is what some are afraid of, more upon account of the *name* than the *thing*. The sovereign power, say they, was erected for the common security, and that alone will give a Prince a sufficient right and title to make use of the goods and fortunes of his subjects whenever necessity requires: because he must be supposed to have a right to everything without

which the public good cannot be obtained. And the *eminent domain* is too arrogant and ambitious a word and which ill princes may sometimes abuse to the damage and ruin of their subjects. But, as it is trifling to dispute about words, so I think there can be no absurdity or danger in giving a particular name to a particular branch of the sovereign power as it exerts itself in a certain way upon certain things." Puff. b. 8, c. 5, § 7, Eng. Translation 1703.

of the sovereignty so created or extended, although it could not have *reserved* any right or estate therein.

(3.) Property that has been once resumed, or appropriated, may still be subject to the right under the same conditions as before,⁴ which is hardly consistent with the theory that the State merely asserts its paramount title, and resumes possession and use of its own; for, having once asserted its title in that way, the power would be exhausted.

(4.) In the United States, each State government possesses the power of eminent domain over all the property in the State, as completely and effectually as though the Federal government did not exist, and the latter government is at the same time clothed with the same power over the same property for all the purposes for which it may appropriate property as completely and effectually as though the State governments did not exist. Here, then, according to the theory in question, must be two paramount titles and two reserved estates in the same property at the same time, which is absurd.

(5.) When a new State is admitted into the Union, formed wholly out of territory either belonging to the general government or held under it, the right of eminent domain immediately attaches to the new State, as to all the property within it, the same as though it had originally owned and granted the land, and although it could not have reserved the right and has not received the grant of it, or of any right or estate in the land, from the general government. It is difficult to understand how the State can have *reserved* a right in land which it never owned.

(6.) The doctrine of a reserved right or title will not apply at all to personal property, and yet there is no doubt that such property is subject to the right of eminent domain to the same extent and in the same manner as real property.⁵

⁴ Post, § 276.

hawk & Hudson R. R. Co., 18

⁵ Post, § 263; Bloodgood v. Mo. Wend. 9, 58.

(7.) Finally, if it is a reserved right, or paramount title or estate, in property, it is something which might be disposed of by grant. Any right which is capable of being *reserved* in land or property, and every species of estate or title therein, may be the subject of a grant or conveyance. But all the authorities agree that the power itself cannot be bargained away or extinguished.⁶

We conclude, therefore, that eminent domain is not of the nature of any estate or interest in property, reserved or otherwise acquired, but simply a power to appropriate individual property as the public necessities require, and which pertains to sovereignty as a necessary, constant and inextinguishable attribute.⁷

⁶ Puff. b. 8, c. 5, § 7; New York, H. & N. R. R. Co. v. Boston, H. & E. R. R. Co., 36 Conn. 196; Sholl v. German Coal Co., 118 Ills. 427.

⁷ "It is a necessary attribute of sovereignty in the State rather than any reserved right in the grant of property to the citizen." Noll v. Dubuque, B. & M. R. R. Co., 32 Ia. 66; Hartwell Matter, 2 *Nisi Prius* Rep. (Mich.) 97; 2 Redfield on R. R., p. 229. "But, practically, it is immaterial whether the right be supposed to have been impliedly reserved because it ought not to be granted, or because it is a portion of the national sovereignty which is inalienable by the government, or whether the right is created by the public necessity, which at the time calls for its exercise,—its existence in every State is indispensable and incontestible." Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & B. Law (N. C.) 451. "Whether this principle be denominated the right of transcendental propriety, or of eminent domain, or as is more properly by Grotius, the force of

supereminent dominion, it means nothing more or less than an inherent political right, founded on a common necessity and interest, of appropriating the property of individual members of the community to the great necessities of the whole community. This principle or right does not rest, as supposed by some, upon the notion that the State had an original and absolute ownership of the whole property possessed by the individual members of it, antecedent to their possession of it, and that their possession and enjoyment of it being subsequently derived from a grant by the sovereign, it is held subject to a tacit agreement or implied reservation that it may be resumed, and all individual rights to it extinguished by a rightful exertion of sovereign power. Such a doctrine is bringing the principles of the social system back to the slavish theory of Hobbes, which however plausible it may be in regard to lands once held in absolute ownership by the sovereignty, and directly

§ 4. Eminent domain distinguished from taxation.—

Besides the power of eminent domain, the State is clothed, by virtue of its sovereignty, with other powers over private property, with which it is closely allied and sometimes confounded. These are the power of taxation and the power of police regulation. A tax is a contribution exacted by the government from all the individuals of the State, or from those of a particular class or locality, for the purpose of defraying the public expenses.¹ The contribution may be of money or of property.² But when property is exacted instead of money, it is not because the State needs the particular property, but because that form of exaction, owing to the scarcity of money, will be more promptly and certainly complied with. Taxation is also based upon some rule of apportionment, as when made upon persons according to number, or upon property according to value or quantity or benefits. In all these respects a tax differs from an exercise of the power of eminent domain. “Taxation exacts money, or services, from individuals, as and for their respective shares

granted by it to individuals, it is inconsistent with the fact that the security of pre-existing rights to their own property is the great motive and object of individuals for associating into governments. Besides, it will not apply at all to personal property, which in many cases is entirely the creation of its individual owners; and yet the principle of appropriating private property to public use, is full as extensive in regard to personal as to real property.” *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9, 57. See also *Scholl v. German Coal Co.*, 118 Ills. 427; *Matter of Firman Street*, 17 Wend. 649, 659; *Heyward v. Mayor etc. of New York*, 7 N. Y. 314; *White v. Nashville etc. R. R. Co.*, 7 Heisk. 518; *Roanoke City v.*

Berkowitz, 80 Va. 616; *Baltimore & Ohio R. R. Co. v. Pittsburg etc. R. R. Co.*, 17 W. Va. 812, 841. Being an attribute of sovereignty, the power of eminent domain does not inhere in a territorial government. *Newcomb v. Smith*, 1 Chandler (Mich.) 71; *Pratt v. Brown*, 3 Wis. 603.

§ 4.

¹ “Taxes are defined as being the enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government, and for all public needs.” *Cooley on Taxation*, p. 1. See also *Burroughs on Taxation*, chap. I.; *Hilliard, id.*, Introduction.

² See *Dowell's Hist. Taxation in England*.

of contribution to any public burthen. Private property taken for public use by right of eminent domain, is taken not as the owner's share of contribution to a public burthen, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual and without reference to the amount, or value exacted from any other individual, or class of individuals."³

§ 5. Distinguished from special assessments or betterments.—There is a peculiar species of taxation, known as special assessments or betterments, which is often confounded with the power of eminent domain. The system prevails in all the States, of assessing a part, or the whole, of the cost of local improvements upon the property specially benefited. These local improvements are usually made to accommodate a particular locality, generally at the instance of property owners in that locality, who urge the improvement for the express purpose of enhancing the value of their property. It seems but just that those whose property is thus enhanced, and who thus receive peculiar benefits from the improvement, should contribute specially to defray its cost. Special benefits being thus the foundation, or principle, upon which the special contribution is based, it should not exceed the benefits conferred. A special assessment is thus seen to be a contri-

³ People *v.* Mayor etc. of Brooklyn, 4 N. Y. 419, 1851. Approved in Hummett *v.* Philadelphia, 65 Pa. S. 146, 1870; see also C. W. etc. R. R. Co. *v.* Coms. of Clinton County, 1 Ohio St. 77, 101, 102; Washington

Ave., 69 Pa. S. 352; Gibson *v.* Mason, 5 Nev. 283, 303; Griffin *v.* Dogan, 48 Miss. 11; Turner *v.* Alt-haus, 6 Neb. 54; City of Aurora *v.* West, 9 Ind. 74, and see next section and *post*, § 155.

bution levied upon a particular class of individuals, and apportioned among them according to the quantity or value of property possessed by each in the locality of the improvement, and in the ratio of benefits conferred. Here is every element of a tax and not one element of the exercise of eminent domain. Under the latter power it is always sought to appropriate *specific* property, without regard to any ratio or apportionment. A special assessment is a contribution of money the same as a general tax. The compensation received in benefits does not differ in principle from the compensation received, or supposed to be received, for general taxes, and is often a myth in fact in the one case as in the other. All this seems so evident that the wonder is that any court should have come to a contrary conclusion. The only State in which the doctrine has been unequivocally announced that special assessments fall under the power of eminent domain, is Illinois, and in that State the courts seem to have been driven to that conclusion in order to sustain such assessments at all, owing to the peculiar provisions as to taxation in the constitution of that State then in force.¹ Since this difficulty was removed by the adoption of the present constitution, the Supreme Court of that State has concluded that a special assessment is a tax and not an exercise of the power of eminent domain.² Other courts have exhibited some vacillation on

§ 5.

¹The provision requiring uniformity. *Chicago v. Larned*, 34 Ills. 203; *Canal Trustees v. Chicago*, 12 Ills. 406; *Chicago v. Colby*, 20 Ills. 614; *McBride v. Chicago*, 22 Ills. 576; *Peoria v. Kidder*, 26 Ills. 351; *Town of Pleasant v. Kost*, 29 Ills. 490; *Howard v. St. Clair Drain Co.*, 51 Ills. 130; *Hessler v. Drainage Coms.*, 53 Ills. 105; *Wright v. Chicago*, 46 Ills. 44. The Supreme Court of Michigan encountered the

same obstacle in the constitution of that State, but overcame it by holding that the constitutional provisions applied only to taxes of the ordinary kind for State, county and municipal expenses, and that therefore the legislature had plenary power over this other kind of taxation, and so sustained special assessments as a tax. *Woodbridge v. Detroit*, 8 Mich. 274.

²*White v. People*, 94 Ills. 604, 1880.

this subject,³ but we believe that the doctrine is now universal to the effect that special assessments are to be referred to the power of taxation.⁴

³ In Louisiana the court first held special assessments to be an exercise of the taxing power in Municipality No. 2 *v.* White, 9 La. An. 446, 1854, and afterwards in The New Orleans Drainage Co. etc., 11 La. An. 338, 1856, and *Surgi v. Snetchman*, 11 *id.* 387, 1856, held them to be an exercise of the power of eminent domain, but finally leave the question in uncertainty in *Wallace v. Shelton*, 14 *id.* 503, 1859, and City of New Orleans etc. 20 *id.* 497 1868; and see further New Orleans *v. Elliott*, 10 La. An. 59 1855; *Yeatman v. Crandall*, 11 *id.* 220, 1856. In New York the Court of Errors in 1844-5 held assessments to be an exercise of the taxing power. *Striker v. Kelley*, 7 Hill 9, 1844; S. C. 2 Denio, 323, 1845. Afterwards there were three decisions to the contrary in the Supreme Court. *Jordan v. Hyatt*, 3 Barb. 275, 1848; *People ex rel. etc. v. Mayor etc. of Brooklyn*, 6 *id.* 209, 1849; *People ex rel. etc. v. Mayor etc. of Brooklyn*, 9 *id.* 535, 1850. But the doctrine was finally settled in favor of the text in the case of *People ex rel. etc. v. Mayor etc. of Brooklyn*, 4 N. Y. 419, 1851, where the court discuss at length the distinguishing characteristics of a tax and of an exercise of the eminent domain power. To same effect, *Astor v. Mayor etc. of New York*, 5 Jones & S. 539; *Moran v. City of Troy*, 9 Hun, 540. Other cases holding or intimating that special assessments fall under the power of eminent

domain are the following: Extension of Hancock Street, 18 Pa. S. 26; *Zoeller v. Kellogg*, 4 Mo. Ap. 163; *State v. City Council*, 12 Rich. S. C. 702; *Sutton's Heirs v. City of Louisville*, 5 Dana 28.

⁴ "The form and manner, spirit and bearing of an act of State, decide whether it be an exercise of the right of eminent domain, or the right of taxation, and not the mere physical nature of the thing ultimately obtained by it for the public use." In the Matter of Dorrence Street, 4 R. I. 230, 246. In support of the text, see: *Burnett v. Mayor etc. of Sacramento*, 12 Cal. 76; *Emery v. San Francisco Gas Co.*, 28 Cal. 345, 350; *Chambers v. Saterlee*, 40 Cal. 497; *Hagar v. Board of Supervisors of Yolo Co.*, 47 Cal. 222; *Nichols v. City of Bridgeport*, 23 Conn. 189; *Alexander v. Mayor etc. of Baltimore*, 5 G. & J. (Md.) 383; *Mayor etc. of Baltimore v. Greenmount Cemetery*, 7 Md. 517; *Williams v. Mayor etc. of Detroit*, 2 Mich. 561; *Woodbridge v. Detroit*, 8 Mich. 274; *McComb v. Bell*, 2 Minn. 295; *Garrett v. St. Louis*, 25 Mo. 505; *Newby v. Platt Co.*, 25 Mo. 258; *Palmyra v. Morton*, 25 Mo. 593; *People ex rel. etc. v. Mayor etc. of Brooklyn*, 4 N. Y. 419; *State v. Mayor etc. of Newark*, 35 N. J. L. 168; *State v. Blake*, 36 N. J. L. 442; S. C. 35 N. J. L. 208; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; S. C. on appeal, 18 N. J. Eq. 518; *Scoville v. City of Cleveland*, 1 Ohio St. 126; *Hill v. Higdon*, 5 Ohio St. 243; *Ridenour*

§ 6. **Distinguished from the police power.**—Every one is bound so to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property owner is under to the owners of neighboring property, he is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives.¹ It is the enforcement of this last duty which pertains to the police power of the State so far as the exercise of that power affects private property. Whatever restraints the legislature impose upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy. It is a *regulation*, and not a *taking*, an exercise of *police power*, and not of *eminent domain*.² But

v. Saffin, 1 Handy, 464; *Allen v. Drew*, 44 Vt. 174; *Woodhouse v. Burlington*, 47 Vt. 300. The nature of special assessments will be found to be exhaustively discussed and the authorities reviewed in *Town of Macon v. Patty*, 57 Miss. 378; *Hammett v. Philadelphia*, 65 Pa. S. 146; *Hancock Street*, 18 Pa. S. 26; *Davidson v. New Orleans*, 96 U. S. 97. Where a city assessed land for repairing and curbing a street which had just been paved and curbed by the city and was in good condition, the object being to make the street conform to a new and different plan, it was held that the assessment would be in derogation of the rights of private property. *Wistar v. Philadelphia*, 8 Pa. S. 505.

§ 6.

¹ “Every right, from an absolute ownership in property, down to a mere easement, is purchased and

holden subject to the restriction, that it shall be so exercised as not to injure others.” *Coates v. Mayor etc. of New York*, 7 Cow. 585, 605. See also *Commonwealth v. Alger*, 7 Cush. 84; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

² *King v. Davenport*, 98 Ills. 305; *Munn v. People*, 69 Ills. 80, S. C. affirmed, 94 U. S. 113; *N. W. Fertilizing Co. v. Hyde Park*, 70 Ills. 634; S. C. affirmed, 97 U. S. 659; *Hine v. New Haven*, 40 Conn. 478; *People v. Hawley*, 3 Mich. 330; *Baker v. Boston*, 12 Pick. 184; *Commonwealth v. Tewksbury*, 11 Met. 55; *Watertown v. Mayo*, 109 Mass. 315; *St. Louis v. Stern*, 3 Mo. Ap. 48; *Vanderbilt v. Adams*, 7 Cow. 349; *Roosevelt v. Godard*, 52 Barb. 533; *Beer Co. v. Massachusetts*, 97 U. S. 25; *C. B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. C. & N. W. R. R. Co.*, 94 U. S. 164. In *Philadelphia v. Scott*, 81 Pa. S.

the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power.³ We shall defer until a subsequent chapter a discussion of the limits of the police regulation of private property and of the acts which, though under the guise of police regulation, amount to a taking of property for public use, and which, therefore, can only be accomplished under the power of eminent domain.⁴ It is sufficient for the present purpose to point out the distinction between the two powers. Under the one, the public welfare is promoted by regulating and restricting the use and enjoyment of property by the owner; under the other, the public welfare is pro-

80, the court, speaking of the powers of eminent domain and police, say: "In their leading features, these powers are plainly different, the latter reaching even to destruction of property, as in tearing down a house to prevent the spread of a conflagration, or to removal at the expense of the owner, as in case of a nuisance tending to breed disease. In the first instance, the community proceeds on the ground of overwhelming calamity; and in the second, because of the fault of the owner of the thing; and in either case compensation is not a condition of the exercise of the power. The same general principles attend its exercise in other directions, and it is generally based upon disaster, fault, or inevitable necessity. On the other hand, the power of eminent domain is conditioned generally upon compensation to the owner, and for the most part is

founded, not in calamity or fault, but in public utility. These distinctions clearly mark the cases distant from the border line between the two powers, but in or near to it they begin to fade into each other, and it is difficult to say when compensation becomes a duty and when not."

³ *Lake View v. Rose Hill Cemetery Co.*, 70 Ills. 192; *Chicago v. Laflin*, 49 Ills. 172; *Commonwealth v. Bacon*, 13 Bush. 210; *Matter of Petition of Cheesbrough*, 78 N. Y. 232; *Commonwealth v. Penn. Canal Co.*, 68 Pa. S. 41; *State v. Glenn*, 7 Jones L. 321; *Cornelius v. Glenn*, 7 Jones L. 512; *Turnpike Co. v. Davidson Co.*, 3 Tenn. Ch. 396; *New Orleans Water Works Co. v. St. Tammany Water Works Co.*, 4 Wood C. C. 134; *Crescent City etc. Co. v. Butchers' Union etc. Co.*, 4 Wood C. C. 96.

⁴ *Post*, § 156.

moted by taking the property from the owner and appropriating it to some particular use.

§ 7. Distinguished from the damaging or destruction of property in cases of necessity.—At common law the right exists in individuals, in cases of emergency where the danger is imminent and admits of no delay, to control and destroy property in order to avert a public calamity.¹ The most common example of the exercise of this right, is the demolition of buildings to prevent the spreading of a conflagration. In all such cases, if the judgment of the individual was a reasonable one under the circumstances in which he was placed, he is not liable, even though it should finally turn out that the destruction was, in fact, unnecessary.² Though the right is regulated by statute and officers designated to determine upon the necessity and order the destruction, the nature of the act remains unchanged. In such cases no remedy exists except such as was previously given by the common law, or is conferred by the statute.³ The regulation of the right by statute does not bring its exercise under

§ 7.

¹2 Kent's Com. 338; Dillon's Munic. Corp. §. 955 (756), and cases cited in subsequent notes to this section. "The best elementary writers lay down the principle, and adjudications upon adjudications have for centuries sustained, sanctioned and upheld it, that in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, or any other great public calamity, the private property of any individual may be lawfully destroyed for the relief, protection or safety of the many, without subjecting the actors to personal responsibility for the damages which the owner has sustained." Senator

Sherman in *Russell v. Mayor etc.* of New York, 2 Denio 461, 474.

²Conwell *v. Emrie*, 2 Ind. 35; *Surocco v. Geary*, 3 Cal. 69; *Dunbar v. The Alcalde etc. of San Francisco*, 1 Cal. 355; *McDonald v. City of Red Wing*, 18 Minn. 38; *Field v. Des Moines*, 39 Ia. 575. In *Bishop v. Macon*, 7 Ga. 200, a contrary doctrine appears to be held.

³People *ex rel. v. Common Council of Buffalo*, 76 N. Y. 558; *Bowditch v. City of Boston*, 4 Clifford, 323; *Keller v. Corpus Christi*, 50 Tex. 614; *Mayor etc. of New York v. Lord*, 17 Wend. 285; S. C. 18 Wend. 126; *Mayor etc. of New York v. Pentz*, 24 Wend. 668;

the power of eminent domain.⁴ This right is plainly distinguishable from the right of eminent domain. It is a right which exists in the individual, and not in the State; by nature, and not as the result of political organization.⁵

§ 8. Distinguished from the war power.—The taking, injuring and destruction of property in time of war, is clearly allied to the injury and destruction of property referred to in the last section. The war power is founded on necessity. It is exercised by the State and its authorized agents, not by individuals acting independently and upon their own author-

Russell *v.* Mayor etc. of New York, 2 Denio 461; American Print Works *v.* Lawrence, 21 N. J. L. 248; S. C. 21 N. J. L. 714; 23 N. J. L. 590; Parsons *v.* Pettingill, 11 Allen 507; Taylor *v.* Plymouth, 8 Met. 462; White *v.* City Council of Charleston, 2 Hill S. C. 571; Field *v.* Des Moines, 39 Ia. 575. For a construction of the New York statute as to goods in buildings destroyed, see Mayor etc. of New York *v.* Stone, 20 Wend. 139.

* In American Print Works *v.* Lawrence, 21 N. J. L. 248, 258, Green, C. J., says: "I am of opinion, therefore, that the destruction of buildings to prevent the spread of a conflagration, is not the taking of property for public use within the meaning of the constitution. Nor is the principle altered by the fact that the destruction in the present instance was committed under legislative sanction. The right of destruction existed prior to the enactment. The statute created no new power. It conferred no new right. It merely converted a right of necessity into a legal right. It regulated the

mode in which a previously existing power should be exercised." See also S. C. 23 N. J. L. 590; Russell *v.* Mayor etc. of New York, 2 Denio 461; Field *v.* Des Moines, 39 Ia. 575; Keller *v.* Corpus Christi, 50 Tex. 614; Bowditch *v.* City of Boston, 4 Clifford, 323.

⁵ "The right of eminent domain is a public right; it arises from the laws of society, and is vested in the State or its grantee, acting under the right and power of the State, and is the right to take or destroy private property for the use or benefit of the State, or of those acting under and for it. The right of necessity arises under the law of nature; it is older than the laws of society or society itself. It is the right of self-defense, of self-preservation, whether applied to persons or to property. It is a private right vested in every individual, and with which the rights of the State or State necessity has nothing to do." Per Randolph, J., in American Print Works *v.* Lawrence, 23 N. J. L. at 615; S. C. 21 N. J. L. at p. 257.

ity.¹ According to the laws of war, private property in the enemy's country, whether belonging to a friend or foe, useful to the enemy for attack, or defense, or subsistence, may be rightfully taken or destroyed.² The owners of property injured, or destroyed, in the actual operations of war, in battle, in the movement of troops, in the construction of works of attack or defense, are without remedy.³ So of property wantonly destroyed by troops. The destruction of property to prevent its falling into the hands of the enemy falls under the same power.⁴ In such case the officer acts at his peril and upon his own responsibility. If his judgment was a reasonable one, in view of the circumstances as they appeared to him at the time, and the information he had a right to rely upon, the act is justifiable, and the loss is the owner's misfortune. If the officer's action was not justified as above explained, he is personally responsible.⁵ It is in no event an exercise of the power of eminent domain. There is not wanting, however, some authority for a contrary view.⁶ Where the property of a citizen is impressed into the service of the State in time of war, which would ordinarily be procured by contract, except for the emergency, there is a taking within the meaning of the constitution, and the owner is entitled to compensation.⁷ But if there is a lack of good faith, or of a sufficient emergency, or of proper authority, the person taking the property will be liable.⁸ In case of such impressment

§ 8.

¹ See *Beck. v. Ingram*, 1 Bush (Ky.) 355.

² *Bell v. Louisville & Nashville R. R. Co.*, 1 Bush (Ky.) 404; see 13 Am. Law Reg. N. S. 275.

³ *Bell v. Louisville & Nashville R. R. Co.*, 1 Bush (Ky.) 404; see article in 13 Am. Law Reg. N. S. 337.

⁴ *Respublica v. Sparhawk*, 1 Dall. 357; *Ford v. Surget*, 46 Miss. 130; Article 13 Am. Law Reg. N. S. 401.

⁵ *Mitchell v. Harmony*, 13 How. 115; *Farmer v. Lewis*, 1 Bush (Ky.) 66; *Dills v. Hatcher*, 6 Bush (Ky.) 606.

⁶ *Grant v. United States*, 1 Ct. of Cl. 41; *Mitchell v. Harmony*, 13 How. 115. But see comments on these cases in 13 Am. Law Reg. 415, note.

⁷ *Drehman v. Stifel*, 41 Mo. 184; *Wallace v. Alvord*, 39 Ga. 609; *Price v. Poynton*, 1 Bush (Ky.) 387.

⁸ *Barrow v. Page*, 5 Haywood

of property, the compensation must be fixed by an impartial tribunal, and not arbitrarily by the government.⁹ Personal property once rightly impressed vests absolutely in the government, and does not revest when the emergency ceases.¹⁰ It has been held that money and real estate cannot be lawfully impressed.¹¹

(Tenn.) 97; *Tyson v. Rogers*, 33 Ga. 473; *Jones v. Commonwealth*, 1 Bush (Ky.) 34; *Sellards v. Zomes*, 5 Bush (Ky.) 90; *Brakebill v. Leonard*, 40 Ga. 60; *Lewis v. McGuire*, 3 Bush (Ky.) 202; *Hogue v. Penn*, 3 Bush (Ky.) 663; *Ferguson v. Loar*, 5 Bush (Ky.) 689.

⁹ *Cox v. Cummings*, 33 Ga. 549; *Cunningham v. Campbell*, 33 Ga. 625.

¹⁰ *Taylor v. Nashville & Chattanooga R. R. Co.*, 6 Cold. 646; *contra*, *Fryer v. McRae*, 8 Porter (Ala.) 187.

¹¹ *White v. Ivey*, 34 Ga. 186; *Terrell v. Rankin*, 2 Bush (Ky.) 453.

CHAPTER II.

CONSTITUTIONAL PROVISIONS.

§ 9. **In general.**—The eminent domain, as we have already seen, is a sovereign power and devolves upon those persons in a State who are clothed with the supreme authority. In the States of the American Union these persons are the people, or, more strictly, that portion of the people invested with the elective franchise. The power of eminent domain has been delegated by the people to the legislative department of the government in the general grant of legislative power.¹ In nearly all the States this grant has been accompanied by an express limitation upon the legislature in the exercise of the power. The ordinary and typical form of this limitation is, that *private property shall not be taken for public use without just compensation*. The later constitutions, however, display a tendency to amplify and complicate this simple prohibition with special reference to the taking of property by municipal and private corporations, and also with reference to the time and manner of compensation. As these constitutional provisions form the basis of a great multitude of decisions, they have, for convenience of reference and the better understanding of the decided cases, been collated at the end of this chapter. It will be observed that but one State, North Carolina, now remains without a provision on this subject in its organic law. Other States have been without such a provision, as follows: New York, until 1822; New Jersey, until 1844; Louisiana, until 1845; Maryland,

§ 9

¹“The power itself is an inseparable incident of sovereignty, and its exercise was delegated by the sovereign power to the general

assembly, in the general grant of legislative authority.” Geizey v. C. W. & Z. R. R. Co., 4 Ohio St. 308, 323; also Todd v. Austin, 34 Conn. 78.

until 1851, and Arkansas, Georgia and South Carolina, until 1868. The provision first appears in the constitution of Vermont, adopted in 1777. Massachusetts and Pennsylvania follow in 1780 and 1790 respectively. The principal questions which have arisen in construing these constitutional provisions are, *first*, what constitutes a *taking*; *second*, what is a *public use*, and, *third*, what is *just compensation*; and these questions are discussed in the succeeding chapters.

§ 10. The constitutional provision a limitation: States which have none.—It is a very interesting question, whether, in those States whose constitutions contain no provision in regard to taking private property for public use, the legislature is under any restraint whatever in the exercise of the power. But this question has lost most of its practical interest, from the fact that all States except one¹ now have an express limitation in their organic law touching the exercise of this power. The courts of nearly all the States which are, or have been, without such a limitation, have held that the limitation itself was simply declaratory of certain great and fundamental principles of natural justice and equity which were as binding and obligatory upon the legislature as though expressly incorporated into the written constitution.²

§ 10.

¹ North Carolina.

² Spencer, J., in Bradshaw *v.* Rodgers, 20 Johns. 103, 1822, speaking of these constitutional provisions, says: "They are declaratory of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice." S. C. 20 Johns. 735, 1823. In Harms *v.* The Chesapeake & Ohio Canal Co., 1 Md. Ch. 248, 1848, it was said that, independent of constitutions, "there was a principle of right and

justice inherent in the nature and spirit of the social compact, which restrained and set bounds to the authority of the legislature, and beyond which it could not be allowed to pass—that principle which protects the life, liberty and property of the citizen from violation in the unjust exercise of legislative power." And see Martin *et al. ex parte*, 13 Ark. 198: Cairo & Fulton R. R. Co. *v.* Turner, 31 Ark. 494; Doe *v.* Georgia R. R. & B. Co., 1 Ga. 524; Young *v.* McKenzie, 3 Ga. 31; Parham *v.* Justices etc. of Decatur County, 9 Ga. 341; Lough-

The idea, however, that the legislature of a State is restrained by limitations which are not to be found in the written constitution, is not founded upon any sound legal or philosophical principles. The later authorities and the better reasoning are against such a view. The subject has been fully treated by Mr. Sedgwick and Mr. Cooley in their admirable treatises on constitutional law.³

The true theory is that these constitutional provisions are limitations upon the power of eminent domain as vested in the legislative department of the State. They are neither to be regarded as declaratory of what the law would be without them, nor as grants of the power in question to the legislature.⁴ In some of the States, which have, or have had, no

bridge v. Harris, 42 Ga. 501; *Matter of Highway*, 22 N. J. L. 293; *Johuston v. Rankin*, 70 N. C. 550; *Petition of Mt. Washington Road Co.*, 35 N. H. 134, 141, 142; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 160; *State v. Franklin Falls Co.*, 49 N. H. 240, 251; *Piscataqua Bridge Co. v. N. H. Bridge Co.*, 7 N. H. 35, 66, 70; *Polly v. Saratoga etc. R. R. Co.*, 9 Barb. 449. *Contra*, *Lindsay v. Commissioners, etc.*, 2 Bay (S. C.) 38, 1796; *Stark v. McCown*, 1 Nott & McCord (S. C.) 387, 1818; *Patrick v. Commissioners, etc.*, 4 McCord (S. C.) 541, 1828; *Maniquinet v. Commissioners of Roads*, 4 McCord (S. C.) 541, 1828; *State v. Dawson*, 3 Hill (S. C.) 101, 1836; *ex parte Withers*, 3 Brevard (S. C.) 83; *Raleigh & Gaston R. R. Co. v. Davis*, 2 Dev. & B. L. (N. C.) 451, 1837; *The Central R. R. Co. v. Hetfield*, 29 N. J. L. 206, 1861; *Den. v. Morris Canal Co.*, 24 N. J. L. 587, 1854.

³ *Sedgwick on Const. & Stat. Law*, pp. 123-132, 150-159; *Cooley*,

Const. Lim., pp. 85, 86, 172, 173; see also *Slack v. Maysville & Lexington R. R. Co.*, 13 B. Mon. 1, 22; see also *City of Logansport v. Seybold*, 59 Ind. 225; *Churchman v. Martin*, 54 Ind. 380; *Quick v. White Water Township*, 7 Ind. 570; *Philadelphia v. Field*, 58 Pa. S. 320; *People v. Toynbee*, 2 Parker (N. Y.) 490; *People v. Gallagher*, 4 Mich. 244; *People v. Marshall*, 6 Ills. 672.

⁴ *United States v. Jones*, 109 U. S. 513, 518; *B. & O. R. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va. 812, 841; *Challiss v. A. T. & S. F. R. R. Co.*, 16 Kan. 117; *District of City of Pittsburg*, 2 W. & S. 320; *The Water Works Co. of Indianapolis v. Burkhardt*, 41 Ind. 364; *Winona & St. Peter R. R. Co. v. Waldron*, 11 Minn. 515, 539. In the latter case the court says: "The right of eminent domain is not conferred by the constitution; but, if affected at all, is limited thereby, and only to the extent of the limitation can the citizen obtain any redress." Again,

provision on the subject, the right to compensation has been worked out through other provisions of the constitution, such as the one that no person shall be deprived of life, liberty or property without due process of law.⁵

§ 11. The provision in the federal constitution.—The provision in the Constitution of the United States, that private property shall not be taken for public use without just compensation, applies only to the operations of the federal government and is not a limitation upon the power of the States.¹ The only dissent from this proposition is found in an early case in Georgia;² but the Supreme Court of that State afterwards modified their views and held in accordance with the text.³

§ 12. Effect of a change in the constitution.—A constitution may be revised or amended so as to introduce important changes regarding the power of eminent domain. The question may arise as to the effect of such changes upon existing laws, pending proceedings or works in progress. The solution of such questions pertains more properly to works on consti-

in *Harvey v. Thomas*, 10 Watts 63, "The clause by which it is declared that no man's property shall be taken or applied to public use without the consent of his representatives and without just compensation is a disabling, not an enabling, one, and the right would have existed in full force without it."

⁵ *Martin ex parte*, 13 Ark. 198; *Harness v. Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248; *Parham v. Justices etc. of Decatur County*, 9 Ga. 341. But a different conclusion is reached in the South Carolina cases cited *ante*, n 2.

§ 11.

¹ *Barron v. Mayor etc. of Bal-*

timore, 7 Peters, 243; *Withers v. Buckley*, 20 How. 84; *Pumfelly v. Green Bay Co.*, 13 Wall. 166, 176; *Livingston v. Mayor etc. of New York*, 8 Wend. 85; *Cairo and Fulton R. R. Co. v. Turner*, 31 Ark. 494; *Raleigh & Gaston R. R. Co. v. Davis*, 2 Dev. & B. Law (N. C.) 451; *Johnston v. Rankin*, 70 N.C. 550; *Concord R. R. Co. v. Greeley*, 17 N. H. 47; *Martin v. Dix*, 52 Miss. 53; *Renthorp v. Bourg*, 4 Martin, O. S. (La.) 97.

² *Doe v Georgia R. R. & B. Co.*, 1 Ga. 524.

³ *Young v. McKenzie*, 3 Ga. 31; *Parham v. Justices of Decatur County*, 9 Ga. 341.

tutional law;¹ but a brief discussion of them will not be out of place in this connection. Much must depend upon the facts of each case, but in general it may be said that provisions intended to secure the citizen additional rights and safeguards against the exercise of the power in question, or affecting the remedy or procedure only, will be deemed to go into operation immediately and without the aid of legislation, unless the operation of such provisions is expressly made dependent upon laws to be afterwards enacted. Thus where, by a change in the constitution, the compensation or damages for property taken is required to be ascertained in a particular mode, all laws inconsistent therewith are at once abrogated,² and proceedings under such laws thereafter are void and of no effect even collaterally.³

The constitution of Arkansas of 1868 provided that the compensation for a right of way appropriated by a corporation should be ascertained by a jury of twelve men in a court of record as should be prescribed by law.⁴ The Cairo & Fulton R. R. Co. was organized under an act of 1855 which provided for the assessment of damages by five commissioners on the application of either party. In 1874 Trout filed his petition against the said company under the act of 1855 for an assessment of damages. An act was passed in 1873 applicable to all railroads, which provided a mode of assessing damages in accordance with the constitution, but it gave the

§ 12.

¹ See Cooley, Const. Lim. chap. 4.

² Kine *v.* Defenbaugh, 64 Ills. 291; Mitchell *v.* Illinois etc. Co., 68 Ills. 286; Householder *v.* City of Kansas, 83 Mo. 488; People *v.* Supervisors, 12 Barb. 446; Lamb *v.* Lane, 4 Ohio St. 167. But see as to proceedings pending on appeal. People *v.* Supervisors, 3 Barb. 332. In the following case the right to go on with pending proceedings was held to be secured by a saving clause.

Peoria etc. R. R. Co. *v.* Birbett, 62 Ills. 332.

³ Mitchell *v.* Illinois etc. Co., 68 Ills. 286; People *v.* Kimball, 4 Mich. 95; Perrysburg Canal and Hydraulic Co. *v.* Fitzgerald, 10 Ohio St. 513; Whitehead *v.* The Arkansas Central R. R. Co., 28 Ark. 460; Weber *v.* County of Santa Clara, 59 Cal. 265; Trahern *v.* San Joaquin Co., 59 Cal. 320.

⁴ Art. V. Sec. 48, see *post*, § 16.

initiative to the railroad company alone. The petitioners' land was entered upon before the passage of this act. The court held that the constitution did not execute itself, but plainly indicated that it was to be carried into effect only by legislation. It was further held that as the petitioner's right accrued before the act of 1873 was passed, he could proceed under the act in force at the time his right accrued.⁵ Where by the adoption of a new constitution compensation was required to be made for property injured or damaged as well as for property taken, it has been held that it did not apply to damages occasioned by works which had been ordered and contracted for before the new constitution went into effect.⁶

§ 13. The provisions apply only to the power of eminent domain.—As we have already seen, private property may be taken or affected for public use, not only under the power of eminent domain, but also under other powers vested in the State, as the power of taxation, the police power and the war power.¹ Some courts have held that the constitutional provision in question is a limitation upon the exercise of all these powers.² But the better view undoubtedly is that it

⁵ Cairo & Fulton R. R. Co. v. Trout, 33 Ark. 17. In *Supervisors of Dodridge County v. Stout*, 9 W. Va. 703 it was held that where, pending proceedings to condemn, a new constitution went into effect requiring compensation to be ascertained in such manner as should be prescribed by general law, provided, that either party should have the right to a jury of twelve free-

holders, the existing laws remained in force until a general law was passed as contemplated by the constitution.

upon existing corporations in respect to the exercise by them of the power of eminent domain, see *Prather v. Jeffersonville etc. R. R. Co.*, 52 Ind. 16: *Den v. Morris Canal etc. Co.*, 24 N. J. L. 587; *Duncan v. Pennsylvania R. R. Co.*, 94 Pa. S. 435; *Philadelphia v. Wright*, 100 Pa. S. 235; *McElroy v. Kansas City*, 21 Fed. R. 257 and also *post*, § 246.

§ 13.

¹ *Ante*, Chap. 1.

² In *Macon v. Patty*, 57 Miss. 378, 399, the court say: "We must apply this provision in all cases, notwithstanding it has been said that it is only applicable to property taken

⁶ *Chicago v. Rumsey*, 87 Ills. 348. As to the effect of a change in the constitution imposing additional liabilities or different conditions

applies only to the power of eminent domain.³ The just compensation required to be made is an equivalent, either in money, or in special benefits to particular property.⁴ In no case is the individual compensated in this manner for money exacted for taxation or loss occasioned by an exercise of police power. In short, these powers would be rendered nugatory, if such compensation was obligatory in case of their exercise. It is enough that a tax or police regulation promotes, or is calculated or intended to promote, the general welfare. The individual receives his only compensation by sharing in the common benefit. But, if the constitutional provision for just compensation is satisfied by a participation in the gen-

under the right of eminent domain, which right does not extend to the taking of money. We agree that the most important use of this provision is to restrain the right of eminent domain; but that is not its whole force. For the prohibition is general and absolute: ‘Private property shall not be taken for public use, except upon due compensation,’ is the language of the constitution. The prohibition is not as to the methods in which the appropriation may be made, but is a denial of the power to make it at all by any method, under any circumstances, and under any pretence whatever, unless compensation is first made. It was intended to secure the absolute inviolability of private property of all kinds against any and all invasions under public authority. If the right of eminent domain does not extend to the taking of money, this is no reason why that kind of property should not come within the protection of this clause of the constitution; but, on the contrary, the absence of the right is but an additional safeguard

for its protection. It is true that money exacted from the citizen, in the way of lawful and constitutional taxation, is not within the meaning of this clause, because it is taken in discharge of a debt to the State or public. But if, under the guise of taxation, money is attempted to be exacted beyond the limits of the taxing power, it is a violation of the security afforded by this clause of the constitution.” See also *Cheaney v. Hooser*, 9 B. Mon. 330, 341.

³“It is only the taking of specific pieces of property of an individual that is prohibited by the constitutional provision mentioned.” *City of Logansport v. Seybold*, 59 Ind. 225, 228; *City of Aurora v. West*, 9 Ind. 74, 83.

⁴We do not mean at this point to give a construction of the words in question. All we mean is that the least effect courts have ever given to them, is that the “just compensation” required to be made may consist of special benefits. See *post*, §§ 465, 471.

eral welfare, then its efficacy to protect the individual against the power of eminent domain is entirely gone. As the provision must have a uniform interpretation and cannot be made to mean one thing at one time and another thing at another time, one thing when applied to the power of eminent domain and another when applied to taxation or police regulation, we think it is clear that its application must be confined to the former power. It does serve to keep the other powers within their legitimate bounds, but within those bounds it has no application. These conclusions are enforced by considering those provisions which require the "just compensation" to be first made. It can hardly be contended that this modification changes entirely the scope and purposes of the provision. But it is evident that it would absolutely preclude the exercise of the power of taxation or police regulation, if applied thereto; for it is impossible to receive the benefit of a tax until it has been collected and expended, or of a police regulation until it has been executed and enforced.

§ 14. Constitutional Provisions—United States.

Art. 5. Amendments of 1791. * * * "nor shall private property be taken for public use, without just compensation."

Ordinance of 1787. Sec. 9, Art. 2. "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same."

§ 15. Alabama.

1819. Art. 1, § 13. * * * "nor shall any person's property be taken or applied to public use, unless just compensation be made therefor."

1865. Art. 1, § 25. "That private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner; *provided, however,* that laws may be made securing to persons or corporations the right of way over the lands of other persons or corporations, and for works of internal improvement, the right to establish depots, stations and turn-outs; but just compensation shall, in such cases be first made to the owner."

1867. Art. 1, § 25. The same provision is continued, except for "other persons or corporations" read "either persons or corporations," and in the last line in place of "such cases" read "all cases."

Art. 13, § 5. "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvements proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law."

1875. Art. 1, § 24. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as individuals. But private property shall not be taken for or applied to public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; *provided, however*, that the general assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporation of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and *provided*, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations other than municipal, or for the benefit of any individual or association."

Art. 13, § 7. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction. The general assembly is hereby prohibited from depriving any person from an appeal from any preliminary assessment of damages against any such corporation or individuals, made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to law."

§ 16. Arkansas.

1836 No provision.

1861. No provision.

1868. Art. 1, § 15. "Private property shall not be taken for public use without just compensation therefor."

Art. 5, § 48. * * * "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law."

1874. Art. 2, § 22. "The right of property is before and higher than any constitutional sanction; and private property shall not be taken,

appropriated, or damaged for public use without just compensation therefor."

Art. 12, § 9. "No property nor right of way shall be appropriated to the use of any corporations until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

§ 11. "Foreign corporations * * * shall not have power to condemn or appropriate private property."

Art. 17, § 9. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 12. "All railroads, which are now or may be hereafter built and operated either in whole or in part, in this State, shall be responsible for all damages to persons and property, under such regulations as may be prescribed by the general assembly."

§ 17. California.

1849. Art. 1, § 8. * * * "nor shall private property be taken for public use without just compensation."

1879. Art. 1, § 14. "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained or paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law."

Art. 12, § 8. "The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals."

Art. 14, § 1. "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."

§ 18. Colorado.

1876. Art. 2, § 14. "That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the land of others, for agricultural, mining, milling, domestic, or sanitary purposes."

§ 15. "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three free-holders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

Art. 15, § 8. "The right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 19. Connecticut.

1818. Art. 1, § 11. "The property of no person shall be taken for public use without just compensation therefor."

§ 20. Delaware.

1776. No provision.

1792. Art. 1 § 8 * * * "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being made."

1831. Art. 1, § 8. Same.

§ 21. Florida.

1838. Art 1, § 14. "That private property shall not be taken or applied to public use unless just compensation be made therefor."

1865. Art. 1, § 14. "That private property shall not be taken or applied to public use, unless just compensation be first made therefor."

1868. Art 1, § 9. * * * "nor shall private property be taken without just compensation."

§ 22. Georgia.

1777. No provision.

1789. No provision.

1798. No provision.

1865. Art. 1, § 17. "In cases of necessity, private ways may be granted upon just compensation being first paid; and with this exception private property shall not be taken, save for public use, and then only on just compensation, to be first provided and paid, unless there be a pressing, unforeseen necessity; in which event the general assembly shall make early provision for such compensation."

1868. Art. 1, § 20. "Private ways may be granted upon just compensation being paid by the applicant."

1877. Art. 1, Sec. III, ¶ 1. "In cases of necessity, private ways may be granted upon just compensation being first paid by the applicant. Private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid."

Art. III, Sec. VII, ¶ 20. "The General Assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

Art. IV, Sec. II, ¶ 2. "The exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as property of individuals." * * *

§ 23. Illinois.

1818. Art. 8, § 11. * * * "nor shall any man's property be taken or applied to public use, without the consent of his representatives in the general assembly, nor without just compensation being made to him."

1848. Art. 13, § 11. Same.

1870. Art. 2, § 13. "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it was taken."

Art. 11, § 14. "The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."

Art. 4, § 31, as amended in 1878. "The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof, with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by special assessments upon the property benefited thereby."

§ 24. Indiana.

1816. Art. 1, § 7. "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor."

1851. Art. 1, § 21. "No man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendere'!"

§ 25. Iowa.

1846. Art. 1, § 18. "Private property shall not be taken for public use without just compensation first being made, or secured, to be paid to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

1857. Art. 1, § 18. Same.

§ 26. Kansas.

1859. Art. 12, § 4. "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation."

§ 27. Kentucky.

1792. Art. 12, § 12. * * * "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

1799. Art. 10, § 12. Same.

1850. Art. 13, § 14. Same.

§ 28. Louisiana.

Civil Code, Art. 489. "No one can be divested of his property, unless for some purpose of public utility and on consideration of an equitable and previous indemnity and in a manner previously prescribed by law. By an equitable indemnity in this case is understood, not only a payment for the value of the thing of which the owner is deprived, but a remuneration for the damages which may be caused thereby."

1812. No provision.

1845. Title 6, Art. 109. "Vested rights shall not be divested unless for purposes of public utility, and for adequate compensation previously made."

1852. Title 6, Art. 105. Same.

1854. Title 6, Art. 109. Same.

1868. Title 6, Art. 110. Same, omitting the word *previously*.

§ 29. Maine.

1819. Art. 1, § 21. "Private property shall not be taken for public use without just compensation, nor unless the public exigencies require it."

§ 30. Maryland.

1776. No provision.

1851. Art. 3, § 46. "The legislature shall enact no law authorizing private property to be taken for public use, without just compensation, as

agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation."

1864. Art. 3, § 39. Same.

1867. Art. 3, § 40. Same.

§ 31. Massachusetts.

1780. Part 1st, Art. 10. "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal services or an equivalent when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the public of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

§ 32. Michigan.

1835. Art. 1, § 19. "The property of no person shall be taken for public use without just compensation therefor."

1850. Art. 10, § 11. "The board of supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships, under such restrictions and limitations as shall be prescribed by law."

Art. 15, § 9. "The property of no person shall be taken by any corporation for public use without compensation being first made or secured, in such manner as may be prescribed by law."

Art. 15, § 15. "Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders, and actually paid or secured in the manner provided by law."

Art. 18, § 2. "When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law. *Provided*, The foregoing provisions shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duties as highway commissioners." (Proviso added in 1860.)

Art. 18, § 14. "The property of no person shall be taken for public use without just compensation therefor. Private roads may be opened in the manner to be prescribed by law; but in every case the necessities of the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such

amount, together with the expenses of proceedings, shall be paid by the person or persons to be benefitted."

§ 33. Minnesota.

1857. Art. 1, § 18. "Private property shall not be taken for public use without just compensation therefor, first paid or secured."

Art. 10, § 4. "Lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such land and the damages arising from the taking of the same; but all corporations being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural and other productions or manufactures on equal and reasonable terms."

§ 34. Mississippi.

1817. Art. 1, § 13. * * * "nor shall any person's property be taken or applied to public use, without the consent of his representatives, and without just compensation being made therefor."

1832. Art. 1, § 13. * * * "nor shall any person's property be taken or applied to public use without the consent of the legislature, and without just compensation being first made therefor."

1868. Art. 1, § 10. "Private property shall not be taken for public use except upon due compensation first being made to the owner or owners thereof in a manner to be provided by law."

§ 35. Missouri.

1820. Art. 13, § 7. * * * "and that no private property ought to be taken or applied to public use without just compensation."

1865. Art. 1, § 16. Same.

1875. Art. 2, § 20. "That no private property can be taken for private use with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."

Art. 2, § 21. "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without the consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

Art. 12, § 4. "The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."

§ 36. Nebraska.

1867. Art. 1, § 13. The property of no person shall be taken for public use without just compensation therefor."

Art. 2, § 3. "The people of the State, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the State."

1875. Art. 1, § 21. "The property of no person shall be taken or damaged for public use without just compensation therefor."

Art. 11, § 6. "The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature of the property and franchises of incorporated companies already organized or hereafter to be organized, and subjecting them to the public necessity, the same as of individuals."

Art. 11, § 8. "No railroad corporation organized under the laws of any other State, or of the United States, and doing business in this State, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this State."

§ 37. Nevada.

1864. Art. 1, § 8. * * * "nor shall private property be taken for public use without just compensation having been first made or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall afterwards be made."

Art. 8, § 7. "No right of way shall be appropriated to the use of any corporation until full compensation be first made or secured therefor."

§ 38. New Hampshire.

1776. No provision.

1784. Part I, Art. 12. * * * "but no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people."

1792. Part I, Art. 12. Same.

§ 39. New Jersey.

1776. No provision.

1844. Art. 1, § 16. "Private property shall not be taken for public

use, without just compensation; but land may be taken for public highways, as heretofore, until the Legislature shall direct compensation to be made."

Art. 4, § 7, cl. 9. "Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owner."

§ 40. New York.

1777. No provision.

1821. Art. 7, § 7. * * * "nor shall private property be taken for public use without just compensation."

1846. Art. 1, § 6. Same.

Art. 1, § 7. "When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity for the road, and the amount of all damages to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefitted."

Art. 1, § 11. "The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State."

§ 41. North Carolina.

1776. No provision.

1868. No provision.

1876. No provision.

§ 42. Ohio.

1802. Art. 8, § 4. "Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner."

1851. Art. 1, § 19. "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use a compensation therefor shall be first made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Art. 13, § 5. "No right of way shall be appropriated to the use of any corporation, until full compensation therefor shall be first made in money, or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation; which

compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

§ 43. Oregon.

1857. Art. 1, § 19. Private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation, nor except in case of the State, without such compensation first assessed and tendered."

Art. 11, § 4. "No person's property shall be taken by any corporation under authority of law, without compensation being first made or secured, in such manner as may be prescribed by law."

§ 44. Pennsylvania.

1776. Art. 8. * * * "but no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives."

1790. Art. 9, § 10. * * * "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made."

1838. Art. 7, § 4. "The legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor, before such property shall be taken."

Art. 9, § 10. Same as in 1790.

1873. Art. 1, § 10. * * * "nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made or secured."

Art. 16, § 3. "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals."

§ 8. "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The general assembly is hereby prohibited from depriving any person from an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to the course of the common law."

§ 45. Rhode Island.

1842. Art. 1, § 16. "Private property shall not be taken for public uses, without just compensation."

§ 46. South Carolina.

1776. No provision.
1778. No provision.
1790. No provision.
1865. No provision.

1868. Art 1, § 23. "Private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner or a just compensation being made therefor: *Provided, however,* that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations, and for works of internal improvement, the right to establish depots, stations, turnouts, etc.; but a just compensation shall, in all cases, be first made to the owner."

Art. 6, § 3. "The people of the State are declared to possess the ultimate property in and to all lands within the jurisdiction of the State."

Art. 12, § 3. "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

§ 47. Tennessee.

1796. Art. 11, § 21. "That no man's particular services shall be demanded or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

1834. Art. 1, § 21. Same.
1870. Art. 1, § 21. Same.

§ 48. Texas.

1836. Republic of Texas, Declaration of Rights, 13th. "No person's particular services shall be demanded, nor property taken or applied to public use, unless by the consent of himself or his representatives, without just compensation being made therefor according to law."

1845. State of Texas, Art. 1, § 14. "No person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person."

1866. Art. 1, § 14. Same.
1878. Art. 1, § 14. Same.

1876. Art. 1, § 17. "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured, by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof."

§ 49. Vermont.

1777. Chap. 1, § 2. "That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."

1786. Chap. 1, § 2. Same.

1793. Chap. 1, § 2. Same, except for "any particular man's property" read "any person's property."

§ 50. Virginia.

1776. Bill of Rights, § 6. * * * "that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected."

1850. Bill of Rights, § 6. Same.

1870. Art. 1, § 8. Same.

§ 51. West Virginia.

1861-3. Art. 2, § 6. "Private property shall not be taken for public use without just compensation."

1872. Art. 3, § 9. "Private property shall not be taken or damaged for public use without just compensation; nor shall the same be taken by any company incorporated for the purposes of internal improvement until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporations, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: *Provided*, that when required by either of the parties such compensation shall be ascertained by an impartial jury of twelve free-holders."

Art. 11, § 12. "The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the legislature, of the property and franchises of incorporated companies already organized, and subjecting them to the public use, the same as of individuals."

§ 52. Wisconsin.

1848. Art. 1, § 13. "The property of no person shall be taken for public use without just compensation therefor."

Art. 9, § 3. "The people of this State, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the State."

Art. 11, § 2. "No municipal corporation shall take private property for public use against the consent of the owner, without the necessity thereof being first established by the verdict of a jury."

CHAPTER III.

WHAT CONSTITUTES A TAKING: GENERAL PRINCIPLES.

§ 53. **Statement of the question.**—The constitutional limitations upon the power of eminent domain, which have been considered in the last chapter, though seemingly plain and definite, nevertheless contain three important ambiguities. These are found in the word “taken” and in the phrases “public use” and “just compensation”. The first of these, or *what constitutes a taking of property*, within the meaning of the constitution, will form the subject of inquiry in the present and succeeding chapters. In regard to personal property, no question can ordinarily arise. It is seldom necessary to appropriate it, but if appropriated, it is *taken*; if not appropriated, it can be removed beyond the influence of any particular improvement and so escape the deterioration or injury it might otherwise sustain. Nor does any question arise in regard to real property when some legal estate or interest therein is acquired, or a physical appropriation made. But it frequently happens when land has been taken for some public purpose, that the use of the land for that purpose, or the adaptation of the land for such use, may occasion damage to adjacent property, the title and possession of which remain wholly unaffected. Such damage may consist of a real structural or physical injury to the property, of an interference with certain rights appurtenant thereto, or enjoyed in connection therewith, or of a mere deterioration in value. Do such damages, whether structural or otherwise, come within the purview of the constitution? Are they, in any case, a *taking* for which compensation must be made?

§ 54. **What is property?**—In determining the question of what constitutes a taking of property, it is important to have,

at the outset, a clear understanding of what *property* really is. The term is applied with many different meanings.¹ "Sometimes," says Austin, "it is taken in a loose and vulgar acceptation to denote not the right of property or *dominium*, but the subject of such a right; as where a horse or piece of land is called my property."² A little reflection, however, will suffice to convince any one that *property* is not the corporeal thing itself of which it is predicated, but certain rights in or over the thing. Land undergoes no corporeal change by the mere fact of being reduced to the dominion and ownership of man. An animal *feræ naturæ* may be precisely the same before and after capture, but in his former state no one would speak of him as property. We must, therefore, look beyond the thing itself, beyond the mere corporeal object, for the true idea of property. Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law.³ These rights are the right of user, the right of exclusion and the right of disposition.⁴ These rights are not possessed in an absolute

§ 54.

¹ At the close of his forty-seventh lecture, Mr. Austin enumerates some of the "various meanings of the very ambiguous word *property*."

² Austin's Jurisprudence, 817-820.

³ 2 Austin's Jur. 818, 847.

⁴ We do not mean to be understood as announcing the doctrine that property was originally *created* by law. Property and the laws of property grew up together out of a primitive condition of things in which neither existed. See, Laveleye's Primitive Property, Morgan's Ancient Society, and Works of Sir Henry Maine. What we mean to assert is that *now* property is exactly what the law makes it.

⁵ "The integral or entire right of property", says Bentham, "in-

cludes four particulars: 1. Right of occupation. 2. Right of excluding others. 3. Right of disposition, or the right of transferring the integral right to other persons. 4. Right of transmission, in virtue of which the integral right is often transmitted after the death of the proprietor, without any disposition on his part to those in whose possession he would have wished to place it." 3 Bentham's Works, ed. 1843, Edinburgh, p. 182. The same author also says: "Property is entirely the creature of the law. * * * There is no form, or color, or visible trace, by which it is possible to express the relation which constitutes property. It belongs not to physics, but to metaphysics: it is altogether a creature

degree, but are limited. The right of user is limited by those regulations which are enacted for the general good and by those restraints which are imposed by the common law under the maxim, *sic utere tuo ut alienum non laedas*. It may also be limited in various ways by contract and testamentary dispositions. The right of exclusion must yield to the requirements of legal process and to the law of necessity. The right of disposition may be limited and regulated in the same way as the right of use.⁵ A person's right of property in things, therefore, consists of the right to possess, use and dispose thereof

of the mind. * * * I can reckon upon the enjoyment of that which I regard as my own, only according to the promise of the law, which guarantees it to me. It is the law alone which allows me to forget my natural weakness; it is from the law alone that I can enclose a field and give myself to its cultivation, in the distant hope of the harvest." Principles of the Civil Code, chap. viii. Works, vol. 1, p. 308. "Property signifies the *right* or *interest* which one has in land or chattels. In this sense it is used by the learned and unlearned, by men of all ranks and conditions. We find it so defined in dictionaries, and so understood by the best authors." Tilghman C. J. in Morrison *v.* Semple, 6 Binn. (Pa) 94, 98, 1813. This definition is approved by the court in Jackson *v.* Housel, 17 Johns. 281, 283, 1820, and Spencer C. J. in that case adds the following: "Property is defined to be the highest *right* a man can have to a thing; being used for that *right* which one hath to lands or tenements, goods or chattels, which no way depend on another man's courtesy." "Property itself in a legal sense is nothing more than the ex-

clusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the use of a thing." Chicago & Western Indiana R. R. Co. *v.* Englewood Connecting Ry. Co., 115 Ills. 375, 385. "Property, in its broader and more appropriate sense, is not alone the chattel or land itself, but the right to freely possess, *use* and alienate the same; and many things are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible." City of Denver *v.* Bayer, 7 Col. 113. See also Wynehamer *v.* The People, 13 N. Y. 378, 433; Eaton *v.* B. C. & M. R. R., 51 N. H. 504, 511; 1 Bl. Com. 138; Austin's Jurisprudence, secs. 47 and 48; Tripp *v.* Overocker, 7 Col. 72; East St. Louis *v.* O'Flynn, 19 Ills App. 64; Caro *v.* Metropolitan El. R. R. Co., 46 N. Y. Super. Ct. 138; Rutherford, b. 1, c. iv, §1. "Full property in a thing," says the author last cited, "is a perpetual right to use it to any purpose and to dispose of it at pleasure."

⁵ 2 Austin's Jurisp. 825, 826, sec. 48; 3 Bentham's Works, p. 182 *et seq.*; Rutherford, b. 1. c. iv.

in such manner as is not inconsistent with the law of the land.

As regards real property, in addition to the rights already enumerated, which pertain to the use and disposition of that limited area which a man calls his own, there are others which pertain to the use which may lawfully be made of contiguous and surrounding areas and which form an important part of that aggregate of rights constituting property in land. Such are the rights to the support of soil, to light and air, the right to the protection afforded by natural barriers against tide and flood, waves and currents, rights in tide waters and running streams and various rights respecting waters flowing upon the surface or percolating through the soil in no defined channel. These rights, wherever they exist, and to the extent to which they are secured by law, are part and parcel of the owner's property in land.⁶

§ 55. Meaning of the word property in the constitution.

—Having indicated the true meaning of the word property, it remains to inquire what meaning it has in the constitution. Undoubtedly, in such an instrument, it should be given a meaning that accords with the ordinary usage and understanding of the people who made the instrument. We do not refer to the small body of persons who actually formulated the instrument, but the large body of citizens who gave it vitality by their votes. The sovereign people say to their agents and servants, the executive and legislative officers of the State: We delegate to you all of our sovereign powers, but you must not take our private property for public use without making us a just compensation therefor. What did they mean by *property*? The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights. It is no more common

⁶An interesting and instructive article by Mr. A. G. Sedgwick in which he considers the different meanings of the word *property* will be found in the *North American Review* for September, 1882. Vol. 135 p. 253.

for ordinary people to speak of *things as property* than it is for them to speak of their *rights in things*, as the right to dispose of a thing in this way or that, the right to use a thing in this way or that, the right to compel a neighbor to desist from doing this or that, etc. Although, as Austin says, all men speak loosely of *things as property*, yet practically all men understand that property consists of certain *rights in things* which are secured by law. They constantly act upon this understanding, although they may never have formulated a definition of the word and would be at a loss to do so. However unable a man may be to formulate his ideas, yet if you turn a stream of water on his land, or defile his atmosphere with gas or smoke, or create other like disturbance, you will soon find that he has a very clear idea of his right to be exempt from such intrusion. Now it seems to us that the word property in the constitution should be given a meaning which, while in accord with the sense in which it is practically used and understood by the people, will also secure to the individual the largest degree of protection against the exercise of the power intended to be restricted. The meaning which, in our opinion, fulfills both of these conditions, is the one set forth in the preceding section.¹ Chief Justice Shaw, of Massachusetts, in speaking on this subject, says: "The word 'property,' in the tenth article of the Bill of Rights, which provides that, 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a

§ 55.

¹ See the article referred to in the last note. In that article Mr. Sedgwick says: "If the views here suggested are sound, the process of interpretation through which the constitutional provision as to taking 'property' is passing, is one under which what Austin calls the true or strict sense of the word is being

substituted for the vulgar acceptation in which the subject of property is confounded with the property itself. That the second of these two views must in the end prevail and render the first obsolete, no one who has paid much attention to the development of the law on the subject in this country can for a moment doubt."

reasonable compensation therefor,' should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such."²

§ 56. Principles which determine when there has been a taking.—If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and, hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto*, taken, and he is entitled to compensation.

It will thus be seen that, in order that there may be a recovery of compensation for damages to property no part of which is taken, such damages must be the result of a violation of some one or more of the rights which constitute property. In other words, the damage must be *actionable* damage, that is, damage which would be remediable if done by an individual without any pretense of statutory authority. If, for damage caused to my land by certain acts of my neighbor done upon his own land for his own use, I may have compensation, and if, for the same damage caused by the same acts done upon the same land by the public or its agents for public use I can have no compensation, it is plain that the right upon which the former action was founded has been *taken* from me, that so much has been subtracted from my property in the land. Every such taking we hold to be within the constitutional prohibition requiring compensation to be made. In any

²Old Colony & Fall River R. R. Co. v. County of Plymouth, 14 Gray, 155, 161.

given case, therefore, where the land of an individual has been damaged or diminished in value by the construction or operation of works for public use, whether he is entitled to compensation or not will depend upon whether the damage or deterioration is due to an interference with any right appurtenant to the land or parcel of his property in it. If this question can be answered in the affirmative, there is a right to compensation; otherwise, not. Thus, if a city takes a lot adjacent to my own and, under proper authority, erects thereon works, the operation of which necessarily fills my premises with noxious gases, whereby my property is depreciated in value, I am entitled to compensation, because my right not to be damaged by an unreasonable use of the adjacent lot has been violated. But if the city erects upon the same lot a school-house and uses it for school purposes and *thereby* my premises are lessened in value, I am remediless, because no right whatever which I had, as owner of my lot, respecting the use which could be made of the adjoining lot, has been violated. A school is not a nuisance in a legal sense, and the city, in the case supposed, has done no more than any individual could have done upon the same premises.¹

§ 57. Changes which the law has undergone.—The law as to what constitutes a taking has been undergoing radical changes in the last few years. Mr. Sedgwick, writing some thirty years ago, in speaking of this subject, says: “It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken, in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential

§ 56.

¹ We do not remember any decision which exactly covers the illustration used, but there are cases which involve the same principle. Thus it has been decided that a suit will not lie either to

prevent, or to recover damages for, the erection of a jail upon adjoining property. *Wehn v. Commissioners of Gage Co.*, 5 Neb. 494; *Burwell v. Commissioners*, 93 N. C. 73.

damage, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain.”¹ The Supreme Court of Maine, in interpreting the constitutional provision in question, in 1852, said: “The design appears to have been simply to declare, that private property shall not be changed to public property, or transferred from the owner to others, for public use, without just compensation.”² These quotations present a fair statement of the condition of the law thirty years ago. The learned author just quoted, after reviewing the decisions which he has summed up in the above quotation, ventures his own opinion upon the subject as follows: “To differ from the voice of so many learned and sagacious magistrates may almost wear the aspect of presumption; but I can not refrain from the expression of the opinion, that this limitation of the term *taking* to the actual physical appropriation of the property or a divesting of title is, it seems to me, far too narrow a construction to answer the purposes of justice, or to meet the demands of an equal administration of the great powers of government. The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove that, in point of fact, the owner is deprived of property, though a particular piece of property may not be actually taken.”³

Numerous cases decided in the last twenty years have vindicated Mr. Sedgwick’s view of what the law should be. In stating, in the last section, the conclusions at which we have arrived after a careful examination of all of the decided cases

§ 57.

² Cushman v. Smith, 34 Me. 247, 258.

¹ Sedgwick Const. Law, 2d ed. p. 456-458.

³ Sedgwick Const. Law, 2d ed. p. 462-463.

and in discussing the principles upon which those conclusions are based, we have not referred to the decisions, because they must be referred to under the different divisions of the subject to which they respectively pertain, and because the soundness of the conclusions we have announced must be tested, not by the few cases which discuss general principles, but by the points actually adjudicated in all the cases. But, in view of the great importance of the question, the numerous cases which call for its solution, and the magnitude of the interests involved, we shall, at the risk of some repetition, refer to some of the leading cases in support of the views we have expressed.

§ 58. Leading cases.—The leading case upon the subject, and the one which has contributed more than any other towards bringing about the change referred to in the last section, is *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504, decided by the Supreme Court of New Hampshire in 1872. In referring to this case, Judge Christiany, of Michigan, says: “But the most satisfactory and best considered case which can be found in the books upon this subject, which examines, classifies and analyzes nearly all the cases, and in the conclusions of which I wholly agree, is that of *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504.”¹

The defendant, a railroad company, laid out its road through the plaintiff’s farm, whose damages were duly assessed, paid and released. But in constructing their road the company cut through a ridge north of plaintiff’s farm, through which in times of freshet the waters of an adjacent river found their way, flooding the plaintiff’s land and bringing down and lodging upon it quantities of earth and stones, thereby rendering the land unfit for cultivation or use. The plaintiff brought suit to recover for this damage, and the court held in an elaborately considered opinion that he was

§ 58.

¹ *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 321.

entitled to succeed. It was conceded in the case "that, if the cut through the ridge had been made by a private land-owner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action." "The vital issue then is," says the court, "whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. To constitute 'a taking of property,' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking the property altogether.' These views seem to us to be founded upon a misconception of the meaning of the term 'property,' as used in the various State constitutions. In a strict legal sense, land is not 'property,' but the subject of property. The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the right of the owner in relation to it.' 'It denotes a right over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' Selden, J., in *Wynehamer v. The People*, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin on Jurisprudence, 3d Ed., 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d Ed. 836; Wells, J., in *Walker v. O. C. W. R. R. Co.*, 103 Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso*

facto, taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property,'—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a taking of 'property.' Why not the former? * * * * The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. * * * The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that described in many other cases. *First*, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession. *Second*, it would clearly be actionable if done by a private person without legislative authority. * * * * We think there has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted make no provision for the

plaintiff's compensation, they afford no justification; that the defendants are liable in this action as wrong-doers; and that, the ruling of the court was correct." The true ground of this decision is that the plaintiff as owner of this farm had a *right* to the protection of the natural barrier against the overflow upon his land of the river in question, that this right was a part of the property in his land, and that the acts of the defendant company amounted to a taking of this right and consequently to a *taking* of his property in the land *pro tanto*, for which he was entitled to compensation under the constitution.

§ 59. **Leading cases, continued.**—The decision in the Eaton case was reviewed two years later by the same court, in the case of *Thompson v. The Androscoggin River Improvement Company*, 54 N. H. 545, 1874, and the true principles of the decision set forth with great clearness and ability. As the Eaton case has exerted so large an influence upon this branch of the law of eminent domain since its rendition, we shall give the views of the court at length from the case last cited:

"Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors. Two of Eaton's proprietary rights in the tract of land described as his farm—his right of exclusive possession and his right of reasonable use of the soil—included the right that the soil should not be injured by R either appropriating it to his own use, or committing a trespass upon it, or making an unreasonable use of his own land. When Eaton's right of not being injured by an unreasonable use of R's land was invaded, his property was taken, in the same legal sense in which it would have been taken if his right of not being injured by a trespass or appropriation had been infringed. If Eaton's farm

had been damaged by R's reasonable use of his own land, Eaton would have had no cause of action; his rights would not have been invaded by R exercising his right of reasonably using his own. The proprietary rights of each were limited in that manner. They were not absolute in respect to each one's use of his own: they included a right in respect to the use of the other's. The soil is often called property; and this use of language is sufficiently accurate for some purposes. But the proposition that the soil is property conveys a very imperfect idea of the numerous and variously limited rights comprised in landed estate; and it is sometimes necessary to remember that the name of property belongs to some of the essential proprietary rights vested in the person called the owner of the soil. A refusal to pay a debt is an injury to the property of the creditor. 25 N. H. 540. A patent right, a copy right, a right of action, an easement, an incorporeal hereditament, may be property as valuable as a granite quarry; and the owner of such property may be practically deprived of it,—such property may be practically taken from its owner,—although it is not corporeal. So those proprietary rights, which are the only valuable attributes or ingredients of a land-owner's property, may be taken from him, without an asportation or adverse personal occupation of that portion of the earth which is his, in the limited sense of being the subject of certain legally recognized proprietary rights which he may exercise for a short time. Property is taken, when any one of those proprietary rights is taken, of which property consists. Arimond *v.* Green Bay, etc., Co., 31 Wis. 316, 335. Eaton's right of not being injured in his real estate by an unreasonable use of R's land was one of the proprietary rights of which his general and comprehensive right of property was composed. And that particular right of being uninjured by an unreasonable use of R's land was equally an element of his property, whether such a use were made of R's land by R or by the defendants.

"The right of R to make a reasonable use of his own (although such a use might cause damage to Eaton's farm), like other rights included in R's property, could be transferred to the defendants (the B. C. & M. R. R.) by R himself, or by the legislature exercising the public power of compulsory purchase, commonly called eminent domain. But the right, by an unreasonable use of R's land, to cause a damage to Eaton's farm, not being R's right, could not be transferred from R to the defendants by R, or by eminent domain, or by any other person or power. Eaton's right of not suffering the damage done his farm by the unreasonable use of R's land could be legally taken from him; he could voluntarily divest himself of it; he could be compulsorily deprived of it by the legislature wielding that power of eminent domain which requires compensation. * * * In *Eaton v. Railroad*, the public (by their agents, the defendants) took from R, and converted to its own use, R's right to make a reasonable use of his own land,—that is, a right to make such a use of his land as it would be reasonable for him to make without compensating Eaton or any one else for any damage resulting therefrom. In making such a use of R's land, the defendants would not transcend the authority conferred upon them. But in making an unreasonable use of R's land as against Eaton, and thereby causing Eaton's land to be injured, they took Eaton's property without compensation, and transcended their authority. The power of eminent domain could neither take from R a right (to make such a use of his land) which he never possessed, nor take from Eaton, without compensation, his proprietary right to be unharmed by such a use of R's land. Thus interpreted and applied, the rule, fairly stated by Sedgwick as the result of the adjudicated cases, is intelligible and sound. It is generally called a rule of consequential damages; and it may safely be called so, if sufficient pains be taken to give such an explanation of its operation and effect as will show how unmeaning and inappropriate the name is.

"If the railroad company, by changing the course of traffic and travel and causing a village to be built on R's land, had reduced the value of Eaton's property in a neighboring village more than the entire worth of his farm, they would not have been liable to him for that damage. They would have been justified, not on the ground that the damage was remote and consequential, in the sense of being a remote consequence, but on the ground that a railroad, changing the channels of commerce and causing a rival village to spring up, would be a reasonable use for others to make of their land, an exercise of their rights of property in land, and not a violation of Eaton's right. The idea sometimes conveyed, in such a case, by the supposed doctrine of remote and consequential damage is, that, although the sufferer's legal right is violated, the damage is too remotely consequential, too remote in degree, to be actionable; as if the law would not give redress for the violation of a legal right, when the space between cause and effect exceeds a certain prescribed legal distance. A proprietor's right may be more seriously infringed by a cut through the bank of a river at a great distance from his land, than by a railway built across his hearth-stone. * * * Suppose, in Eaton's case, R—the former owner of the land where the cut was made—had owned not only that, but also all the rest of the strip on which the railroad was built, from Concord to the northern end of the road, or had, by contract, acquired from the owners the right to build and use a railroad upon it; and suppose he could have built and used it without infringing any public right of way on land or water, or any other public right; he could, without legislative authority, have lawfully built and used a railroad there for his exclusive private purposes, or for carrying the passengers and freight now carried by the railroad corporation; he could have built it over the spot where the cut was made, without violating Eaton's right. Such a use of his own land would have been reasonable; but if he had made such a cut there as the corporation made,

without taking the precautions necessary to prevent the natural, apparent, and expected consequence of the river being poured upon Eaton's farm, he would have been liable, because such a cut, causing such an injury, would have been an unreasonable use of his own land. His liability, under such circumstances, was understood to be admitted, and would seem to be too clear to be contested.

"Then modify the supposed case, by inserting the fact that he could not have built the road, on the route on which it was built, without infringing public rights of way on land and water; and suppose that difficulty obviated by an act of the legislature, authorizing him to encroach upon public rights of way to an extent necessary for the building of a railroad, to be used by him in the business of a common carrier: such a modification of public rights would not effect Eaton's private right of not being injured in his property by R pouring Baker's river upon his farm. Modify the supposed case further, by inserting the fact that R obtains a charter, making him a corporation by the name of R; Eaton's right of property would not be affected by the circumstance that the river was poured upon his farm by R, acting, not in his natural capacity, but as an artificial being—invisible, intangible, and existing only in contemplation of law. How, then, could R acquire the right to pour the river upon Eaton's farm through a cut which it would be an unreasonable use of his own land for him to make? By a purchase, voluntary or compulsory. The public, exercising the public power of compulsory purchase, otherwise called eminent domain, whereof compensation is an essential element, could authorize him as a public agent, in his natural or in his artificial capacity, to take as many of Eaton's rights of property as were necessary for a public use. In that way R, as an agent of the public, could obtain Eaton's right of not being injured by an unreasonable use of R's land. That right was properly before the B. C. & M. Railroad acquired any of R's rights; and it continued to be property afterwards. It was property that the railroad

corporation could not acquire from R; and it could not be transferred to them from Eaton by a compulsory purchase without compensation.”¹

§ 59.

¹ We shall not take the space to quote to any extent from the opinions of other courts. The Supreme Court of the United States in a case which is often cited on this question says: “It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as these rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.” Pumfelly v.

Green Bay Co., 13 Wall. 166, 177, 1871. Approved and followed in Arimond v. The Green Bay and Miss. Canal Co., 31 Wis. 316, 1872.

“Depriving an owner of property of one of its essential attributes, is depriving him of his property.” People v. Otis, 90 N. Y. 48, 52. The following are also leading cases on the question: Conniff v. San Francisco, 67 Cal. 45; Hooker v. New Haven & Northampton Co., 14 Conn. 146; Same v. Same, 15 Conn. 312; Denslow v. Same, 16 Conn. 98; Nevins v. Peoria, 41 Ills. 502; Evansville & Crawfordsville R. R. Co. v Dick, 9 Ind. 433; Kemper v. Louisville, 14 Bush. 87; Lee v. Pembroke Iron Co., 57 Me. 481; Old Colony & Fall River R. R. Co. v. County of Plymouth, 14 Gray, 155; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; O’Brien v. St. Paul, 25 Minn. 331; Wearer v. Boom Co., 28 Minn. 534; McKenzie v. Miss. & Rum River Boom Co., 29 Minn., 288; Peters v. Fergus Falls, 35 Minn. 549; Thurston v. St. Joseph, 51 Mo. 510; Broadwell v. City of Kansas, 75 Mo. 213; Trenton Water Power Co. v. Raff, 36 N. J. L. 335; Story v. New York El. R. R. Co., 90 N. Y. 123; Seifert v. Brooklyn, 101 N. Y. 136; Cogswell v. New York, New Haven & Hartford R. R. Co., 103 N. Y. 10; Lahr v. Metropolitan El. R. R. Co., 104 N. Y. 268; Foster v. Stafford National Bank, 57 Vt. 128.

CHAPTER IV.

WHAT CONSTITUTES A TAKING: WATERS.

§ 60. **Streams defined and classified.**—Running streams consist of a well defined channel with sides or banks, in which water habitually flows, though it need not flow continuously.¹ Some streams are small and incapable of navigation for any purpose. All the authorities agree that such streams are wholly private property and that the title of the riparian owner extends to the middle of the stream.² In regard to navigable streams, there is much conflict of authority, both as to the title of the riparian owner to the bed of the stream and as to his right in the stream itself. As to what constitutes navigability is a question which does not fall within the province of this treatise, and for a solution of it the reader is referred to other works.³ So also as to title to the bed of navigable streams.⁴ The decisions of the different States vary upon these questions, and especially upon the latter. For the purposes of this treatise it is necessary to ascertain and define the rights of riparian owners; and, as respects such rights, streams may be divided into three classes: *First*, private non-navigable streams; *second*, private navigable streams; *third*, public navigable streams.⁵ The second and third classes are public highways by water, the only difference being that in the second class the title to the bed of the stream is in the riparian proprietors, while in the third class it is in the public. Important distinctions

§ 60.

Gould on Waters, 19, 41, *et seq.*

¹ Angell on Watercourses, §§ 1-4;

⁴ Same.

Gould on Waters, § 41.

⁵ Angell on Waterc., chap. xiii;

² Angell on Waterc., §§ 10 & 11;

Gould on Waters, chap. iii; Wood

Gould on Waters, § 46, *et seq.*

on Nuisances (1st ed.), § 586.

³ Angell on Waterc., chap. xiii;

are, by some courts, based upon this circumstance which will be noticed hereafter.

§ 61. Rights of the riparian owners in the flow of the stream.—It may be laid down as a well-settled principle that every proprietor over or past whose land a stream of water flows has a *right* that it shall continue to flow to and from his premises in the quantity, quality and manner in which it is accustomed to flow by nature.¹ This right is a part of his property in the land and in many cases constitutes its most valuable element.² It necessarily follows, therefore, that any violation of this right in the exercise of the power of eminent domain is a taking of private property for which compensation must be made.³ Such a violation must occur in one of three ways: (1) By abstracting or diverting water above, (2) by changing or corrupting the current, or (3) by works below which prevent the water flowing off in its accustomed manner. As respects the rights of the riparian owner in the *flow* of the water, we apprehend it makes no difference whether the stream is public or private;⁴ but we shall recur to the rights of riparian owners upon public streams hereafter.⁵

§ 62. Abstracting or diverting the water of a stream.—Where the waters of a stream or any part thereof are taken

§ 61.

¹ Angell on Watercourses, §§ 90-96; Gould on Waters, § 204. And see cases cited in the following sections.

² Wadsworth *v.* Tillotson, 15 Conn. 365, 373; Ten Eyck *v.* Delaware & Raritan Canal Co., 18 N. J. L. 200; Avery *v.* Fox, 1 Abb. U. S. 246; Harding *v.* The Stamford Water Co., 41 Conn. 87; Bottoms *v.* Brewer, 54 Ala. 288; Stamford Water Co. *v.* Stanley, 39 Hun, 424; City of

Emporia *v.* Soden, 25 Kan. 588; St. Helena Water Co. *v.* Forbes, 62 Cal. 182; Lux *v.* Haggin, 69 Cal. 255; Gould on Waters, § 204.

³ Lux *v.* Haggin, 69 Cal. 255; Hamor *v.* Bar Harbor Water Co., 78 Me. 127; Mayor etc. of Baltimore *v.* Apphold, 42 Md. 442. And see cases cited in the succeeding sections.

⁴ Gould on Waters, § 204.

⁵ Post, §§ 77-83.

or diverted to supply a city or village with water,¹ or for the use of a canal² or railroad company,³ or to improve a highway by land,⁴ or to make a new channel either for the improvement of navigation,⁵ or for the protection of a pub-

§ 62.

¹ Stein *v.* Burden, 24 Ala. 130; Stein *v.* Ashby, 24 Ala. 521; Burden *v.* Stein, 27 Ala. 104; Stein *v.* Burden, 29 Ala. 127; Stein *v.* Ashby, 30 Ala. 363; Harding *v.* Stamford Water Co., 41 Conn. 87; St. Helena Water Co. *v.* Forbes, 62 Cal. 182; City of Emporia *v.* Soden, 25 Kan. 588; Hamor *v.* Bar Harbor Water Co., 78 Me. 127; Lund *v.* New Bedford, 121 Mass. 286; *Ætna Mills v.* Waltham, 126 Mass. 422; Bailey *v.* Woburn, 126 Mass. 416; *Ætna Mills v.* Brookline, 127 Mass. 69; Watuppa Reservoir Co. *v.* Fall River, 134 Mass. 267; Hall *v.* Ionia, 38 Mich. 493; Higgins *v.* Flemington Water Co., 36 N. J. Eq. 538; Acquackanonk Water Co. *v.* Watson, 29 N. J. Eq. 366; Gardner *v.* Village of Newburgh, 2 Johns. Ch. 161; Smith *v.* City of Rochester, 92 N. Y. 463; Stamford Water Co. *v.* Stanley, 39 Hun, 424; Hough *v.* Doylestown, 4 Brews. Pa. 333; Swindon Water Works Co. *v.* Wilts & Berks Canal Navigation Co., L. R. 7 E. & I. App. Cas. 697.

² Denslow *v.* New Haven & Northampton Canal Co., 16 Conn. 98; Heilman *v.* Union Canal Co., 50 Pa. S. 268; Walker *v.* Board of Public Works, 16 Ohio, 540.

³ A railroad company being a riparian proprietor, either by virtue of its right of way crossing a stream or otherwise, may take therefrom a reasonable amount of

water for the purpose of supplying its locomotives or for other use. Elliot *v.* Fitchburg R. R. Co., 10 Cush. 191; Pennsylvania R. R. Co. *v.* Miller, 112 Pa. S. 34; Earl of Sandwich *v.* Great Northern Ry. Co., L. R. 10 Ch. Div. 707. But it cannot take more, except by an exercise of its eminent domain power. Same, and Garwood *v.* New York Central & H. R. R. R. Co., 83 N. Y. 400; S. C. 17 Hun, 356.

⁴ McCord *v.* High, 24 Ia. 336.

⁵ Avery *v.* Fox, 1 Abb. U. S. 246, 253. In this case the court says: "To divert a stream from its natural channel into an artificial one, for the purpose of affording improved navigation and benefiting commerce, may be a work of great public concernment and advantage, but if thereby a riparian owner is wholly or injuriously deprived of the use of its waters, which he is employing advantageously as an incident to his land, it is taking the private property of such owner in and to the use of that water for public use, and, unless just compensation is made, is against both the principles of the common law and the provisions of the constitution of the United States, and courts have no alternative but to so administer the law as to secure and protect such rights in a proper case." The improvement in this case was being made by the United States and so the Federal Constitution applied to the case.

lic road,⁶ or for any other public use, compensation must be made to the inferior proprietors on the banks of the stream who are injured thereby. The only dissenting case which has come to our notice is that of the Commissioners of Homochitto River *v.* Withers, in which the Supreme Court of Mississippi held that it was not a *taking*, to divert a stream of water from the plaintiff's property into a new channel for the purpose of improving navigation.⁷ This decision is so palpably wrong that we do not think it requires discussion. Where a railroad company divert a stream into a new channel for a short distance, it is bound to restore it unimpaired to its natural channel, and where in such case the stream escaped from the new channel by percolation the company was held liable.⁸

The manner in which the diversion is accomplished is immaterial, whether by an artificial channel, by pumping, by percolation into a well or gallery, or by other means. The injury consists in *taking* the water. Under a general authority to take water for the purpose of supplying its inhabitants with water for domestic use, for extinguishing fires and for manufacturing, a city purchased land on a stream bordering a mill pond and dug a well about seventy-five feet from the water's edge, from which it pumped a supply. The water came to the well by percolation from the pond. The city also extended a pipe directly into the pond, to be used only in case of fire. The owner of the pond and of the mill which

⁶ Smith *v.* Gould, 59 Wis. 631; S. C. 61 Wis. 31; State *ex rel.* Smith, *v.* Board of Supervisors, 66 Wis. 199.

⁷ 29 Miss. 21, 32. The court say: "It appears to us that it (the constitution) applies to such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition; property of a specific, fixed, and tangible nature, capable of being had

in possession and transmitted to another, as houses, lands, and chattels. But it is not easy to understand how a man can be said to have a property in water, light, or air of so fixed and positive a character as to deprive the sovereign power of the right to control it for the public good and general convenience."

⁸ Cott *v.* Lewiston R. R. Co., 36 N. Y. 214.

the pond supplied brought suit for the damages. It was held that he was entitled to recover, that the city had no more right to draw the water from the pond indirectly, by percolation, than directly, by a pipe or other means, and that the distance of the well from the pond was immaterial, provided its supply came from the pond.⁹ Several similar decisions have been made in Massachusetts.¹⁰ The fact that the city is the owner in fee of land on the stream where such works are constructed does not alter the case.¹¹ The right of a riparian owner to take sufficient water for domestic use does not apply to a city. It is not an individual and has no natural wants.¹² Where a city under a special act has voted to take a million gallons a day from a river, and has constructed a filtering gallery on land adjacent to the river into which water comes by percolation both from the river and from other sources, a riparian owner on the stream is entitled to have his damages assessed on the basis of the taking of the maximum amount daily.¹³

The riparian owners upon a stream which flows through or from a pond or lake, are entitled to compensation for water

⁹ City of Emporia *v.* Soden, 25 Kan. 588.

¹⁰ Bailey *v.* Woburn, 126 Mass. 416; *Ætna Mills v. Waltham*, 126 Mass. 422; *Ætna Mills v. Brookline*, 127 Mass. 69; Cowdrey *v.* Woburn, 136 Mass. 409.

¹¹ Same; also Stein *v.* Burden, 24 Ala. 130; and as respects other corporations withdrawing water for a public use as riparian proprietors, see Garwood *v.* N. Y. Cent. & H. R. R. Co., 83 N. Y. 400; Pennsylvania R. R. Co. *v.* Miller, 112 Pa. S. 34; Swindon Water Works Co. *v.* Welts & Berks Canal Co., L. R. 7 E. & I. App. Cas. 697; Earl of

Sandwich *v.* Great Northern Ry. Co., L. R. 10 Ch. Div. 707.

¹² City of Emporia *v.* Soden, 25 Kan. 588, 607. The court say: "The city, as a corporation, may own land on the banks, and thus in one sense be a riparian owner. But this does not make each citizen a riparian owner. And the corporation is not taking the water for its own domestic purposes; it is not an individual; it has no natural wants; it is not taking for its own use, but to supply a multitude of individuals; it takes to sell."

¹³ *Ætna Mills v. Waltham*, 126 Mass. 422.

taken from the lake.¹⁴ Where a canal company used a stream of water for a period of years, in pursuance of a contract, and continued the use after the contract expired, it was held to be an appropriation under the eminent domain powers conferred upon the company and that the owner at the time of the appropriation was entitled to compensation.¹⁵ But, where a canal company construct an artificial feeder over an individual's land, he acquires no right to the use of the water as against the company, and the latter may divert it at pleasure.¹⁶ Where a canal company has the right to take water from a stream for navigation purposes only, it cannot take a surplus for the purpose of leasing it to mill owners.¹⁷

§ 63. Increasing the quantity of water.—Not only is it a violation of the right of a riparian owner to obstruct or divert the water of a stream before it reaches his land, but it is equally a violation of his rights to increase the quantity of water flowing past his land by artificial means not connected with the reasonable use of the land above.¹ Thus plaintiff owned land on both sides of Roland's Run, which was a natural stream. The City of Baltimore proposed to introduce into the stream, above plaintiff, an artificial supply of ten million gallons a day, for the purpose of increasing the supply in a reservoir situated in the run below plaintiff's land, from which the city was supplied. It appeared that this increase would cause the stream to overflow some of plaintiff's land and saturate and injure other parts. The

¹⁴ *Bailey v. Town of Woburn*, 126 Mass. 416; *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267; *Smith v. City of Rochester*, 92 N. Y. 463; S. C. 38 Hun, 612.

¹⁵ *Heilman v. Union Canal Co.*, 50 Pa. S. 268.

¹⁶ *Cooper v. Williams*, 4 Ohio, 253; *Erkenbrecher v. Cincinnati*, 2 Cinn. Sup. Ct. 412; *Burbank v. Fay*, 65 N. Y. 57. But where a natural

watercourse was changed into a canal and used as such for twenty years, it was held the riparian proprietors had the same rights as though it had continued a natural watercourse. *Burk v. Simonson*, 104 Ind. 173.

¹⁷ *Adams v. Slater*, 8 Ill. App. 72. § 63.

¹ *Wood on Nuisances*, (1st ed.) § 365.

court held that the plaintiff was entitled to have the stream "continue to flow through his land in its usual quantity, at its natural place and at its usual height" and that the city should be enjoined from doing the damage until it had acquired the right by condemnation.² Water turned into a running stream by a riparian proprietor, becomes, after leaving his land, identified with the natural stream as to any benefit to the lower proprietors, and one such lower proprietor cannot abstract an amount equal to that artificially added to the injury of another.³

§ 64. Interfering with the regularity of the current.— The upper proprietor may always make a reasonable use of the water as it passes over his land, although such use may to a certain extent change the natural current of the stream or affect its volume or quality. What constitutes a reasonable use in any given case is a question of fact for the jury.¹ Beyond this neither individuals nor the public can go without compensation to the inferior proprietor who suffers damage. Any interference with the regularity of the current for public use, so as to make the flow fitful, uncertain and intermittent, is a violation of the common law right to have the stream flow as it is wont by nature, and a recovery may be had for any damages so occasioned. Where a booming company erect dams across a stream and let off the water from time to time in floods for the purpose of floating logs, and in the intervals retain the water for such purpose, a lower proprietor whose mill is interfered with or whose lands are flooded may recover compensation.² But a boom company

² *Mayor of Baltimore v. Apphold*, 42 Md. 442.

³ *Druley v. Adams*, 102 Ills. 177.

§ 64.

¹ *Thompson v. The Androscoggin River Improvement Co.*, 54 N. H. 545; *Phillips v. Sherman*, 64 Me. 171.

² *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Folsom v. The Apple River Log Driving Co.*, 41 Wis. 602; *Thompson v. Androscoggin River Improvement Co.*, 54 N. H. 545; *Middleton v. Flat River Booming Co.*, 27 Mich.

was held not liable for damages caused by an unusual accumulation of logs and an unusual rise of water.³

§ 65. Pollution of the water.—The general right to the flow of a stream in its natural purity is fully established by the decisions.¹ Should it ever become necessary to befoul the waters of a stream for public use, those who suffered damages thereby would unquestionably be entitled to compensation. Such an emergency might arise in disposing of the sewage of a large city, and perhaps in other ways; but no case appears to have arisen in which the pollution of a stream has been accomplished for a public purpose and in the exercise of the eminent domain power. It has been held that a company to supply a village with water could not take the water of a stream and return to it an equal amount of inferior quality to the damage of a lower proprietor;² also that a city should not pollute a stream with sewage, however great the necessity of making such use.³ In Massachusetts⁴ it has been held that it is a reasonable use of a stream running through a city, to empty into it the public sewers of the town, and that for such pollution as arises

533; *Phillips v. Sherman*, 64 Me, 171; *Carroll v. Atlanta*, 74 Ga, 386; *Brown v. Atlanta*, 66 Ga. 71; *Hackstack v. Keshena Improvement Co.*, 66 Wis. 439. In the last case the plaintiff's property was situated twenty miles below the improvements. It was flooded by water detained and let off in large volumes for the purpose of floating logs. In Massachusetts it is held that under the Mill act a mill owner is not liable for any injury, done to intervening land by letting down water from his reservoir dam for the use of his mill, for which he would not be liable at common law. *Drake v. Hamilton Woolen Co.*, 99 Mass. 574.

³ *Lawler v. Baring Boom Co.*, 56 Me. 443.

§ 65.

¹ *Gladfelter v. Walker*, 40 Md. 1; *Richmond Manufacturing Co. v. Atlantic DeLaine Co.*, 10 R. I. 106; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Angell on Watercourses*, § 136; *Wood on Nuisances*, (1st ed.) § 697.

² *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366.

³ *Attorney General v. Leeds*, 5 L. R. Ch. App. 583, 589.

⁴ *Merrifield v. Worcester*, 110 Mass. 216.

therefrom the lower proprietor has no remedy. This seems to us a wrong conclusion. Undoubtedly the lower proprietor must endure without remedy such impurities as find their way into a stream from the natural wash and drainage of a city situated on its banks. Drains and sewers may be constructed for the purpose of facilitating the drainage into the stream of the water which falls upon the surface or percolates beneath. This is no more than a reasonable use of the stream. But it is a different thing to conduct directly into the stream, by means of sewers and artificial supplies of water, the waste and filth which come from a dense population. There is no principle upon which this can be justified. A city is not a riparian proprietor simply because a stream runs through or past its limits. Those who own the banks of the stream are the riparian proprietors. And even if the city could be regarded as a riparian owner, either because the stream was within its corporate limits or because its streets or public grounds intersected or bounded on it, there is no riparian right to cast filth directly into the stream. A single proprietor upon a very small stream would not be allowed to place his privy over the stream and turn directly into it the refuse from his kitchen and stable. No more can a hundred proprietors on a larger stream or the corporate authorities of a city through which it runs.⁵ But we see no reason why this could not be done if authorized by law and compensation was made for taking the right to pure water. One who has been accustomed to foul a stream by using the water for manufacturing purposes, but has acquired no right to do so by grant or prescription, cannot recover damages when compelled to relinquish such use of the water

⁵ In *Butler v. Mayor etc. of Thomasville*, 74 Ga. 570 and *Morgan v. Bingham*, 32 Hun, 602, the respective cities were restrained from polluting a stream with sewage and in *Hooker v. Rochester*, 37 Hun, 181, a judgment for damages

for such pollution in favor of a riparian proprietor was sustained. A mill owner may be enjoined from depositing saw dust in a stream to the damage of a lower proprietor. *Waterman v. Buck*, 58 Vt. 519.

by reason of the stream being taken at a point below his mill under the power of eminent domain to supply a city with water.⁶ But if the mill-owner has acquired such right by prescription or otherwise, then the right must be condemned.

§ 66. Changing the current by works in, across or near the channel.—Works of public utility must be so constructed as not to interfere with the accustomed flow of the stream, otherwise there is a right to recover for any consequent damage to private property.¹ Authority to bridge or cross a stream does not imply authority to interfere with its current.² Where a railroad company, in carrying its road across a stream, erected a bridge and embankment in such a way as to change and increase the current of the stream in times of high water, thereby causing damage to the lands of a proprietor some distance below, none of whose land was taken, it was held he could recover compensation for the loss.³ And, generally, if a railroad company in bridging a stream change in any way the natural current of the stream to the damage of

⁶ *Baltimore v. Warren Manufacturing Co.*, 59 Md. 96; *Dwight Printing Co. v. Boston*, 122 Mass. 583.

§ 66.

¹ *Rowe v. Granite Bridge Corporation*, 21 Pick. 344; *Ten Eyck v. Delaware & Raritan Canal Co.*, 18 N. J. L. 200; *Robinson v. N. Y. & E. R. R. Co.*, 27 Barb. 512.

² *Howe v. Granite Bridge Corporation*, 21 Pick. 344; *Robinson v. N. Y. & E. R. R. Co.*, 27 Barb. 512.

³ *Evansville & Crawfordsville R. R. Co. v. Dick*, 9 Ind. 433, 436. “A proper construction of the word taken,” says the court, “makes it synonymous with seized, injured, destroyed, deprived of. It is, therefore, evident that the legislature

have no power to authorize, in any case, either a direct or consequential injury to private property, without compensation to the owner.” But where the road crossed on the land of the plaintiff it was held that it must be presumed that he had been compensated for all such damages as would result from constructing the bridge in a reasonable and proper manner with a view both to the safety of passengers and the protection of the property-holder, and that he could only recover for damages resulting from improper construction as thus explained. See also *Terre Haute & Indianapolis R. R. Co. v. McKinley*, 33 Ind. 274.

private property, there is a right to compensation.⁴ The same rule applies to a bridge built by a town or city as part of a highway.⁵ It is held that one over whose land such crossing is made is entitled to receive compensation for all such damages as will result from constructing the bridge or other crossing in a reasonable and proper manner.⁶ If no part of one's land is taken, he may always recover for damages occasioned by such interference with the current of a stream, either by an assessment under the statute,⁷ or by a common law action.⁸ Damages which result from negligent or improper construction may always be recovered, whether there has been an assessment of damages or not.⁹ In bridging a stream, by legislative authority, a railroad company is only required to exercise reasonable diligence and foresight to avoid damages by reason of extraordinary floods and ice gorges.¹⁰ The channel of the American River, a tributary of the Sacramento, was changed so as to enter the latter

⁴ Robinson *v.* N. Y. & E. R. R. Co., 27 Barb. 512; Dickson *v.* Chicago, Rock Island and P. R. R. Co., 71 Mo. 575; Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243; Estabrooks *v.* Peterborough & Shirley R. R. Co., 12 Cush. 224; Chicago, Rock Island & P. Ry. Co. *v.* Moffitt, 75 Ills. 524; Union Pacific Ry. Co. *v.* Dyche, 31 Kan. 120. *Contra:* Norris *v.* Vermont Central R. R. Co., 28 Vt. 99; Henry *v.* Same, 30 Vt. 638.

⁵ Perry *v.* Worcester, 6 Gray, 544.

⁶ Terre Haute & Indianapolis R. R. Co. *v.* McKinley, 33 Ind. 274; Mississippi Central R. R. Co. *v.* Mason, 51 Miss. 234; Baltimore & Potomac R. R. Co. *v.* Magruder, 34 Md. 79. As to the correctness of this position, see *Post*, chap. xxiv. Where an owner grants a right of way over his land to a railroad, with the right to change water-

courses, this only authorizes changes on his own land, and he may recover damages caused to his land by a change made by the company on the land of another. St. Louis, etc., R. R. Co. *v.* Harris, 47 Ark. 340. To the same effect, Eaton's Case, 54 N. H. 502.

⁷ Estabrooks *v.* Peterborough & Shirley R. R. Co., 12 Cush. 224.

⁸ Delaware & Raritan Canal Co. *v.* Lee, 22 N. J. L. 243; Evansville & Crawfordsville R. R. Co. *v.* Dick, 9 Ind. 433.

⁹ Spencer *v.* Hartford, Providence & T. R. R. Co., 10 R. I. 14; Fowle *v.* N. H. & N. R. R. Co., 112 Mass. 334; Brink *v.* Kansas City etc. R. R. Co., 17 Mo. App. 177; I. & G. N. Ry. Co. *v.* Klaus, 64 Tex. 293.

¹⁰ Bellinger *v.* New York Central R. R. Co., 23 N. Y. 42; Omaha and R. V. R. R. Co. *v.* Brown, 14 Neb. 170. But see *Post*, chap. xxiv.

river opposite the plaintiff's premises. During a high flood, the force of the current was such as to wash away the plaintiff's land and buildings, causing damage to the amount of \$28,000. It was held by the Supreme Court of California that the damage was not a taking and that there was no liability on the part of the commissioners engaged in the work or the city for whose benefit it was done.¹¹ A railroad company building an embankment on one side of a stream, upon its own land, is not liable for damages caused thereby to property on the other side in times of flood.¹² In such case there is no interference with the channel or accustomed flow of the stream. So, too, where a wall was erected by county authorities to protect a public road.¹³

§ 67. Works which set back the water and cause a flooding.—The right to have the water of a stream flow off from one's premises is property.¹ Consequently, where works are constructed below the lands of a proprietor which cause the stream to set back and overflow his land, there is a taking for which compensation must be made.² It is immaterial

¹¹ *Green v. Swift*, 47 Cal. 536; *Hoagland v. Sacramento*, 52 Cal. 142; see also a similar case in Ohio, *Railroad Co. v. Carr*, 38 Ohio St. 448.

¹² *Moyer v. N. Y. C. etc. R. R. Co.*, 88 N. Y. 351; *Lawrence v. Great Northern Ry. Co.*, 16 Q. B. 643.

¹³ *Tyron v. Baltimore County*, 28 Md. 510.

§ 67.

¹ *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335.

² *Bottoms v. Brewer*, 54 Ala. 288; *Martin ex parte*, 13 Ark. 198; *Davis v. Sacramento*, 59 Cal. 596; *Hill v. Ward*, 2 Gil. (Ill.) 285; *Trustees of Wabash & Erie Canal v. Spears*, 16 Ind. 441; *Hebron Gravel Road Co.*

v. Harvey, 90 Ind. 192; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Barrett v. Bangor*, 70 Me. 335; *Estabrooks v. Peterborough & Shirely R. & R. Co.*, 12 Cush. 224; *Treat v. Bates*, 27 Mich. 390; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 308; *Weaver v. Mississippi & Rum River Boom Co.*, 28 Minn. 534; S. C. 30 Minn. 477; *McKenzie v. Same*, 29 Minn. 288; *Mississippi Central R. R. Co. v. Mason*, 51 Miss. 234; *Silver Creek Nav. and Imp. Co. v. Mangum*, 64 Miss. 682; *Barnes v. City of Hannibal*, 71 Mo. 449; *Young v. City of Kansas*, 27 Mo. App. 101; *Omaha & Rep. Valley R. R. Co. v. Standen*, 22 Neb. 343; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143; *Amoskeag Mfg. Co. v.*

whether the flooding is continuous and permanent or only occasional. Where the works of a boom company cause lands to be occasionally flooded and obstructed by stranded logs, there is a taking to the extent of the injury.³ It has been held in New York and Ohio that merely raising the water in the channel of a stream without producing any actual injury affords no ground of action;⁴ but a contrary view is taken by the Supreme Court of North Carolina,⁵ and if the water is set back upon a mill the owner may recover.⁶ Where a city undertakes to make a new channel for a creek, it interferes with the stream at its peril, and if, by reason of the insufficiency of the new channel, lands are flooded, it will be liable.⁷ A lake had its outlet through a bed of porous gravel, which outlet was obstructed by a gravel-road company, causing the lake to rise and flood the plaintiff's land. The company was held liable.⁸ Where one has a right to maintain a dam at a certain height, he will not be liable for additional flooding caused by repairing the dam and making it tight.⁹ Where flooding and damage are caused by extra-

Goodale, 46 N. H. 53; Sinnickson *v.* Johnson, 17 N. J. L. 129; Delaware etc. Canal Co. *v.* Lee, 22 N. J. L. 243; Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335; Crittenden *v.* Wilson, 5 Cow. 165; Barclay R. R. & Coal Co. *v.* Ingham, 36 Pa. S. 194; Willey *v.* Hunter, 57 Vt. 479; Arimond *v.* Green Bay & Mississippi Canal Co., 31 Wis. 316; Pumfelly *v.* Green Bay Company, 13 Wall. 166.

³ Weaver *v.* Mississippi & Rum River Boom Co., 28 Minn. 534; S. C. 30 Minn. 477; McKenzie *v.* Same, 29 Minn. 288.

⁴ Cooper *v.* Hall, 5 Ohio, 320; People *v.* Canal Appraisers, 13 Wend. 355. But this is certainly the violation of a right and should entitle the upper proprietor to

nominal damages. Canal Appraisers *v.* People, 17 Wend. 603.

⁵ Little *v.* Stanbank, 63 N. C. 285.

⁶ Gibson *v.* Fisher, 68 Ia. 29; Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335; Barclay R. R. & Coal Co. *v.* Ingham, 36 Pa. S. 194; Tinsman *v.* Belvidere Del. R. R. Co., 26 N. J. L. 148; Lee *v.* Pembroke Iron Co., 57 Me. 481.

⁷ Barnes *v.* Hannibal, 71 Mo. 449.

⁸ Hebron Gravel Road Co. *v.* Harvey, 90 Ind. 192.

⁹ Cowell *v.* Thayer, 5 Met. 253; But where there is a prescriptive right to flood certain land, and a new dam, tighter but not higher, causes additional flooding and saturating, there is a liability. Powell *v.* Lash, 64. N. C. 456.

ordinary floods and ice gorges in connection with a bridge or other works in a stream, it is held that there will be no liability if the bridge or works have been constructed with reasonable care and skill to avoid such results.¹⁰ Of course any damage caused by the negligent construction of works is actionable.¹¹ A city is not liable because a levee which has been built causes the flood water to accumulate to a greater depth upon the plaintiff's lots which are situated between the levee and the river.¹²

§ 68. Making a private stream public, or navigable, by statute.—As we have already stated, streams which are not navigable are wholly private property. The riparian owner, by means of dams, or otherwise, may make a reasonable use of the water as it flows over his land. An act of the legislature declaring such a river public, or navigable, will not affect such rights, and the riparian owner cannot be deprived of the use of the water,¹ or his private works on the stream interfered with without compensation.² Compensation must be made for all damages occasioned to private rights by improvements making such a stream navigable in fact.³

§ 69. Rights of riparian owners on private navigable streams.—Streams which are navigable are public highways by water, and the rights of riparian proprietors thereon are subject to the paramount right of the public to use and improve the stream as such highway. In all other respects riparian owners have the same rights as upon private, non-

¹⁰ *Omaha & R. V. R. R. Co. v. Brown*, 14 Neb. 170; *Bellinger v. New York Central R. R. Co.*, 23 N. Y. 42; *Burchardt v. Wausau Boom Co.*, 54 Wis. 107; *Lawler v. Baring Boom Co.*, 56 Me. 443. *Gulf etc. R. R. Co. v. Pomeroy*, 67 Tex. 498.

¹¹ *Abbott v. Kansas City etc. R. R. Co.*, 83 Mo. 271.

¹² *Hoard v. Des Moines*, 62 Ia. 326. § 68.

¹ *Walker v. Board of Public Works*, 16 Ohio, 540.

² *Morgan v. King*, 35 N. Y. 454; S. C. 18 Barb. 277.

³ *Macdonnell v. Caledonia Canal Commissioners*, 8 Shaw & Dunl. 881; *White Deer Creek Improvement Co. v. Sassaman*, 67 Pa. S. 415.

navigable streams, and the further right of making use of the navigable waters in connection with their property, including the right to build piers, booms and the like.¹ "The public right is one of passage, and nothing more; as in a common highway. It is called by the cases an easement and the proprietor of the adjoining land has a right to use the land and water of the river in any way not inconsistent with this easement."² The Court of Appeals of New York, in a recent opinion, speaking of this easement, says: "It is an elementary principle that all easements are limited to the very purpose for which they were created, and their enjoyment cannot be extended by implication. This right, being founded upon the public benefit supposed to be derived from their use as a highway, cannot be extended to a different purpose inconsistent with its original use."³ And again in another case: "The legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purpose of *regulating, preserving and protecting the public easement*. Further than that, it has no more power over these fresh-water streams than over other private property. It may make laws for regulating booms, dams, ferries and bridges, only so far as is necessary to protect and preserve the public easement; and when it goes further, it invades private rights protected under the constitution."⁴ These conclusions, so well put by the New York court, state fully and correctly the rights of riparian owners upon private navigable streams, and the limitations to which they are subject, and are fully sustained by the authorities.⁵ These limitations necessarily prevent any

§ 69.

⁴ *Chenango Bridge Co. v. Paige*,
83 N. Y. 178, 185.

¹ *Post*, §§ 77-83.

⁵ *Hooker v. Cummings*, 20 Johns.

² *Ex parte Jennings*, 6 Cow. 518,
527.

⁶ *State of Pennsylvania v.*
Wheeling & Belmont Bridge Co.,

³ *Smith v. Rochester*, 92 N. Y.
463, 483.

⁷ 18 How. 421; *Canal Commissioners
v. Kempshall*, 26 Wend. 404.

structure on the bed or banks of the stream which interferes with navigation, such as a dam,⁶ or boom,⁷ and all such structures are nuisances and may be abated.⁸

— **§ 70. An interference with such rights is a taking.**—Such being the rights of the riparian owner upon a private navigable stream, it follows that any interference with these rights, under legislative sanction, for any purpose not connected with the navigation of the stream, is a taking.¹ The water cannot be taken as a feeder for a canal,² or to supply a town with water,³ or for any public purpose without compensation. Any interference with the accustomed flow of the stream, in its quantity, quality or uniformity, to the damage of a riparian proprietor, will be actionable, and the authorities heretofore referred to in treating of non-navigable streams apply with full force.

+ **§ 71. Damages by reason of improving navigation.**—The public easement in a private navigable stream includes not only the right to use, but also the right to improve. The public may make such changes and construct such works in the bed of the stream, as may be deemed necessary to promote its usefulness and efficiency as a highway. If such improvements change the current of the stream so as to wash away the land of a proprietor, it is *damnum absque injuria*.¹ The riparian owner, in such case, must protect his bank.

⁶ Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61; Woodward v. Kilbourn Mfg. Co., 1 Abb. U. S. C. 158.

⁷ Stevens Point Boom Co. v. Reilly, 44 Wis. 295; S. C. 46 Wis. 237.

⁸ Altee v. Packet Co. 21 Wall. 389.

§ 70.

¹ Chenango Bridge Co. v. Paige, 83 N. Y. 178, 185.

² *Ex parte Jennings*, 6 Cow. 518; Canal Commissioners v. Kempshall, 26 Wend. 404.

³ Smith v. Rochester, 92 N. Y. 463.

§ 71.

¹ Hollister v. Union Co., 9 Conn. 436. But it is held that one State cannot authorize works for the improvement of navigation which will produce damage, either direct or consequential, to lands in an-

But, if such works cause private property to be overflowed, compensation must be made.² The banks of the stream, being private property, cannot be occupied without compensation.³ It has been held in Wisconsin that a side chute, or subsidiary channel, though forming a navigable connection with the main stream, may be closed for the purpose of turning all the water into the principal channel, and that a proprietor upon the former, who is thus cut off from all access to the river, is not entitled to compensation.⁴ The Supreme Court of Mississippi has gone so far as to hold that a stream may be turned into an entirely new channel without compensation to those whose use of it is thus destroyed.⁵ The latter decision seems to us erroneous. The public right is a right of passage only, including the right to improve the navigation. It is necessarily limited to the bed of the stream.⁶ So far as the water is concerned, it can only use it for navigation; it cannot take it or divert it.⁷ The public easement includes the right to make any use of the water or bed of the stream, for promoting the navigation of the stream itself, which the legislature deems expedient. But the public right is one of *passage* only, and improvements can be made only for that purpose. While these general principles are admitted by all, there is much diversity in their application. It has recently been held in Wisconsin that it was competent to confer upon a corporation the exclusive right of construct-

other State. Holyoke Water Power Co. v. Connecticut River Co., 22 Blatch. 181; S. C. 52 Conn. 570.

² Arimond v. Green Bay & Mississippi Canal Co., 31 Wis. 316; Pumfelly v. Green Bay Co., 13 Wall. 166; Grand Rapids Boom Co. v. Jarvis, 30 Mich. 308; see also *ante*, § 67.

³ Colton v. Mississippi & Rum River Boom Co., 19 Minn. 497; Perry v. Wilson, 7 Mass. 393.

⁴ Black River Improvement Co.

v. La Crosse Booming & Trans. Co., 54 Wis. 659.

⁵ Commissioners of Homochitto River v. Withers, 29 Miss. 21. This case was taken to the Supreme Court of the United States, but there dismissed for want of jurisdiction; Withers v. Buckley, 20 How. 84.

⁶ Weaver v. Miss. & Rum River Boom Co., 28 Minn. 534, 538.

⁷ See cases cited *ante*, § 62.

ing and operating booms for a certain distance on the Wisconsin River, where the result was not only to deprive the riparian owner of the right or privilege of constructing a boom opposite his own bank, but also to cut him off from the navigable part of the river.⁸ Plaintiff had about two thousand feet of frontage on the river and was owner of timber lands above. The channel was about two hundred feet from shore. He had bought the property for the purpose of erecting saw mills thereon and with a view to constructing in front thereof booms for storing logs. The defendant company constructed a boom along the whole front of his land, extending from near the shore to the channel. The maintenance of the defendant's works would virtually ruin his property. The court held the defendant's works to be a legitimate exercise of the public easement of navigation, that no property of the plaintiff's was taken, and that he was not entitled to any relief. Undoubtedly a boom in such a stream is a work of public utility for which property may be taken.⁹ But the construction of a boom for the storing, sorting and handling of logs can hardly be called an improvement of the *right of passage* in a stream. It is a legitimate use of highways to drive cattle along them, and the public may make the ways safe and convenient for that purpose; but it would not be contended that this would justify the construction of cattle yards in front of a man's door to enable the drover to feed, water, rest or sell his stock.¹⁰ The right of access to the navigable part of the river and the right to construct

⁸ Cohn v. Wausau Boom Co., 47 Wis. 314.

⁹ Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372; *post*, § 177.

¹⁰ We wish to credit this illustration, which is a very apt one, to its proper source. In Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308, 319, Christiany, J., says: "This river, so far as it is naviga-

ble for vessels, or floatable for logs, is but a public highway by water; the right to navigate the one or float the other *is but a right of passage*, including only such rights as are incident to *that right* and necessary to render it reasonably available. And, though the drover has the right to drive his herds of cattle along a public road, no one will contend that he has a right to

booms for logs adjacent to one's premises, which do not interfere with the public use of the stream, are valuable riparian rights which cannot be taken or impaired without compensation.

§ 72. What streams are public.—At common law all streams and waters where the tide ebbed and flowed were regarded as navigable, and the soil below high water mark was held to be in the public. All other waters were regarded as private property.¹ In this country, with its great inland lakes and rivers, there has been some tendency to depart from the common law doctrine, but no definite rule has been enunciated by any State by which it can be determined in any given case whether the title to the bed of a stream is in the public or the riparian owners. The Supreme Court of the United States, after originally confining admiralty jurisdiction to tide waters, in accordance with the common law of England,² at length overcame the force of English precedent and extended that jurisdiction to all waters navigable in fact for purposes of commerce, without regard to the ebbing and flowing of the tide;³ and even where the river was only rendered navigable for boats of any size by means of locks and canals, as in the case of the Fox River, Wisconsin.⁴ Most of the States have adhered to the common law rule. Of

convert a certain length of the highway into a cattle yard, and occupy it for that purpose for months or weeks, or even a day, while he is purchasing, collecting and bringing in his droves, assorting, dividing or selling them. * * * Every man sees at once that, however convenient such right might be to the drover, and however necessary to enable him to make his business profitable, it is a convenience and necessity for which he must pay."

§ 72.

¹ *De Juris Maris*, Part I, C. 2; *Angell on Watercourses*, §§542-551; *Wood on Nuisances*, (1st ed.) § 575; *Gould on Waters*, chap. iii.

² *The Thomas Jefferson*, 10 Wheat. 428; *The Steamboat New Orleans v. Phœbus*, 11 Peters, 175.

³ *The propeller Genesee Chief*, 12 How. 443; *The Magnolia*, 20 How. 296; *A. O. Hine v. Trevor*, 4 Wall. 555.

⁴ *The Montello*, 20 Wall. 430.

these are Maine,⁵ New Hampshire,⁶ Massachusetts,⁷ Connecticut,⁸ Maryland,⁹ Virginia,¹⁰ Ohio,¹¹ Indiana,¹² Illinois,¹³ Michigan,¹⁴ Mississippi,¹⁵ and Wisconsin.¹⁶ On the other hand several of the States have held some of our large inland rivers to be public streams, in the fullest sense of the term. This has always been the doctrine in Pennsylvania, which holds the title to navigable streams to be in the public from low water mark.¹⁷ Several decisions in Iowa in relation to the Mississippi River have held the title to the bed of the stream to be in the public from high water mark.¹⁸ Several other States have held

⁵ *Berry v. Carle*, 3 Greenl. 269; *Lapish v. Bangor Bank*, 8 Greenl. 85; *Springer v. Russell*, 7 Me. 273; *Simpson v. Seavy*, 8 Me. 188; *Wadsworth v. Smith*, 11 Me. 278; *Brown v. Chadbourne*, 31 Me. 9; *Knox v. Chaloner*, 42 Me. 150; *Granger v. Avery*, 64 Me. 292.

⁶ *Scott v. Wilson*, 3 N. H. 321; *State v. Gilmanton*, 9 N. H. 461; *State v. Canterbury*, 28 N. H. 195; *Norway Plaines Co. v. Bradley*, 52 N. H. 86.

⁷ *Commonwealth v. Chapin*, 5 Pick. 199; *Gray v. Bartlett*, 20 Pick. 186.

⁸ *Adams v. Pease*, 2 Conn. 481; *Chapman v. Kimball*, 9 Conn. 38; *East Haven v. Hemingway*, 7 Conn. 186; *Middleton v. Sage*, 8 Conn. 221.

⁹ *Brown v. Kennedy*, 5 H. & J. 195.

¹⁰ *Hays v. Bowman*, 1 Rand. 417; *Mead v. Haynes*, 3 Rand. 33.

¹¹ *Gavit v. Chambers*, 3 Ohio, 495; *Lamb v. Rickets*, 11 Ohio, 811; *Walker v. Board of Public Works*, 16 Ohio, 540.

¹² *Cox v. State*, 3 Blackf. 193; *Porter v. Allen*, 8 Ind. 1; *Sherlock v. Bainbridge*, 41 Ind. 35, 41; *Ross v. Faust*, 54 Ind. 471.

¹³ *Middletown v. Pritchard*, 3 Scan. 510; *People v. St. Louis*, 5 Gil. 351; *Seaman v. Smith*, 24 Ills. 523; *Hubbard v. Bell*, 54 Ills. 112; *Braxon v. Bressler*, 64 Ills. 488.

¹⁴ *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. 155; *Lorman v. Benson*, 8 Mich. 18; *Rice v. Ruddiman*, 10 Mich. 125.

¹⁵ *Morgan v. Reading*, 3 S. & M. 366; *Steamboat Magnolia v. Marshall*, 39 Miss. 109.

¹⁶ *Jones v. Pettibone*, 2 Wis. 308; *Mariner v. Shulte*, 13 Wis. 692; *Arnold v. Elmore*, 16 Wis. 509; *Olsen v. Merrill*, 42 Wis. 203.

¹⁷ *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Union Canal Co. v. Landis*, 9 Watts, 228; *Coovert v. O'Connor*, 8 Watts, 470; *Barclay Road v. Ingham*, 36 Pa. S. 194, 201; *Flannagan v. Philadelphia*, 42 Pa. S. 219.

¹⁸ *McManus v. Carmichael*, 3 Ia. 1; *Haight v. Keokuk*, 4 Ia. 199; *Tomlin v. Dubuque, B. & M. R. R. Co.*, 32 Ia. 106; *Musser v. Hershey*, 42 Ia. 356. In *Houghton v. C. D. & M. R. Co.*, 47 Ia. 370, high water mark is defined "as co-ordinate with the limit of the river bed.

or inclined to similar views.¹⁹ The Supreme Court of the United States, while holding that the question is one of State policy and State law,²⁰ yet inclines to approve the doctrine maintained by the Iowa court.²¹ The decisions in New York are seemingly conflicting, but the common law doctrine may be said to prevail, except as to the Mohawk and Hudson. These rivers are exceptional, owing to the fact that they were originally under the jurisdiction of the Dutch, and through them were, so to speak, impressed with the doctrines of the civil law.²² As we have before said, it is not within the purview of this treatise to examine these decisions and work out the true doctrine in respect to the title to navigable streams. The subject is fully treated by Gould in his recent work on Waters, where all the authorities are referred to and discussed.²³ We have referred to the question here for the purpose of showing how it stands. The question which concerns us is, what consequences follow from the title to the bed of the stream being in the public?

§ 73. Rights of riparian owners on public navigable streams.—So far as these rights are connected with the navigation of the stream, we shall treat of them under the general head of *Rights in Public Waters*. We shall only discuss here the right to the *flow* of the stream. In New York it has been held that the State has an absolute right to appropriate the water of public streams in any way it sees fit,

What the river does not occupy long enough to wrest from vegetation, so far as to destroy its value for agriculture, is not river bed."

¹⁹ Benson *v.* Morrow, 61 Mo. 345; Ravenswood *v.* Flemings, 22 W. Va. 52; Cates *v.* Waddington, 1 McCord, 580; Schurmier *v.* Railroad Co., 10 Minn. 82.

²⁰ Barney *v.* Keokuk, 94 U. S. 324.

²¹ Railroad Co. *v.* Schurmier, 7

Wall. 272; Barney *v.* Keokuk, 94 U. S. 324.

²² Canal Commissioners *v.* People, 5 Wend. 423, S. C. 13 Wend. 355; 17 Wend. 570; Canal Appraisers *v.* Kempshall, 26 Wend. 404; People *v.* Canal Appraisers, 33 N. Y. 461; Smith *v.* Rochester, 92 N. Y. 463. In the latter case prior decisions are reviewed, explained and distinguished.

²³ Gould on Waters, §§ 46-79.

as to supply a city with water,¹ or create a feeder for a canal,² without compensation to the riparian owners. The doctrine is not without support in other States, especially in Pennsylvania. The logic of these cases is, that a public river may be entirely appropriated by the State, so as to leave the riparian owners abutting on a dry river bed, and yet violate no right of private property. It seems to us that this is a result not to be tolerated, and that the principles which involve it are erroneous. As respects the flow of the stream, we think there is no difference between public and private navigable rivers. Though title is declared to be in the State, it holds it as a mere trustee, for the benefit of the public and the riparian owners alike. The public are beneficiaries to the extent of having a common right of passage, and perhaps of fishery; the riparian owners are beneficiaries to the extent of having a right to all those advantages which the stream affords, and which can be enjoyed without interfering with the public rights. These beneficiary rights are property, and within the protection of the constitution. They are attached to the riparian property by nature, are universally estimated as part of its value in all the dealings between man and man, and should receive the protection of the law. For a justification of these conclusions we refer to what is said further on in regard to rights in public waters. [Post, §§ 77-83.]

§ 74. Interfering with the flow of public streams. — According to the conclusions announced in the last section, any

§ 73.

¹Crill *v.* Rome, 47 How. 398.

²Canal Commissioners *v.* People, 5 Wend. 423; S. C. 13 Wend. 355; 17 Wend. 570; People *v.* Canal Appraisers, 33 N. Y. 461. In matter of Commissioners of State Reservation at Niagara, 37 Hun, 537,

affirmed in 102 N. Y. 734, it was held that a riparian owner could acquire by prescription a right to such use of the stream as did not interfere with the rights of the public, and that he was entitled to compensation when such right was taken. S. C. 15 Abb. N. C. 159 and 395.

damage to riparian owners on public streams by works for any purpose not connected with the improvement of navigation is a taking for which compensation is to be made. Exactly the same rules apply as in case of private navigable streams.¹ Where the city of St. Louis extended a street or pier seven hundred feet into the Mississippi River, thereby destroying a channel adjacent to plaintiff's property and greatly depreciating its value, the city was held liable.² But most of the decisions on this question are of older date and adverse to the views we have expressed. We referred in the last section to some cases in relation to diverting the water of public streams,³ and will now refer to some additional cases holding the same doctrine. A railroad company, authorized to cross a tidal river, constructed a bridge, the piers of which caused a change in the current of the river, which rendered additional sea wall and piling necessary in order to protect the plaintiff's land. It was held that the company was not liable. "It is incident to the power of the legislature," says the court, "to regulate a navigable stream so as best to promote the public convenience, and if, in doing so, some damage is done to riparian proprietors, and some increased expense thrown upon them, it is *damnum absque injuria*."⁴ It is difficult to reconcile this case with another in the same volume which seems to hold that precisely the same item of damages is allowable.⁵

§ 75. Damage to authorized works on public streams.—
It has been repeatedly held, in Pennsylvania, that, where a dam has been built on a public navigable stream, under an

§ 74.

¹ *Ante*, §§ 61-67.

² *Meyers v. St. Louis*, 8 Mo. Ap. 266; see also *Chapman v. Oshkosh & Miss. R. R. Co.*, 33 Wis. 629, and *Commonwealth v. Boston & Maine R. R. Co.*, 3 Cush. 25.

³ See cases cited in last section.

⁴ *Fitchburg R. R. Co. v. Boston &*

Maine R. R. Co., 3 Cush. 58, 88; also *Bailey v. Philadelphia etc. R. R. Co.*, 4 Harr. (Del.) 389; to the same point, *Mississippi River Bridge Co. v. Lonergan*, 91 Ills. 508.

⁵ *Commonwealth v. Boston & Maine R. R. Co.*, 3 Cush. 25; see also *Fowle v. N. H. & N. Co.*, 112 Mass. 334.

act of the legislature granting permission to do so, the grant is a mere license, revocable at pleasure, and that where such dam is injured or destroyed by reason of other improvements in or upon the stream, authorized by the legislature, no compensation need be made.¹ The Supreme Court of the United States, in a case which went up from Pennsylvania, characterize this doctrine as "somewhat peculiar," but, nevertheless, follow it as being a rule of property in that State.² In Virginia and other States it has been held, in such case, that, the legislature having granted the right to erect the dam, and the grantee having erected it, he had a vested right to maintain it which could not be taken or impaired without compensation.³ This would seem to be the better rule and to be of general application to all works erected in public waters by legislative authority.

§ 76. Title to lakes and ponds.—The title to the great fresh-water lakes of the United States is universally held to be in the public from low water mark.¹ The same rule is generally applied to the smaller lakes and ponds varying in size from one or two to many miles in circumference.² By colonial ordinances of 1641 and 1647, all great ponds in

§ 75.

¹Union Canal Co. v. Landis, 9 Watts, 228; Monongahela Navigation Co. v. Coons, 6 W. & S. 101; Susquehanna Canal Co. v. Wright, 9 W. & S. 9; New York & Erie R. R. Co. v. Young, 33 Pa. S. 175; McKeen v. Delaware Canal Co., 49 Pa. S. 424; Freeland v. Penn. R. R. Co., 66 Pa. S. 91; see also Bailey v. Phil. W. & B. R. R. Co., 4 Harr. Del. 389.

²Rundle v. Delaware & Raritan Canal Co., 14 Ilow. 80, 93.

³Crenshaw v. Slate River Co., 6 Rand. Va. 245; Glover v. Powell, 10 N. J. Eq. 211; Lee v. Pembroke Iron Co., 57 Me. 481; State v. Glen,

7 Jones L. 321; and see Langdon v. Mayor etc. of New York, 93 N. Y. 129; Railroad Company v. Renwick, 102 U. S. 180.

§ 76.

¹Diedrich v. N. W. Ry. Co., 42 Wis. 248; Seaman v. Smith, 24 Ills. 521. These cases relate to Lake Michigan, and, in the latter, the precise limit of private ownership in that lake is held to be the line where the water usually stands when unaffected by disturbing causes. Smith v. Rochester, 92 N. Y. at p. 479; Canal Commissioners, v. People, 5 Wend. 423, 446; Austin v. Rutland R. R. Co., 45 Vt. 215.

²Delaplaine v. C. & N. W. Ry.

Massachusetts containing more than ten acres were made public and common forever, and in that State it has been held that the title to all such ponds below low water mark is in the public.³ The general doctrine seems to be doubted in a recent case in New York,⁴ but the lake in question in that case was held to have been vested absolutely in private parties by a special grant of the State.⁵ In Michigan the title to small lakes and ponds is held to be in the riparian owners, subject to the public right of navigation.⁶ The question as to the ownership of the bed of streams and lakes is one which each State is at liberty to determine for itself, in accordance with its own views of public law and public policy.⁷

§ 77. Rights of riparian owners on public waters.—There is not more diversity of opinion among the courts as to the title to the bed and shores of navigable streams and waters than there is as to the rights of riparian owners in such waters as are conceded to be entirely *publici juris*. The older, and perhaps more numerous, authorities hold that such an owner has no private rights in the stream or body of water which are appurtenant to his land, and, in short, no rights beyond that of any other member of the public, and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the waters over his own land, which the public do not. The stream is regarded as an adjoining freehold, the title to which is absolutely in the

Co., 42 Wis. 214; Boorman *v.* Sun-nucks, 42 Wis. 233; State *v.* Gil-manton, 9 N. H. 461; Bradley *v.* Rice, 13 Me. 198; Robinson *v.* White, 42 Me. 209; Paine *v.* Woods, 108 Mass. 160; Fay *v.* Salem & Danvers Aqueduct Co., 111 Mass. 27; Wheeler *v.* Spinola, 54 N. Y. 377.

³ West Roxbury *v.* Stoddard, 7 Allen, 158.

⁴ Smith *v.* Rochester, 92 N.Y. 463.

⁵ So also in Ledyard *v.* Ten Eyck, 36 Barb. 102.

⁶ Rice *v.* Ruddiman, 10 Mich. 125.

⁷ Delaplaine *v.* C. & N. W. Ry. Co., 42 Wis. 214, 225; Barney *v.* Keokuk, 94 U. S. 324, 338; Pol-lard's Lessee *v.* Hogan, 3 How. 212.

public, and which the public may use and control in the same manner as an individual could if the stream was his private property. Access to and use of the stream by the riparian owner is regarded as merely permissive on the part of the public and liable to be cut off absolutely if the public see fit to do so.¹ Wood, in his work on *Nuisances*, states the doctrine as follows: "The State is the owner, absolutely, of the *alveus* of the stream to high-water mark, and, as such owner, may devote the stream, or any part thereof, to such purposes as it sees fit, so long as it does not materially obstruct navigation. Riparian owners, as such, upon this class of streams, have no more rights than any other member of the public, either in the stream, or any of the lands covered thereby. They cannot erect a wharf thereon, or use any portion of the *alveus* of the stream for any purpose whatever, except in the exercise of the common right of navigation. They may cross and recross the same for the purpose of approaching the sea, and so may any other member of the public. They may use the waters of the stream for ordinary domestic purposes, and so may any one else. The owner of the bank has no *jus privatum*, or special usufructuary interest, in the

§ 77.

¹ The leading cases in support of this doctrine are *Stevens v. Patterson etc. R. R. Co.*, 34 N. J. L. 532, 1870, and *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522, 1852. Other cases in which the same doctrine is held are, *Pennsylvania R. R. Co. v. New York etc. R. R. Co.*, 23 N. J. Eq. 157 (opinion of Chancellor only); *Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247 (opinion of Chancellor only); *Gould v. Hudson River R. R. Co.*, 12 Barb. 616; *Matter of Water Commissioners*, 3 Edwards Ch. 290; *Getty v. Hudson River R. R. Co.*, 21 Barb. 617; *Tomlin v. Dubuque, B. & M. R. R. Co.*,

32 Ia. 106 (Beck, J., dissents); *Canal Commissioners v. People*, 5 Wend. 423; S. C. 13 Wend. 355; 17 Wend. 570; *People v. Canal Appraisers*, 33 N. Y. 461; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *McKeen v. Delaware Canal Co.*, 49 Pa. S. 424; *Boston & Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 Cush. 605; *Fay v. Salem & Danvers Aqueduct Co.*, 111 Mass. 27; *Thayer v. New Bedford R. R. Co.*, 125 Mass. 253; *Matter of N. Y. W. S. & B. Ry. Co.*, 29 Hun, 269. See also *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 656, which states and applies the law of New Jersey.

water. He does not, from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream, over any other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, riparian ownership brings no greater rights than those incident to all the public, except that he can approach the water more readily, and over lands which the general public have no right to use for that purpose. But this is a mere convenience, arising from his ownership of the lands adjacent to the ordinary high-water mark, and does not prevent the State from depriving him entirely of this convenience, by itself making erections upon the shore, or authorizing the use of the shore by others, in such a way as to deprive him of this convenience altogether, and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is *damnum absque injuria.*"²

§ 78. **The same continued.**—On the other hand, there are cases which hold that the riparian owners, upon waters the bed of which belongs to the public, have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation. This seems to us the better and sounder rule. The opposite conclusion has been reached by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the State, or the public. It is assumed that this title gives the State the same absolute and exclusive control of the waters and their bed, as an individual possesses over his private property. But there is really no analogy between the relations of a riparian owner to the waters upon which he abuts and the relations between the proprietors of adjoining lands. The State holds the title to public waters as a trustee, merely, for the use of all the public in common. The very object of declaring the title in the public is the better to secure this common use and bene-

² Wood on Nuisances (1st ed.), 592.

fit. The riparian owner is peculiarly situated for the enjoyment of these advantages. He has rights in the waters upon which he abuts which no private owner has in the land of his neighbor. No private owner holds his lands for the purpose of being used by his neighbors and the public. The conclusions, therefore, which are based upon the artificial and purely metaphysical notion of title, carried to its extremest logical consequences, as in the case of ordinary private ownership, are, it seems to us, unsound and unwarranted. As matter of fact, riparian owners have always enjoyed, in connection with their estates, various privileges in the contiguous shore and waters, and, practically, these privileges have been regarded as annexed to their estates and estimated as part of the property in business transactions touching the value of the same. When a court is called upon to say whether these privileges are *rights* appurtenant to the property and part and parcel of it, it must establish a rule of law and of property, whichever way it decides the question. To look simply to the fact of title and then apply the law relating to adjoining proprietors, is to ignore some of the most important features in the case. True, the title is in the State, but it is only in the State by the declaration of courts, and then only as trustee for the benefit of all the public in common, including the riparian owners. And, looking further, it is seen that the riparian owner, in addition to rights which he shares in common with others, has other rights or privileges which are peculiar to himself, such as the right to accretions, the right of wharfage, the right of access to and from his lot, and the like, which destroy all analogy to the case of adjoining proprietors. It is more reasonable, more logical and more just to say that these privileges are in fact *rights*, as inviolable as the soil itself. The public loses nothing, for it is conceded that all these rights are subject to the paramount right of the State to use and improve the waters as shall best subserve the common rights of all.

§ 79. **The same continued.**—These views are not without a strong support in the earlier cases and cases already cited, and have been vindicated by several late decisions by courts of the highest authority. In *Gould v. Hudson River Railroad Co.*,¹ Judge Edmonds filed an elaborate dissenting opinion, in which he combated the conclusions of the majority with great learning and ability. He enumerates eight rights which the riparian owner has, that are peculiar to himself and appurtenant to his property: 1. The right of navigating the river to and from his land, and landing upon his shore. 2. The right, under the statute, to be preferred in the grant of a ferry right terminating upon his land and in a grant of the soil under water opposite his land. 3. The right of fishing in the river and of using his land in connection therewith. 4. The right to accretions. 5. The right to use the water in his business, whatever it may be, and for domestic purposes. 6. The right to lade and unlade upon the bank. 7. The right of way from his land to the channel of the river. 8. The right to be and remain a riparian owner, and have the water lave his land. And so in the case of *Stevens v. Paterson & Newark R. R. Co.*,² two of the Judges unite with the Chancellor in a dissenting opinion in which similar views are maintained. Says the Chancellor: “The right, on the principles of the common law, which I for convenience call the right of adjacency, consists in the right of ferriage, of landing boats alongside a wharf, or land by the shore, and unloading goods upon or taking them from it, the right of fishing from the shore, and drawing nets upon it, of entering upon it from the land, for bathing or procuring water, and such other benefits as can be enjoyed only by the adjoining owner, peculiar to him, and not common to the rest of the public.” And he concludes as follows:

“The conclusions to which I have arrived are these:

“First. That the owner of lands upon tide waters has a

§ 79.

¹ 6 N. Y. 522.

² 34 N. J. L. 532, 562.

right to the natural advantages conferred on his land by its adjacency to the water, which, like the right to have fresh water streams flow unobstructed and unpolluted upon and from his land, and like the right to support for the natural soil from the adjacent soil, is an incident to the land, and is property.

“*Second.* That, by the law of New Jersey, being the common law as adopted here, altered to suit the circumstances and necessities of the people and the genius of our government, the right to wharf out from the lands situate on tide waters over the shore in front, has become an incident to such lands and a right of property.

“*Third.* That, by the wharf act of 1851, the right to fill in and appropriate the shore is conferred upon the shore owner as an incident to his property.

“*Lastly.* That all these rights, being incidents to an estate which add to its value, are property, and cannot be taken away by general or special legislation, except by the power of eminent domain for public use and upon compensation.”³

§ 80. The same continued.—The same doctrine is affirmed in a recent case in the Supreme Court of the United States which went up from Wisconsin. The plaintiff had extended a wharf into the Milwaukee River. Afterwards the city of Milwaukee, acting under certain legislative acts, established dock lines upon the river, and declared a part of plaintiff’s wharf which projected beyond these lines a nuisance and ordered its abatement. The plaintiff filed his bill to enjoin and prevailed. The court say that, though the title to the

³ Judge Cooley, in his work upon Constitutional Limitations (p. 544), speaking of these cases, says: “So far as these cases hold it competent to cut off a riparian proprietor from access to the navigable water, they seem to us to justify an appro-

priation of his property without compensation; for, even those courts which hold the fee in the soil under navigable streams to be in the State, admit valuable riparian rights in the adjacent proprietor.”

bed of the river is in the public, yet the abutting owner has riparian rights, and "among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. * * * This riparian right," say the court, "is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."¹

§ 81. The same continued.—Several well considered cases upon this question are to be found in the 42d volume of the Wisconsin Reports. In one of these cases it appeared that one Diedrich owned a lot on lake Michigan and had, by artificial means, extended his lot some eighty-five feet into the lake. A railroad company located its road across this new land, and instituted proceedings to condemn so much of the land as was required for its track. On appeal the court held that Diedrich had no title to the made land on which the railroad was laid, and that, as the damages awarded had been given for the land taken, and not for injury to riparian rights, the case must be reversed. The question of riparian rights was discussed and the opinion expressed that, for any injury thereto, the owner would be entitled to compensation.¹

In another case² a railroad company constructed its road across a small lake in the City of Madison so as entirely to

§ 80.

¹ *Yates v. Milwaukee*, 10 Wall. 497, 504. To the same effect, *Chicago v. Laflin*, 49 Ills. 172.

§ 81.

¹ *Diedrich v. N. W. U. Ry. Co.*, 42 Wis. 248.

² *Delaplaine v. C. & N. W. Ry. Co.*, 42 Wis. 214, 226.

cut off the plaintiff from access to the lake and leave a stagnant pool in front of his premises. The lake was navigable and about nine miles in circumference. The plaintiff sued for damages. The title to the bed of the lake beyond the water's edge was held to be in the State, but the court held the plaintiff had riparian rights appurtenant to his land of which he could not be deprived without compensation. The court say: "But, while the riparian proprietor only takes to the water line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land, out to navigable waters, in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public. All the facilities which the location of his land with reference to the lake affords, he has the right to enjoy for purposes of gain or pleasure; and they often-times give property thus situated its chief value. It is evident, from the nature of the case, that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark, that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore. In such ownership they have their origin. They may and do exist, though the fee in the bed of the river or lake be in the State. If the proprietor owns the bed of the stream or lake, this may possibly give him some ad-

ditional right; but his riparian rights, strictly speaking, do not depend on that fact.”³

The same views are entertained by the Supreme Court of Minnesota, which, in a recent case, says: “In this State it is the settled doctrine that the riparian owner has the fee to low water mark. But, while he only has the fee to low water mark, he has certain rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low water mark, and, to this extent, exclusively to occupy for such and like purposes, the bed of the stream, subordinate only to the paramount public right of navigation. These riparian rights are property, and cannot be taken away without paying just compensation therefor.”⁴

§ 82. **The same continued.**—These views are fully sustained by a decision of the House of Lords, in the late case of *Lyon v. Fishmongers Co.*¹ The question was, whether a riparian proprietor on the banks of a tidal navigable river had any rights or natural easements similar to those which belong to a riparian proprietor upon a non-tidal stream. This question was answered in the affirmative. “I cannot entertain any doubt,” says the Lord Chancellor, “that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner,

³The same questions of right are discussed in the following cases, which, however, do not involve any exercise of the eminent domain power: *Olson v. Merrill*, 42 Wis. 203; *Boorman v. Sunnuchs*, 42 Wis. 233.

⁴*Union Depot etc. Co. v. Brunswick*, 31 Minn. 297, 301.

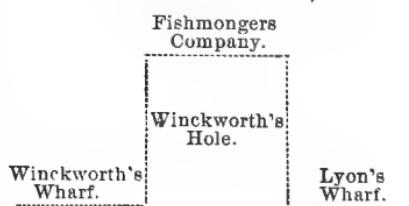
§ 82.

¹Law Reports, 1 Appeal Cases, 662, 674, 682; 1876.

underlying and controlled by, but not extinguished by, the public right of navigation." And from Lord Selborne's opinion we take the following: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *juræ naturæ*, because his land has, by nature, the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream.' Water which is more or less salt by reason of the flow of the tides may still be useful for many domestic and other purposes, though there are no doubt some purposes which fresh water only will serve. The general law as to riparian rights is not stated by any authorities, that I am aware of, in terms which require this distinction, and, if there is any sound principle on which it ought to be made, the burden of proof seems to lie on those who so affirm. As for the public right of navigation, it may well co-exist with private riparian rights, which must of course be enjoyed subject to it; just as where there is no navigation, each riparian proprietor's right is concurrent with, and is so far limited by, the rights of other proprietors. With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights, properly so called, because the word "riparian" is relative to the bank, and not the bed, of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream depends, not upon nature, but on grant or presumption of law."²

²In this case the facts were as follows: Lyon owned a wharf which fronted south on the Thames and west on an inlet extending north about forty feet, known as Winckworth's Hole, at the bottom of which was the defendant company's wharf, and west of the inlet

was Winckworth's wharf, thus:—



This case may safely be regarded as settling the law of England in favor of the conclusions reached in the text. Further confirmation will be found in the cases cited in the note and in the following sections.³

§ 83. The same concluded.—In conclusion, the following rights may be enumerated as appurtenant to property upon public waters:

First. The right to be and remain a riparian proprietor

By an act of parliament, a body called the Conservators of the Thames was constituted, with power to grant to the owner or occupier of any land fronting and immediately adjoining the Thames a license to make any dock or other work immediately in front of his land and into the body of said river, but not so as to take away, alter or abridge any right to which any owner or occupier of lands on the banks of the river, including the banks thereof, was by law entitled. The defendants obtained a license to extend their wharf to the main line of the river, so as entirely to displace the water in Winckworth's Hole and cut off the plaintiff from access to his premises on the west side thereof. The plaintiff applied for an injunction, which was granted by the Vice Chancellor. On appeal, the decision of the Vice Chancellor was reversed, on the ground that the plaintiff had no right or claim which would be taken away, altered or abridged by the execution of the projected improvement. (Law Rep., 10 Ch. App. 679.) The broad ground was taken that a riparian owner on tidal waters has no private right in the waters appurtenant to his land. The latter decision was reversed by

the House of Lords without a dissenting opinion.

³The authorities sustaining these views are here collated, for convenience of examination and comparison with the cases supporting the opposite view, to be found in note 1, § 77: *Yates v. Milwaukee*, 10 Wall. 497; *Delaplaine v. C. & N. W. Ry. Co.*, 42 Wis. 214; *Boorman v. Sunnucks*, *id.* 233; *Diedrich v. N. W. Union Ry. Co.* *id.* 248; *Lyon v. Fishmongers' Company*, L. R. 1 App. Cas. 662; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Miner v. Gilmour*, 12 Moore P. C. 131; *Rose v. Groves*, 5 M. & G. 613; *Attorney General v. Conservators of the Thames*, 1 H. & M. 1; *Gough v. Bell*, 2 Zab. 441; *Ball v. Slack*, 2 Whart. Pa. 538; *Carli v. Stillwater Street R. & T. Co.*, 28 Minn. 373; *Brisbine v. St. Paul & Sioux City R. R. Co.*, 23 Minn. 114; *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297; *Garitee v. Mayor etc. of Baltimore*, 52 Md. 422; *Baltimore & Ohio R. R. Co. v. Chase*, 43 Md. 23; *Myers v. St. Louis*, 82 Mo. 367; *Wilson v. Welch*, 12 Or. 353; *Dutton v. Strong*, 1 Black. 23; *Langdon v. Mayor etc. of New York*, 93 N. Y. 129; *Renwick v. D. & N. W. Ry. Co.*, 49 Ia. 664; *Aff'd*, 102 U. S. 180.

and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.¹

Second. The right of access to the water, including a right of way to and from the navigable part.²

Third. The right to build a pier or wharf out to navigable water, subject to any regulations of the State.³

Fourth. The right to accretions or alluvium.⁴

Fifth. The right to make a reasonable use of the water as it flows past or laves the land.⁵

In addition to these rights which are recognized by the common law, the riparian owner upon public waters is frequently invested with rights by statute. All these rights are subordinate to the regulation and use of the waters by the public for navigation and fishing.

§ 83.

¹ Dissenting opinion, Stevens *v.* Patterson, 34 N. J. L. 532; opinion of Judge Edmonds, dissenting Gould *v.* Hudson River R. R. Co. 6 N. Y. 522; Lyon *v.* Fishmongers Co., L. R. 1 App. Cas. 662; Delaplaine *v.* C. & N. W. Ry. Co., 42 Wis. 214; Rice *v.* Ruddiman, 10 Mich., 125, 142.

² Baltimore & Ohio R. R. Co. *v.* Chase, 43 Md. 23, 35; Garitee *v.* Mayor etc. of Baltimore, 52 Md. 422; Carli *v.* Stillwater Street R. & T. Co., 28 Minn. 373; Brisbene *v.* St. Paul & Sioux City R. R. Co., 23 Minn. 114; cases cited in last note; Yates *v.* Milwaukee, 10 Wall. 497; Union Depot etc. Co. *v.* Brunswick, 31 Minn. 297; Shirley *v.* Bishop, 67 Cal. 543.

³ Yates *v.* Milwaukee, 10 Wall. 497; Dutton *v.* Strong, 1 Black. 23; Delaplaine *v.* C. & N. W. Ry. Co., 42 Wis. 214; Gough *v.* Bell, 2 Zab. 441; Baltimore & Ohio R. R. Co. *v.* Chase, 43 Md. 23, 35; Garitee *v.*

Mayor etc. of Baltimore, 52 Md. 422: East Haven *v.* Hemingway, 7 Conn. 186; State *v.* Sargent. 45 Conn. 358; Grant *v.* Davenport, 18 Ia. 179: Musser *v.* Hershey, 42 Ia. 356, 361; Sturs *v.* Brooklyn, 101 N. Y. 51; Carli *v.* Stillwater Street R. & T. Co., 28 Minn. 373, 380; Brisbene *v.* St. Paul & Sioux City R. R. Co., 23 Minn. 114; Union Depot etc. Co. *v.* Brunswick, 31 Minn. 297; see Ravenswood *v.* Flemings, 22 W. Va. 52; Gregory *v.* Forbes, 96 N. C. 77; Hart *v.* Mayor etc. of Baton Rouge, 10 La. An. 171.

⁴ Girard's Lessee *v.* Hughes, 1 G. & J. 249; Baltimore & Ohio R. R. Co. *v.* Chase, 43 Md. 23, 35; Tomlin *v.* D. B. & M. R. R. Co., 32 Ia. 106, 109; Lockwood *v.* N. Y. & N. H. R. R. Co., 37 Conn. 387; Camden & Atlantic Land Co. *v.* Lippincott, 45 N. J. L. 405.

⁵ Opinion of Judge Edmonds in Gould *v.* Hudson River R. R. Co., 6 N. Y. 522.

§ 84. **Injury to riparian rights a taking.**—According to principles heretofore laid down, it follows that any injury to riparian rights for public use is a taking for which compensation must be made.¹ This general proposition has been sufficiently illustrated in the preceding sections.

The legislature cannot authorize the construction of a railroad between high and low water mark, or anywhere below the line of private ownership, without compensation to the riparian owner.² It is immaterial that a public highway intervenes between the plaintiff's lot and high water mark, if the fee is in the plaintiff.³ Nor can a city, in making an improvement of the channel of a tidal river, deposit mud and debris in front of private property so as to cut off access to the channel.⁴

§ 84.

¹ “These riparian rights founded on the common law, are property, and are valuable, and while they must be enjoyed in due subjection to the rights of the public, they cannot be abridged or capriciously destroyed or impaired. They are rights of which, when once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use, upon due compensation.” *Baltimore & Ohio R. R. Co. v. Chase*, 43 Md. 23, 35; *Diedrich v. N. W. Union Ry. Co.*, 42 Wis. 248; and see the cases cited in the last section. Also *Kingsland v. Mayor etc. of New York*, 35 Hun. 458.

² *Carli v. Stillwater Street R. & T. Co.*, 28 Minn. 373; *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297; *Delaplaine v. C. & N. W. Ry. Co.*, 42 Wis. 214; *Diedrich v. N. W. Union Ry. Co.*, *id.* 248; *Railway Co. v. Renwick*, 102 U. S. 180: S. C. 49 Ia. 664;

Druxy v. Midland R. R. Co., 127 Mass. 571. In this case the court, without entering into any discussion of the matter, or of prior cases, hold that “the right of free access to tide waters is a right the obstruction of which is an element of damage.” *Contra*: *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522; S. C. 12 Barb. 616; *Getty v. Same*, 22 Barb. 617; *Pennsylvania R. R. Co. v. New York etc. R. R. Co.*, 23 N. J. Eq. 157; *Stevens v. Paterson etc. R. R. Co.*, 34 N. J. L. 532; *Tomlin v. D. B. & M. R. R. Co.*, 32 Ia. 106; *Boston & Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 Cush. 605; *Thayer v. New Bedford R. R. Co.*, 125 Mass. 253.

³ *Brisbine v. St. Paul & Sioux City Ry. Co.*, 23 Minn. 114; *Chesapeake & Ohio Canal Co. v. Union Bank*, 5 Cranch, C. C. 509.

⁴ *Garitee v. Mayor etc. of Baltimore*, 52 Md. 422; see also *Langdon v. Mayor etc. of New York*, 93 N. Y. 129.

§ 85. Miscellaneous cases in regard to public waters.—Those States which hold the doctrine of the absolute title of the public to public waters, of course, deny any redress for injury to riparian rights, for the reason that they do not recognize the existence of such rights. It has accordingly been held in such States that the waters of a public stream,¹ or public pond,² may be taken to supply a city with water without compensation to the riparian owner. Also, that interfering with a fishery by a wall or wharf,³ destroying a fording by deepening a public river,⁴ the converting of a private wharf into a public one,⁵ or the building of public wharves in front of private property, to be owned and controlled by the public, are things which may be done without compensation to the riparian owner.⁶

It has been held that a proprietor upon a navigable stream cannot recover for any damages to his property by reason of an authorized dam or bridge across the river.⁷ So the construction of a bridge or highway across the mouth of a cove, which prevented those living on its shore from having access to the sea, was held not to be a taking of any property of such shore owners.⁸ In Ohio it has been held that authority to bridge a navigable stream, did not confer authority to construct a bridge without a draw.⁹ Where a company is au-

§ 85.

¹ *Crill v. Rome*, 47 How. Pr. 398.

² *Fay v. Salem & Danvers Aqueduct Co.*, 111 Mass. 27.

³ *Tinicum Fishing Co. v. Carter*, 61 Pa. S. 21; S. C. 90 Pa. S. 85.

⁴ *Zimmerman v. Union Canal Co.*, 1 W. & S. 346.

⁵ *Hart v. Mayor etc. of Baton Rouge*, 10 La. An. 171; *Shepherd v. New Orleans*, 6 Rob. La. 349.

⁶ *Ravenswood v. Fleming*, 22 W. Va. 52.

⁷ *Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247; *Matter of Water Commissioners*, 3 Edwards,

ch. 290; *Parker v. Cutter Milldam Co.*, 20 Me. 253; *Blackwell v. Old Colony R. R. Co.*, 122 Mass. 1; *Lansing v. Smith*, 8 Cow. 146; S. C. 4 Wend. 9; No recovery can be had for the temporary interruption of navigation while rebuilding a draw. *Hamilton v. Vicksburg etc. R. R. Co.*, 119 U. S. 280.

⁸ *O'Brien v. Norwich & Worcester Ry. Co.*, 17 Conn. 371; *Clark v. Saybrook*, 21 Conn. 313; see matter of *New York, West Shore & Buffalo Ry. Co.*, 101 N. Y. 685.

⁹ *Hickok v. Hine*, 23 Ohio St. 523.

thorized to construct tide-water mills, with suitable basins and other works below high water mark, a railroad company cannot cross the same without compensation for the damages occasioned.¹⁰ It has been held in California that one who erected a house in San Francisco bay had a right of property therein as against the city of San Francisco, which proposed to take the ground it occupied for a public slip.¹¹ One who has planted oysters in public waters for thirty years acquires no rights as against the public.¹² If one have an exclusive right to the wharfage of a pier, the city cannot appropriate the adjoining slip to the purposes of a ferry without compensation.¹³

§ 86. Damages from discharge of sewer.—A municipal corporation has no right to discharge a sewer upon private property, either directly or indirectly, and will be liable for any damage thereby occasioned.¹ Nor has it a right to discharge the same into a private race-way or canal,² or mill pond,³ or even into tide waters so as to impede access to a private wharf or pier.⁴ A city is not liable for not providing sufficient sewerage or sewers of sufficient size,⁵ nor for an injudicious plan of sewerage,⁶ but will of course be liable

¹⁰ *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 16 Pick. 512.

¹¹ *Gunter v. Geary*, 1 Cal. 462.

¹² *Post v. Kreischer*, 32 Hun. 49.

¹³ *Murray v. Sharp*, 1 Bos. 539.

tiff's consent. *Searing v. Saratoga Springs*, 39 Hun. 307.

² *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Elgin Hydraulic Co. v. Elgin*, 74 Ills. 433.

³ *Mills v. Nashua*, 63 N. H. 42.

⁴ *Sleight v. Kingston*, 11 Hun. 594; *Haskell v. New Bedford*, 108 Mass. 208; *Brayton v. Fall River*, 113 Mass. 218; *Breed v. Lynn*, 126 Mass. 367.

⁵ *Carr v. Northern Liberties*, 35 Pa. S. 324; *Wright v. Wilmington*, 92 N. C. 156; *Rozell v. Anderson*, 91 Ind. 591; *Rice v. Evansville*, 108 Ind. 7.

⁶ *Johnston v. District of Columbia*, 118 U. S. 19.

for any damages caused by negligence in their construction or management.⁷

§ 87. Turning water upon land; Seeping; Saturating.—An early and important decision as to what constitutes a taking was made in Connecticut. Defendant was incorporated for the purpose of constructing and maintaining a canal from New Haven to Northampton. The canal was built and water escaped from the canal by a waste wier, and after passing over the land of intermediate proprietors, washed and gullied the plaintiff's land. In a suit for the damages, it was held that any injury to the land which deprived the owner of the ordinary use and enjoyment of it was equivalent to a taking, and that the plaintiff should recover.¹ Causing water to flow upon land is a clear violation of the right of exclusive occupation and enjoyment, which cannot be taken or interfered with without compensation. Numerous cases support this conclusion.² So damage to land caused by percolation and seeping from a mill-pond, canal or reservoir, may be recovered.³ A railroad company which permitted the waste water from a tank to run upon private property, where it caused damage by freezing and otherwise, was held liable for the damages resulting therefrom.⁴

§ 88. Rights respecting surface water.—Respecting surface water which accumulates from rains and melting

⁷ *Lewenthal v. Mayor etc. of New York*, 5 Lans. 532; *Child v. Boston*, 4 Allen, 41; see *Barry v. Lowell*, 8 Allen, 127; *Stanchfield v. City of Newton*, 143 Mass. 110; *Reid v. Atlanta*, 73 Ga. 523.

§ 87.

¹ *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146; affirmed in *Same v. Same*, 15 Conn. 312.

² *How v. Chesapeake & Delaware Canal Co.*, 5 Harr. Del. 245; *Foot v. New Haven & N. Co.*, 23 Conn. 214; *Phlinizy v. City Council of Au-*

gusta, 47 Ga. 260; *Selden v. Delaware & Hudson Canal Co.*, 24 Barb. 362; *Pumfelly v. Green Bay Co.*, 13 Wall. 166; *Arimond v. Same*, 31 Wis. 316. *Contra*: *West Branch & Susquehanna Canal Co. v. Mulliner*, 68 Pa. S. 357.

³ *Ellington v. Bennett*, 59 Ga. 286; *Spilman v. Roanoke Navigation Co.*, 74 N. C. 675; *Wilson v. New Bedford*, 108 Mass. 261; and see *Giffin v. Lawrence*, 135 Mass. 365.

⁴ *C. & N. W. Ry. Co. v. Hoag*, 90 Ills. 339.

snows and seeks a lower level, by force of gravity, without flowing in any defined channel, the rights of an owner of land are very different from those respecting running streams. There is considerable conflict in the decisions upon this subject, but we think it may be laid down as the better and more approved doctrine, that an owner of land has a right to have the surface water flow off from his land by the courses and channels in which it is naturally accustomed to flow, and that the lower proprietor has no right to prevent or hinder such flow by erecting barriers or otherwise.¹ The owner of land also has a right that the proprietor of lands higher than his own shall not, by artificial means, materially increase the flow of such surface water or discharge it upon him in new or unusual channels.² Any proprietor may, of course, consume

§ 88.

¹ Martin *v.* Riddle, 26 Pa. S. 415; Beard *v.* Murphy, 37 Vt. 99; Earle *v.* DeHart, 1 Beasley, 12 N. J. L. (1 Beasley) 280; Ogburn *v.* Conner, 46 Cal. 346; Toote *v.* Clifton, 22 Ohio St. 247; Laney *v.* Jasper, 39 Ills. 46; Porter *v.* Durham, 74 N. C. 767; Butler *v.* Peck, 16 Ohio St. 334; Livingston *v.* McDonald, 21 Ia. 160; Davis *v.* Londgreen, 8 Neb. 43; Charlton *v.* Alleghaney City, 1 Grant's Cases, 208; Adams *v.* Walker, 34 Conn. 466; Gray *v.* Knoxville, 85 Tenn. 99; Wood on Nuisances, (1st ed.) § 386; Washburn on Easements, pp. 427, 429, (2nd ed.) The latter author says: "The owner of the upper field, in such case, has a natural easement, as it is called, to have the water which falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude, in the nature of dominant and servient tenements." p. 429. See Gould on Waters, chap. ix.

² Kauffman *v.* Greismer, 26 Pa. S. 407; Livingston *v.* McDonald, 21 Ia. 160; Hays *v.* Hinkleman, 68 Pa. S. 324; Porter *v.* Durham, 74 N. C. 767; Adams *v.* Walker, 34 Conn. 466; Wood on Nuisances, (1st ed.) § 386; Martin *v.* Riddle, 26 Pa. S. 415. In the latter case the court say: "When two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances. Hence the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of the water is diverted from its natural channel, and a new channel made on the lower ground; nor can he collect into one channel

all the surface water which he finds upon his premises, no matter whence its source, and divert the same whither he pleases, provided he does not injure others by turning it upon them. In other words, the lower estate has no *right* to the continued or uninterrupted flow of such water.³ These rights are subject to the paramount right of every proprietor to make a reasonable use of his own land. In agricultural districts one may plough and cultivate his land, though such use may in some degree change the quantity or direction of the flow of surface water upon a lower proprietor, or may in some degree obstruct the flow of such water on to his premises from higher land.⁴ In determining the question of reasonable use, say the court in the case last cited, all the circumstances of the case would have to be taken into consideration, "and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other land owners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen."

These views in respect to surface water are in conflict with decisions in several of the States.⁵ The courts of these States hold that the owner of land may use or improve it without any regard to the surface water which comes upon or flows

waters usually flowing off into his neighbor's field by several channels, and thus increase the wash upon the lower fields."

³ Buffum *v.* Harris, 5 R. I. 243; Cott *v.* Lewiston, 36 N. Y. 214, 217; Curtiss *v.* Ayrault, 47 N. Y. 73; Broadbent *v.* Ramsbotham, 11 Exch. 602; Angell on Watercourses, § 103 r; Washburn on Easements, p. 435.

⁴ Swett *v.* Cutts, 50 N. H. 439, 446.

⁵ Hovey *v.* Mayo, 43 Me. 322; Bangor *v.* Lansil, 51 Me. 521; Gree-

ley *v.* Maine Central R. R. Co., 53 Me. 200; Morrison *v.* Bucksport & Bangor R. R. Co., 67 Me. 353; Gannon *v.* Hargadon, 10 Allen, 106; Parks *v.* Newburyport, 10 Gray, 28; Luther *v.* Winnisimmet Co., 9 Cush. 171; Ashley *v.* Wolcott, 11 Cush. 192; Sprague *v.* Worcester, 13 Gray, 193; Flagg *v.* Same, *id.* 601; Hoyt *v.* Hudson, 27 Wis. 656; Heth *v.* Fond du Lac, 63 Wis. 228; Waters *v.* Bay View, 61 Wis. 642; Kansas City & Emporia R. R. Co. *v.* Riley, 33 Kan. 374.

over it, that he may erect a barrier so as to prevent its flow on to his land, and may discharge it in new channels or in augmented quantities upon the land below. Property in lands in these States, therefore, does not embrace any rights respecting surface water, and no interference with the flow of such water can constitute a taking. The subject of this section will be found very fully discussed in Gould on Waters, chapter ix.

The conflicting decisions in regard to surface water illustrate the fact that *property* in land differs in the different States. It is not the same in Illinois that it is in the adjoining State of Wisconsin. In the former State it includes certain rights in respect to surface water, in the latter none.

§ 89. What interference with surface water is a taking.

—An interference with any right respecting surface water in the exercise of the eminent domain power is a taking. If a railroad company so constructs its road as to obstruct the flow of surface water and dam it back upon private property, it will be liable therefor.¹ The same rule applies to a municipal corporation executing a public work.² A railroad

§ 89.

¹ *Gillham v. Madison County R. Co.*, 49 Ills. 484; *Illinois & St. Louis R. R. Co. v Fehringer*, 82 Ills. 129; *Chicago, Rock Island & Pacific R. R. Co. v. Casey*, 90 Ills. 514; *Kankakee & Seneca R. R. Co. v. Horan*, 22 Ills. App. 145; *Shane v. Kansas City, St. Joe & C. B. R. R. Co.*, 71 Mo. 237. This is an elaborate case, and overrules prior decisions. Compare *Munkers v. Same*, 72 Mo. 514; *S. C. 60 Mo. 334*, and *Hosher v. Same*, 60 Mo. 329. (But *Shane's* case is in turn overruled in *Abbot v. Kansas City & St. Joseph R. R. Co.*, 83 Mo. 271, and *Jones v. St. Louis etc. Ry. Co.*, 84 Mo. 151). *Bentonville R. R. Co. v. Baker*, 45

Ark. 252; *Payne v. Morgan's La. & Tex. R. R. etc. Co.*, 38 La. An. 164; *Texas Central Ry. Co. v. Clifton*, 2 Tex. App. Civil Cas. 433; *Gulf, Col. & S. F. Ry. Co. v. Helsley*, 62 Tex. 593; *Sabine & East Tenn. R. R. Co. v. Johnson*, 65 Tex. 389; *Gulf, Col. & Santa Fe R. R. Co. v. Holliday*, 65 Tex. 512; *Raleigh & Augusta Air Line R. R. Co. v. Wicher*, 74 N. C. 220; *Drake v. Chicago, R. I. & P. Ry. Co.*, 63 Ia. 302; *Indiana, Bloomington & Western Ry. Co. v. Eberle*, 110 Ind. 542; *Owens v. Missouri Pacific Ry. Co.*, 67 Tex. 679.

² *Bowman v. New Orleans*, 27 La. An. 501; *Maguire v. Centerville*, 76 Ga. 84; *Peters v. Fergus Falls*, 35

company constructed an embankment which formed a barrier to the natural flow of surface water and caused the same to collect in a ditch beside the road, in which it ran for a long distance and was then discharged through a culvert upon the plaintiff's land, where it had not been accustomed to flow before. The company was held liable on the ground of its being a *taking*.³ And, generally, it is a taking to collect surface water into a channel and turn it upon land where it has not been accustomed to flow.⁴ Contrary decisions will be found in those States which hold a different doctrine in regard to surface water.⁵ Damages from the obstruction of

Minn. 549; *Conniff v. San Francis-co*, 67 Cal. 45.

³ *T. W. & W. Ry. Co. v. Morrison*, 71 Ills. 616; *Benson v. Chicago & Alton R. R. Co.*, 78 Mo. 504; *Hogen-sen v. St. Paul*, Minneapolis & Manitoba Ry. Co., 31 Minn. 224. In *Chicago & Alton R. R. Co. v. Glen-ney*, 118 Ills. 487, where damages were claimed in a similar case, it was held that the company was not liable for damages caused by water brought into its ditch by artificial channels connected with the ditch without its consent. And see *Curtis v. Eastern R. R. Co.*, 14 Allen, 55; *Moses v. St. Louis, Iron Moun-tain & Southern Ry. Co.*, 85 Mo. 86; *Mitchell v. New York, Lake Erie & Western R. R. Co.*, 36 Hun, 177; *Rathke v. Gardner*, 134 Mass. 14.

⁴ *McCormick v. Kansas City, St. Joe & C. B. R. R. Co.*, 70 Mo. 359; *Arn. v. City of Kansas*, 4 McCrary, 558; *G. C. S. F. Ry. Co. v. Donahoo*, 59 Tex. 128; *Chase v. New York Central R. R. Co.*, 24 Barb. 273; *Crawfordsville v. Bond*, 96 Ind. 236; *Cubit v. O'Dett*, 51 Mich. 347; *Sei-fert v. Brooklyn*, 101 N. Y. 136; *West Orange v. Field*, 37 N. J. Eq.

600; *Huddlestun v. Borough of West Bellvue*, 111 Pa. S. 110; *G. H. & S. A. Ry. Co. v. Tait*, 63 Tex. 223; *Fort Worth & Denver City Ry. Co. v. Scott*, 2 Tex. App. Civil Cas. p. 187; *Jacksonville R. R. Co. etc. v. Cox*, 91 Ills. 500; *Aurora v. Love*, 93 Ills. 521; *Blakeley v. Devine*, 36 Minn. 53; *Pye v. Mankato*, 36 Minn. 373; *Whalley v. Lancashire & Yorkshire Ry. Co.*, 13 L. R. Q. B. 131; S. C. affd. 16 Same, 227.

⁵ *Greeley v. Maine Central R. R. Co.*, 53 Me. 200; *Morrison v. Bucks-port & Bangor R. R. Co.*, 67 Me. 353; in this case the court say that "any proprietor of land may control the flow of mere surface water over his premises, according to his own wants and interests, without obligation to any proprietor either above or below." *Cassidy v. Old Colony R. R. Co.*, 141 Mass. 174; *A. T. & S. F. R. R. Co. v. Ham-mer*, 22 Kan. 763; *O'Connor v. Fond du Lac, A. & P. Ry. Co.*, 52 Wis. 526; *Wagner v. Long Island R. R. Co.*, 2 Hun, 633; *New Albany & Salem R. R. Co. v. Higman*, 18 Ind. 77; *Cairo & Vincennes R. R. Co. v. Stevens*, 73 Ind. 278; *Clark v. Han-*

surface water by an insufficient culvert, or from allowing ditches to become filled up,⁶ have been held to be recoverable on the ground of negligence.⁷

§ 90. Subterranean waters.—In regard to water which permeates the soil but is not collected in any stream under ground, the owner of the soil may use or divert it as he sees proper, provided, of course, that he does not turn it upon others in an unreasonable manner, to their injury.¹ Accordingly, where the construction of a railroad resulted in draining off a tract of low, marshy ground which had served as a sort of reservoir for the plaintiff's mill, so that in dry times the supply was insufficient and in times of rain too great, it was held that the plaintiff had no cause of action.² So where a well, dug by a railroad on its own land, drained a spring on adjoining land.³ In regard to subterranean streams, there is much confusion among the authorities as to the rights of the owner of the soil. The better opinion, perhaps,

nibal & St. Joe R. R. Co., 36 Mo. 202; Hosher *v.* K. C. St. J. & C. B. R. R. Co., 60 Mo. 329; Munkres *v.* Same, 60 Mo. 334; Same *v.* Same, 72 Mo. 514. It has been held in Massachusetts that such damages may be taken into consideration in assessing compensation under the statute. Walker *v.* Old Colony & Newport R. R. Co., 103 Mass. 10.

⁶ Carriger *v.* R. R. Co., 7 Lea. Tenn. 388; Mississippi Central R. R. Co. *v.* Caruth, 51 Miss. 77; Same *v.* Mason, 51 Miss. 234; Johnson *v.* Atlantic & St. Lawrence R. R. Co., 35 N. H. 569; German Theological School *v.* Dubuque, 64 Ia. 736; Waterman *v.* C. & P. R. R. Co., 30 Vt. 610.

⁷ For cases in respect to damages from surface water resulting from the grading and improvement of streets, see *post*, §103.

§ 90.

¹ Chasemore *v.* Richards, 7 H. L. Cas. 349; 5 H. & N. 982; 2 H. & N. 168; Rawston *v.* Taylor, 11 Exch. 367; Greenleaf *v.* Francis, 18 Pick. 117; Ocean Grove Camp Meeting Association *v.* Asbury Park, 40 N. J. Eq. 447; Roath *v.* Driscoll, 20 Conn. 533; Wood on Nuisances (1st ed.) § 383; Washburn on Easements, pp. 452-457; Gould on Waters, § 280.

² Waffle *v.* New York Central R. R. Co., 58 Barb. 413; Regina *v.* Metropolitan Board of Works, 3 B. & S. 710.

³ Hougan *v.* Milwaukee & St. Paul Ry. Co., 35 Ia. 558; Aldrich *v.* Cheshire R. R. Co., 21 N. H. 359; and see Lybe's Appeal, 106 Pa. S. 626, and Roath *v.* Driscoll, 20 Conn. 532; Ocean Grove Camp Meeting Association *v.* Asbury Park, 40 N

is, that the same rules apply to them as to percolating waters.⁴ Some confusion exists in regard to the pollution of water coursing in subterranean streams or percolating through the ground.⁵ It seems to us, however, that the better doctrine is, that one has no more right to send impurities into the soil below the surface than he has into the air above the surface. One who creates or permits noxious and offensive substances upon his premises ought to take care that they do not escape either in a fluid or gaseous form into or upon his neighbor's land.⁶ The owner of land has a right not to be injured in this manner, and an interference with this right would be a taking, if done under the power of eminent domain.

§ 91. Interference with natural barriers against water.

—The owner of land has a right to the protection afforded by natural barriers against the overflow of streams or the

J. Eq. 447. But under a statute rendering a city liable for "damages occasioned by the laying, making or maintaining" of a sewer, it was held liable for draining a well on adjoining land. *Trobridge v. Brookline*, 144 Mass. 139.

⁴ *Lybe's Appeal*, 106 Pa. S. 626; *Smith v. Adams*, 6 Paige, 435; *Wheatley v. Baugh*, 25 Pa. S. 528; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282; *Roath v. Driscoll*, 20 Conn. 532; *Brown v. Illius*, 25 Conn. 583; *Hale v. McLea*, 53 Cal. 578; *Haldeman v. Bruckhart*, 45 Pa. S. 514; *Angell on Watercourses*, pp. 150-159; *Washburn on Easements*, pp. 441-448; *Gould on Waters*, § 281.

⁵ *Hodgkinson v. Ennor*, 4 B. & S. 229; *Womersley v. Church*, 17 L. T. Rep. N. S. 190; *Brown v. Illius*, 25 Conn. 583; *Greencastle v. Hazlett*, 23 Ind. 186; *Sherman v. Fall*

River Iron Works Co., 5 Allen, 213. In *Greencastle v. Hazelett*, a bill was filed to enjoin the City of Greencastle from establishing a cemetery on a certain lot, on the ground that it would corrupt the waters of a valuable spring on plaintiff's land. The court held the city was the owner of the subterranean streams of its own land and would not be liable for any damages resulting in the manner alleged in the bill. But a different view was taken by the court in a similar case in *Clark v. Lawrence*, 6 Jones Eq. 83.

⁶ *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115, reversing S. C. 26 L. R. Ch. Div. 194; *Snow v. Whitehead*, 27 L. R. Ch. Div. 588; *Sherman v. Fall River Iron Works*, 5 Allen, 213; *Brown v. Illius*, 25 Conn. 583.

action of waves and tides.¹ When this right is violated in the exercise of the right of eminent domain, and damage ensues, the owner is entitled to compensation. The leading case upon this question is *Eaton v. B. M. & C. R. R. Co.*, 51 N. H. 504, which has already been given at length in the preceding chapter.² Similar decisions have been made in New York.³

In this connection we call attention to an important case which arose in Milwaukee, and which seems to us to have been wrongly decided.⁴ The plaintiff owned lots on the Milwaukee River, near Lake Michigan, upon which he had valuable improvements. The city, under authority of a special act of the legislature, made an artificial channel, 260 feet wide and

§ 91.

¹ *Eaton v. R. R.*, 51 N. H. 504; *Robinson v. New York & E. R. R. Co.*, 27 Barb. 512; *Attorney General v. Tomline*, 12 L. R. Ch. Div. 214; 48 L. J. Ch. Div. 593; S. C. on appeal, 14 L. R. Ch. Div. 58; 49 L. J. Ch. Div. 377. In the latter case Cotton L. J. states the case as follows (14 L. R. Ch. Div. p. 68): "The plaintiff's land is situated a short distance from the sea, and the only land intervening between the plaintiff's land and the sea is the land of the defendant, and the complaint is that the defendant is so dealing with that land, by removing the shingle which constitutes the whole of the surface of that land, that the sea will at a time which cannot positively be stated, but within a reasonable time, undermine and destroy the land and the building of the plaintiff upon his land. * * * Then the question which we have to consider is this, whether or no that prospective or apprehended injury to the land of the plaintiff is

one, which, if done, would be actionable, and one which the court ought to restrain by injunction. I am of opinion that it is." And the case was so determined in both courts.

² *Ante*, § 58.

³ *Brown v. Cayuga & Susquehanna R. R. Co.*, 12 N. Y. 486; *Robinson v. N. Y. & E. R. R. Co.*, 27 Barb. 512. In the latter case the court say: "The excavation and removal of the banks of the stream left the water to flow out of the natural channel of the creek and to overflow the plaintiff's premises. And this overflow the jury have found would not have happened but for such alteration and excavation of the natural banks of the stream. For the damages resulting from such alteration and excavation, I think this action clearly maintainable." And see *Gulf etc. Ry. Co. v. Jones*, 63 Tex. 524.

⁴ *Alexander v. City of Milwaukee*, 16 Wis. 247, 1862.

twelve or fourteen feet deep, from a point near the plaintiff's property to the lake. In consequence of this opening, when the winds were from the east, the waters of the lake were driven in upon the plaintiff's property, producing very serious loss and damage. A recovery was denied, on the ground that a municipal corporation, making a great public improvement, solely for the public benefit, in the precise way authorized by the legislature and in a careful and discreet manner, was not liable for consequential damages resulting to private property therefrom. A distinction was taken between a public corporation acting for the public benefit and a private corporation executing a public work for the sake of private emolument. It was virtually conceded that if the cut had been made by an individual upon his private property for his own use, he would have been liable. But on what grounds would he have been liable? Clearly on the ground that the plaintiff had a right to have the natural barrier between his property and the lake remain in the condition in which nature had placed it. The legislature could not authorize this right to be taken from him by a public or private corporation, for any purpose, without compensation.⁵

⁵The correctness of this decision has been questioned. See *Pumfelly v. Green Bay Co.*, 13 Wall.

166, 180; *Arimond v. Green Bay Co.*, 31 Wis. 316.

CHAPTER V.

WHAT CONSTITUTES A TAKING. STREETS AND HIGHWAYS.

I. *Street Grade Cases.*

§ 92. **Early English cases.**—The earliest case upon this subject is that of *Leader v. Moxon*,¹ decided in 1773, in the English Court of Common Pleas. Certain commissioners were authorized by act of parliament “to pave, repair, sink or alter certain streets in such manner as they should think fit.” Defendants, acting under these commissioners, raised the grade of a street some six feet in front of plaintiff’s house, intercepting the light and preventing access thereto. The plaintiff brought suit for the damages so occasioned to his premises, and the action was sustained. The case is badly reported and the ground of the decision is hard to make out. But Gould J. is reported as saying: “Every man of common sense must understand that this act of Parliament ought to be carried into execution without doing such enormous injury to individuals as hath been manifestly done to the plaintiff in this case. Whenever a trust is put in commissioners by act of parliament, if they misdemean themselves in that trust, they are answerable criminally in the King’s Bench; if they aggrieve and damnify the subject, as they have done in the present case, they are answerable in this court, *civiliter* in damages to the party injured.² Blackstone J. says: “I am of the same opinion. * * * I think the commissioners have acted arbitrarily and tyrannically, and that the damages are too small.” This case, instead of becoming an authority, was speedily overruled and explained away. Twenty years later Lord Kenyon laid down

§ 92.

¹ 3 Wils. 461; ² Bl. 924.

² 3 Wils. 467.

the law in the case of *The Governor and Company of the British Cast Plate Manufacturers v. Meredith*,³ which has ever since been a leading case, both in England and America. Certain commissioners, acting under and in accordance with an act of parliament, raised the street in front of the land of the plaintiff who brought suit for damages. Lord Kenyon says: “If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction. * * * Some individuals suffer an inconvenience under all these acts of parliament; but the interests of the individual must give way to the accommodation of the public.” His Lordship questioned the correctness of the report of *Leader v. Moxon*, and explained it on the ground that the commissioners in that case had abused their authority and acted in an arbitrary and abusive manner.⁴ The principle of this decision is that no action will lie for the doing of that which is authorized by an act of parliament; and the reason is that an act of parliament is, in England, the supreme law of the land. The same principle has been reiterated in numerous cases.⁵

³ 4 T. R. 794, 1792.

⁴ *Leader v. Moxon* has been similarly explained in other cases. In *Sutton v. Clark*, 6 Taunton, 28, 1815, the court, referring to it, say: “The court thought they [the commissioners in that case] were acting in a most tyrannical and oppressive manner, and that, though they had a right to pave, and perhaps to raise, the street, they had acted so arbitrarily, that they were answerable.” Also in *Boulton v.*

Crowther; 2 B. & C. 703, 708, 1824; S. C. 9 E. C. L. R. 306, Bailey J. said: “In *Leader v. Moxon* the decision proceeded upon the ground that the commissioners had exceeded their authority in raising the pavement so as to obstruct the plaintiff’s windows.” So Littledale to the same effect.

⁵ *Sutton v. Clark*, 6 Taunton, 28; 1 E. C. L. R. 493; *Jones v. Bird*, 5 B. & Ald. 837; 7 E. C. L. R. 455; *Hall v. Smith*, 2 Bing. 156; 9 E. C.

§ 93. Value of English precedent in constitutional questions.—The English cases to which we have referred have been much cited in America to show that the owner of property damaged by works of a public nature, such as a change of grade, cannot recover compensation for such damage. But it is evident that they have no proper application in such cases. In England, as we have said, an act of parliament is the supreme law of the land. Courts cannot declare that wrong which an act of parliament has made lawful. In all cases of damage from the execution of public works, the English courts have simply to inquire whether the works were authorized by law and whether they have been executed with care and skill. If so, there can be no recovery unless a remedy is provided by the act. But in the United States an act of the legislature may be no justification whatever. The legislature is powerless to do that which the constitution prohibits. And, in case of damages caused by public works, it is necessary in this country to inquire, not only whether the works are authorized by law and have been carefully executed, but also whether the damage amounts to a *taking* of property within the meaning of the constitution. In solving this last question the English cases afford us no aid, or practically none. This distinction is frequently lost sight of, and we wish to insist upon it here, once for all.¹

L. R. 524; *Boulton v. Crowther*, 2 B. & C. 703; 9 E. C. L. R. 306; *The King v. The Bristol Dock Co.*, 6 B. & C. 181. In *Boulton v. Crowther*, the act provided for compensation for property *taken*, and it was insisted that to diminish its value by cutting off access, etc., was a *taking* within the act, but it was held otherwise.

§ 93.

¹ This distinction is pointed out by the Supreme Court of Ohio in *Crawford v. Village of Delaware*, 7

Ohio St. 459, 466, 1857, from which we quote as follows:

"The power of the English parliament is supreme. It would be quite as absurd for English courts to pronounce an act of parliament, adopted by the three Estates of the Realm, unconstitutional, or unauthorized, as for this court to pronounce a provision of the Constitution of the United States unconstitutional and void. 'What the parliament doeth, no authority on earth can undo.'

§ 94. Leading cases in the United States. Callendar v. Marsh.—The leading case in this country is that of *Callendar v. Marsh*, 1 Pick. 417, 430, decided in 1823. The defendant, acting as highway surveyor for the city of Boston, cut down the street in front of plaintiff's house so as to lay bare its walls and endanger its falling, to remedy which he was obliged to incur large expense. The court having determined that the work was authorized by legislative enactment, proceeded to consider whether the plaintiff's property was *taken* within the meaning of the constitution, and whether he could recover upon any ground. This question they solved in the negative. The court held this provision applied only to property actually taken and appropriated by the government, and not to consequential damages; that when the highway

"An authority, therefore, derived from the Supreme power of the State, or, in other words, operations undertaken and conducted by virtue of an act of parliament, cannot be deemed unauthorized in view of the English law, or lay any foundation for a common law action for damages. If, indeed, the supreme power of a State authorizes and directs an act to be done, who has the power to pronounce that act unlawful? No coördinate power exists to control it. The grantee of a franchise or a public agent, so long as he does not transcend the authority conferred upon him by act of parliament, in the exercise even of eminent domain or its incidents, represents the supreme power of the State; and just so far as the same supreme power has provided the mode and means of compensation for the violation of the rights of private property, in the exercise of eminent domain or its incidents, there is a remedy; but

no further. It is true, that it is the duty of parliament, and one which is in general scrupulously performed, to provide compensation to individuals who are deprived of their property, for the public use, or who are injuriously affected by the erection of public works. But there is no power over parliament to enforce this duty, or to create a liability, beyond what parliament specifically recognizes and provides. Hence the English courts, in holding that an action against commissioners of streets or municipal officers or their agents, acting under the authority of an act of parliament, will not lie for damages occasioned by the construction of a public work, any further than is specially provided for by the law itself, do not simply decide a principle of municipal law, but announce a constitutional principle, inseparable from a recognition of the fiat of the supreme power of State."

was established, whether by condemnation or otherwise, the public acquired not only the right to pass over the surface in the state it was in when first made a street, but also the right to repair and amend the street in such manner as the public needs might from time to time require; that the liability to damages by such alterations was a proper subject for the inquiry of those who laid out the road, or, if the title was acquired by purchase, the proprietor might claim compensation not only for the land taken, but for such damages, and that persons purchasing upon a street after the lay-out, were supposed to indemnify themselves against loss by reason of further improvements or to take the chance of such improvements. The court also say that the same principle applied as in case of adjoining proprietors.¹ This case has had an important influence in moulding the law of this country.

§ 94.

¹ On this point the court say: "The streets on which the plaintiff's house stands had become public property by the act of laying them out conformably to law, and the value of the land taken must have been either paid for, or given to the public, at the time, or the street could not have been legally established. Being legally established, although the right or title in the soil remained in him from whom the use was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right also to repair and amend the street, and, for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient. Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing

population of the city may require, in order to render the passage to and from the several parts of it safe and convenient, and, as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit. The standing laws of the land giving to surveyors the power to make these improvements, every one who purchases a lot upon the summit or on the decline of a hill, is presumed to foresee the changes which public necessity or convenience may require, and may avoid or provide against a loss." And again, "We can perceive no difference in the principle on which this action is founded, and that which was involved in the case of *Thurston v. Hancock*, 12 Mass. 220." The latter is a leading case as to the rights of adjoining proprietors, in which the rule is laid down that if a man

§ 95. Other early cases.—A few years after the decision in *Callendar v. Marsh*, the same question arose in Tennessee and Kentucky, and was decided in the same way, though without reference to the case from Massachusetts. In both the former States, the law applicable to adjoining proprietors was made the basis of the rule laid down.¹ The question was disposed of in a summary way in an early case in Pennsylvania by a reference to the English cases, and a sweeping assertion that the defendant corporation had the power and could not be made responsible for mere consequential injury.²

The question was elaborately considered by the New York Court of Appeals in *Radcliff's Executors v. Mayor, etc. of Brooklyn*, 4 N. Y. 195, 203, 1850. The street was cut down in front of plaintiff's premises so that his soil, shrubbery, fences, etc., fell into the street, and he was put to great expense in restoring his premises and adapting them to the new grade. The case was said "to fall within the principle that a man may enjoy his land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which may be sustained by an adjoining land owner." "In levelling and grading the street," says the court, "they (the defendants) were at work on their own land, doing a lawful act for a lawful purpose." The conclusion follows that they could not be liable, for no person is responsible for the consequences of a lawful act done upon his own property. It was also held upon authority and upon principle that the damages complained of were not a *taking* within the constitution, and consequently that the laws authorizing the acts which produced the injuries were valid

does what he has a right to do on his own land, without trespassing upon any law, custom, title or possession, he is not liable for injurious consequences which may result, unless he acts maliciously.

§ 95.

¹ *Keasy v. City of Louisville*, 4 Dana, Ky. 154, 1836; *Humes v. Mayor etc. of Knoxville*, 1 Humph. 403, 1839.

² *Green v. Borough of Reading*, 9 Watts, 382.

and a complete justification. "If the statute under which the defendants acted is constitutional, it is settled that they are not answerable to third persons, whatever damage they may have suffered. Indeed, it is absurd to say, that public officers may be liable to an action for what they have done under lawful authority, and in a proper manner."³

This case, with that of *Callendar v. Marsh*, *ante*, may be considered as having settled the law of this country as respects claims for damages caused by elevating or depressing the grade of streets. Many cases in other States have been disposed of by a simple reference to these two authorities.

§ 96. The general doctrine.—In conformity with the foregoing cases, it has been held in nearly every State in the Union, that there can be no recovery for damages to abutting property resulting from a mere change of grade in the street in front of it, there being no physical injury to the property itself, and the change being authorized by law.¹

³ The same court, in *Cogswell v. New York, New Haven & Hartford R. R. Co.*, 103 N. Y. 10, in referring to Radcliff's case, say: "the case carries to the utmost limit the right of the legislature, for public reasons, to interfere with private property to the injury of the owner without making compensation."

§ 96.

¹ *Simmons v. City of Camden*, 26 Ark. 276, 1870; *Burritt v. New Haven*, 42 Conn. 174; *Dorman v. City of Jacksonville*, 13 Fla. 538, 1870; *Markham v. Atlanta*, 23 Ga. 402, 1857; *Mayor etc. of Macon v. Hill*, 58 Ga. 595, 1877; *Fuller v. Atlanta*, 66 Ga. 80, 1880; *Roberts v. Chicago*, 26 Ills. 249, 1861; *Murphy v. Chicago*, 29 Ills. 279, 1862; *City of Quincy v. Jones*, 76 Ills. 231,

1875; *Snyder v. Rockport*, 6 Ind. 237, 1855; *La Fayette v. Spencer*, 14 Ind. 399, 1860; *Macy v. Indianapolis*, 17 Ind. 267, 1861; *La Fayette v. Spencer*, 19 Ind. 326, 1862; *Columbus v. Storey*, 33 Ind. 195, 1870; *Terre Haute v. Turner*, 36 Ind. 522, 1871; *Kokomo v. Mahan*, 100 Ind. 242; *North Vernon v. Voegler*, 103 Ind. 314; *Rensselaer v. Leopold*, 106 Ind. 29; *Creal v. Keokuk*, 4 G. Greene (Ia.) 47, 1853; *Freeland v. City of Muscatine*, 9 Ia. 461, 1859; *Cole v. Same*, 14 Ia. 296, 1862; *Ellis v. Iowa City*, 29 Ia. 229, 1870; *Russell v. City of Burlington*, 30 Ia. 262, 1870; *City of Burlington v. Gilbert*, 31 Ia. 356, 1871; *Methodist Episcopal Church v. Wyandotte*, 31 Kan. 721; *Keasy v. City of Louisville*, 4 Dana (Ky.) 154, 1836; *Newport & Cincinnati*

§ 97. Ratio decidendi of these cases.—An examination of the cases cited in the last section shows that, so far as the courts have attempted to reason out their decisions, their conclusions have been made to rest upon one or more of the following grounds:

First. That, when a street or highway is laid out, compensation is given once for all, not only for the land taken, but for damages which may at any time be occasioned by adapting the surface of the street to the public needs.¹

Bridge Co. v. Foote, 9 Bush (Ky.) 264, 1872; *Reynolds v. Shreeveport*, 13 La. An. 426, 1858; *Briggs v. Lewiston & Auburn Horse R. R. Co.*, 79 Me. 363; *Callendar v. Marsh*, 1 Pick. 418, 1828; *Peddicord v. Baltimore etc. H. R. R. Co.*, 34 Md. 463, 1871; *City of Pontiac v. Carter*, 32 Mich. 164, 1875; *Lee v. City of Minneapolis*, 22 Minn. 13, 1875; *Henderson v. Minneapolis*, 32 Minn. 319; *Genois v. St. Paul*, 35 Minn. 330; *St. Louis v. Gurno*, 12 Mo. 414, 1849; *Taylor v. St. Louis*, 14 Mo. 20, 1851; *Hoffman v. St. Louis*, 15 Mo. 651, 1852; *Shattner v. City of Kansas*, 53 Mo. 162, 1873; *Nebraska City v. Lampkin*, 6 Neb. 27, 1877; *Plum v. Morris Canal Co.*, 10 N. J. Eq. 256, 1854; *Fish v. Mayor etc. of Rochester*, 6 Paige, 268, 1837; *Graves v. Otis*, 2 Hill 466, 1842; *Waddell v. Mayor etc. of New York*, 8 Barb. 95, 1850; *Radcliff's Executors v. Mayor etc. of Brooklyn*, 4 N. Y. 195, 1850; *Conklin v. New York, Ontario & Western Ry. Co.*, 102 N.Y. 107; *Green v. Borough of Reading*, 9 Watts, 382, 1840; *Henry v. Pittsburgh & Allegheny Bridge Co.*, 8 W. & S. 85, 1844; *O'Connor v. Pittsburgh*, 18 Pa. S. 187, 1851; *In re Ridge Street*, 29 Pa. S. 391, 1857; *City of Reading*

v. Keppelman, 61 Pa. S. 233, 1869; *Rounds v. Mumford*, 2 R. I. 154, 1852; *Humes v. Mayor etc. of Knoxville*, 1 Humph. (Tenn.) 403, 1839; *Penniman v. St. Johnsbury*, 54 Vt. 306, 1881; *Smith v. City Council of Alexandria*, 33 Gratt. 208, 1880; *Kehrer v. Richmond City*, 81 Va. 745; *Goszler v. Georgetown*, 6 Wheat. 593, 1821; *Smith v. Corporation of Washington*, 20 How. 135, 1857; *Transportation Co. v. Chicago*, 99 U. S. 635; see also cases cited in the succeeding sections.

§ 97.

¹ *Callendar v. Marsh*, 1 Pick. 418; *Skinner v. Hartford Bridge Co.*, 29 Conn. 528; *Rounds v. Mumford*, 2 R. I. 154; *Fellows v. City of New Haven*, 44 Conn. 240; *City of Pontiac v. Carter*, 32 Mich. 164, 172. In the latter case the court, per Cooley, J., say: "The injury in all these cases is incidental to an exercise of public authority, which in itself must be assumed to be proper, because it is had by a public body acting within its jurisdiction, and not charged with malice or want of good faith. It must, therefore, be regarded as an injury that every citizen must contemplate as one that, with more or less like-

Second. That the public, as proprietors of the street, stand in the same relation to the abutting lot owners as an individual would who owned the strip of land constituting the street, and that their rights, duties and liabilities are determined by the same rules as apply to adjoining proprietors of land.²

Third. That this species of damages is not a *taking* within the meaning of the constitution, and, consequently, if the works occasioning the damage are authorized by law, no action will lie.³ We shall advert to these principles further on.⁴

§ 98. **The Ohio cases.**—The decisions in Ohio are exceptional. The first cases went up on a demurrer to the

lihood, might happen. When the land was taken for a street, if damages were assessed, they would cover this possible injury, and it could never be known subsequently that the jury, in estimating them, did not calculate upon a change in the grade of the proposed street as probable, and attach considerable importance to it in their estimate. It is matter of common observation, that much beyond the value of land taken is sometimes given in these cases: not because of any present injury, but because contingencies cannot be fully foreseen. And the rule in such cases is, that all possible damages are covered by the award, except such as may result from an improper or negligent construction of the public work, or from an excess of authority in constructing it. In other words, the award covers all damages resulting from the doing in a proper manner whatever the public authorities have the right to do; but it does not cover injuries from negligence or from trespasses. And one who

gives his land for the purpose of a public way is supposed to contemplate all the same contingencies, and to make the gift on the supposition that the incidental benefits will equal or exceed all possible incidental injuries.”

² *Callendar v. Marsh*, 1 Pick. 418; *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195; *Quincy v. Jones*, 76 Ills. 231; *Waddell v. Mayor etc. of New York*, 8 Barb. 95; *Humes v. Mayor etc. of Knoxville*, 1 Humph. 403; *Simmons v. City of Camden*, 26 Ark. 276; *Smith v. Corporation of Washington*, 20 How. 185. The analogy is expressly denied in some cases: *Fellows v. New Haven*, 44 Conn. 240, 253; *Goodall v. Milwaukee*, 5 Wis. 32.

³ *Callendar v. Marsh*, 1 Pick. 418; *Macy v. Indianapolis*, 17 Ind. 267; *Radcliff v. Brooklyn*, 4 N. Y. 195; *Wilson v. New York*, 1 Denio, 595; *Reynolds v. Shreveport*, 13 La. An. 426; *City of Pontiac v. Carter*, 32 Mich. 164.

⁴ *Post*, §§ 100, 114, 122.

declaration. In *Goodloe v. Cincinnati*,¹ the suit was for damages caused to plaintiff's property by cutting down a street, and the declaration alleged that it was done *illegally* and *maliciously*. In *Smith v. Cincinnati*,² the facts were the same, except that the acts were only charged to have been done *illegally*. In both cases a demurrer to the declaration was overruled, and in both cases there were afterwards trials and judgments for the plaintiff in the court below upon the general issue. These demurrers would not have been decided differently, probably, in any other State. In *Scovil v. Geddings*,³ the defendants, by authority of the trustees of Cleveland, lowered the street in front of plaintiff's property, and the suit was for damages thereby occasioned. The court held that such damages were not a *taking* within the constitution, and that the action would not lie. The leading case of *Callendar v. Marsh* was cited with approval. This case is explained or *reconciled* in the later decisions by distinguishing between the corporate authorities and their agents, holding that the latter would not in any event be personally liable for doing that, as agents of the corporation, which the corporation had power to do.⁴ This, however, would be contrary to the general rule that in actions *ex delicto* agents and principals are alike responsible.

The question of the liability of the corporation was presented to the court in a case which went up shortly after from the same city,⁵ and it was again held that such damages did not constitute a taking or give any right of action, and *Callendar v. Marsh* and *Scovil v. Geddings* are cited with approbation. In both these cases in the 7th and 8th Ohio it appears that a statute gave a remedy in such cases, but the decisions, unless possibly the latter, are not put upon the ground that the statutory remedy was exclusive. It re-

§ 98.

¹ 4 Ohio, 500, 1831.² 4 Ohio, 515, 1831.³ 7 Ohio, Pt. 2, 211, 1836.⁴ See *Crawford v. Village of Delaware*, 7 Ohio St. 459.⁵ *Hickox v. Cleveland*, 8 Ohio, 543, 1838.

mained for the court to discover in a later case that this was the ground of decision in those cases.⁶

In *Rhodes v. Cleveland*,⁷ it appeared that the city cut ditches and watercourses along the streets in such a manner as to cause water to flow upon and wash away the plaintiff's land. The defendant was held liable, but not upon any very tangible grounds. The decision was not based upon constitutional right, but rather upon natural equity and the maxim *sic utere tuo ut alienum non laedas*.⁸ This case is the starting point of the *peculiar* doctrine of the Ohio court, but it is to be observed that it was not for damages caused by a change of grade, but by a physical invasion of the property, and belongs to a class in which a recovery has been allowed in many other States.⁹ The next case is that of *McComb v. Town of Akron*,¹⁰ which was twice in the Supreme Court. McComb had erected a store upon his lot and adjusted it to

⁶ 10 Ohio, 159, 1840.

⁷ 10 Ohio, 159, 1840.

⁸ The court say: "Upon the whole, then, we believe that *justice* and *good morals* require that a corporation should repair a consequential injury, which ensues from the exercise of its functions, and that if we go further than adjudicated cases have yet gone, we do not transcend the line, to which we are conducted by acknowledged principles. * * * That the rights of one should be so used, as not to impair the rights of another, is a principle of morals, which from very remote ages has been recognized as a maxim of law. If an individual, exercising his lawful powers, commit an injury, the action on the case is the familiar remedy: if a corporation, acting within the scope of its authority, should work wrong to another, the

same principle of ethics demands of them to repair it, and no reason occurs to the court, why the same remedy should not be applied, to compel justice from them." The fault with this reasoning is, *first*, that courts do not administer law upon ethical principles, and, *second*, that individuals cannot commit *injuries* in the proper exercise of their lawful powers. An *injury* is the violation of a *legal right*, and *lawful power* in one to violate the *legal right* of another is an absurdity, a contradiction in terms. Of course a person may exercise lawful powers with negligence and so render himself liable, but then the liability is based upon the *negligence* and not on the exercise of the powers.

⁹ *Post*, § 103.

¹⁰ 15 Ohio, 474, 1846; *Town of Akron v. McComb*, 18 Ohio, 229, 1849.

the grade of Howard street, upon which his lot abutted. There was at this time, however, no established grade. Afterwards the town lowered the grade, in consequence of which the value of the plaintiff's property was greatly depreciated, though it was not otherwise damaged. The corporation was held liable "to the extent of the real and substantial injury done to the plaintiff's property by its act of leveling the street." The decision appears to rest upon the broad ground of natural right and justice. Thus the court say: "If a municipal corporation, for the good of all within its limits, see proper to cut down a street, it is nothing more than right that an injury there done to a single individual should be shared by all."¹¹ In all these cases the question whether a corporation can be made liable in an action of tort is much discussed, with an implication that if that question is answered in the affirmative its liability in this class of cases would necessarily follow.¹²

The unsatisfactory nature of these decisions seems to have impressed itself upon the Ohio court, and, when the question next comes up for decision, we find them making a careful review of all the prior cases; and, although their results are approved and adhered to, the loose grounds upon which they rest are tacitly abandoned and their doctrine established upon

¹¹ 15 Ohio, p. 480.

¹² Bronson, C. J., of the New York Court of Appeals, referring to *McComb v. Akron*, 15 Ohio, 474, says: "If the case goes on the ground that the corporation, though it had ample authority to grade the street, did it in an illegal and improper manner, and thereby caused an injury to the plaintiff's property, the decision is well enough. But if the doctrine of the case be, that the corporation was answerable, because it was a corporation, and when a natural person, acting under the like authority, would

not have been liable, the decision is entitled to no respect whatever. If the court intended to hold, that persons, whether artificial or natural, were answerable for the damages which might result to an adjoining land-owner from the grading of the street, though the act was done under ample authority, and in a proper manner, the case is in conflict with many decisions, and cannot be law beyond the State of Ohio." *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195, 205, 1850.

a new basis. The case referred to is that of *Crawford v. Village of Delaware*.¹³ In that case, the plaintiff had built a house upon his lot, with reference to the grade of the adjacent street as it then existed. Afterwards the defendant established a grade for the street some six feet below the natural surface, and made the necessary excavation opposite the plaintiff's premises. The court instructed the jury, among other things, "that when such corporation neglects to fix any grade, and none is established for a street, and the owner of a lot builds upon and improves his lot in reference to the then existing state of the road or street used in front of his lot, and uses ordinary discretion and judgment in making his improvements, having reference to the probable future improvements of the town, and with reference also to the right possessed by the corporate authorities to make a reasonable and proper grade of such street, and he is afterwards injured by the making of such grade, he is entitled to recover for actual damages he may sustain, even though the grade so afterward made may be a reasonable and proper one. But if he so locates his house without such reasonable reference to future reasonable and proper improvements of the streets adjoining his lot, and without such exercise of discretion and judgment, and the town afterwards makes such reasonable and proper grade, and he is thereby injured, he cannot recover for such injury. That in ascertaining whether such act of the defendant in making the improvement, was a just and reasonable exercise of its authority to improve the street, the jury are authorized to take into consideration any evidence showing that it was the first improvement and the first grading of the street, also showing the inequality of the ground, and that the plaintiff's property was so situated in relation to it, as that the grade and improvements should have been reasonable anticipated by the plaintiff; and where such grade and improvements could have been thus anticipated by the exercise of ordinary discretion and judgment,

¹³ 7 Ohio St. 459, 1857.

the plaintiff is not entitled to damages for the making of such reasonable and proper grade and improvement." There was conflicting evidence upon the points submitted by the instructions; the jury appear to have found for the defendant, and judgment on the verdict was affirmed.¹⁴ The right to recover at all in such cases is based upon the ground that an abutting owner's right to the use of a street is itself property which cannot be taken without compensation.¹⁵ The court then go on to lay down the following propositions:

First. That the owner of an improved lot cannot recover for filling, ditching or cutting down a street, for he is presumed to purchase the lot with a view to the future improvement of the street in such reasonable manner as the public authorities may deem expedient.

Second. That the owner of a lot upon a street, the grade of which has not been established, must use reasonable care and judgment in making his improvements, with reference to the right possessed by the corporation to make a reasonable and proper grade.

Third. That when the owner of a lot makes improvements with reasonable care and judgement, in view of the right of the corporation to make a reasonable and proper grade, or makes improvements with reference to a grade

¹⁴ We say "appear to have found for the defendant," because it is a matter of inference only. The plaintiff took the case up. It may be the jury found a small verdict in his favor which he sought to have set aside.

¹⁵ Thus the court: "Distinct from the right of the public to use a street, is the right and interest of the owners of lots adjacent. The latter have a peculiar interest in the street, which neither the local nor the general public can pretend

to claim: a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds, and the erections thereon; an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be comparatively of little value. This easement, appurtenant to the lots, unlike any right of one lot-owner in the lot of another, is as much property as the lot itself," p. 469.

already established, and a change is afterwards made in the street which interferes with the access to his improvements from the street, he is entitled to recover damages.

"It is," says the court, "as positive and substantial an injury to private property, and as direct an invasion of private right, incident to a lot, as if the erections upon the lot were taken for public use. It comes not within the letter, but manifestly within the spirit, of the constitution, which requires compensation for property taken for public use."

In *Jackson v. Jackson*¹⁶ the ground of recovery in such cases is still more explicitly stated. A township road ran through the plaintiff's farm, connecting with a county road. This was altered up to, but not upon, his farm. This suit was brought to recover damages alleged to have been occasioned to his farm by such alteration. A recovery was denied, on the ground that the damages were too remote. In commenting upon prior cases, it was held that compensation had been given in highway cases, in obedience to the constitution, as for private property taken for public use, and that the cases only went to the extent of holding that the adjacent owner, "has a private right of access to and from the street or highway; and, when he has made improvements on his land, with direct reference to the adjoining highway as then established, and with reasonable reference to its prospective improvement and enjoyment by the public, he has a private right of way, or passage, to and from the highway as it then exists; and any substantial change in the highway, to the injury of such passage or way, is an invasion of his private property; and this private right extends so far as the reasonable and convenient enjoyment of such improvements requires the use of the adjacent highway; but, beyond such necessary use thereof, the private right is merged in that of the public;" that, as the plaintiff had not been deprived of any such private right in this case, no property of his had been taken, and he could not recover.

¹⁶ 16 Ohio St. 163, 168, 1865.

In *Cincinnati v. Penny*¹⁷ all the cases were again reviewed and the same doctrines affirmed. Penny sued for damages to a building occasioned by excavating for a sewer. His recovery was defeated on the ground that he did not exercise reasonable prudence in the erection of his building, in view of the right of the city to appropriate the alley to such uses in the future. "We have no disposition," says the court, "to depart from the line of decisions formerly made by this court upon this subject. * * * We believe the principles established by our former cases to be most just and equitable."

In *Youngstown v. Moore*¹⁸ the same principles were fully approved, and a judgment for damages caused by lowering the grade of a street was affirmed.

Finally comes the case of *Akron v. The Chamberlain Company*,¹⁹ decided in 1878. In 1842 the Chamberlain Company built a flouring mill upon the lot in question. At that time no grade had been established for the street in front. In 1876 the grade of the street was raised fourteen feet in front of the mill, and the company brought this suit for the damages thereby occasioned, and recovered a verdict and judgment for \$9,600.

The court "adhere, with entire satisfaction, to the doctrines enunciated, in *Cincinnati v. Penny*," but explain that it never had been decided, and that the court had never intended to decide, that if an owner used reasonable care and judgment in making improvements and was afterwards injured by the establishment of a grade, he could recover though the grade was a reasonable and proper one. "We are now unanimously of opinion," says the court, "that if the subsequent grade, in such case, be reasonable, or, in other words, if it be established in the reasonable exercise of the authority conferred on the municipality, at the time it is

¹⁷ 21 Ohio St. 499, 504, 1871.

¹⁸ 34 Ohio St. 328, 1878.

¹⁹ 30 Ohio St. 133, 1876.

made, then such grade should have been anticipated by the owner of the adjacent lot, and his improvements should have been made with reference thereto."

The right of recovery is limited to three cases: (1) where one builds to an established grade and it is changed to his damage; (2) where one builds before a grade is established, but succeeds in anticipating the grade which is afterwards established, and the grade after being so established is changed; (3) where one builds before a grade is established and afterwards an *unreasonable* grade is established. The court hold that a grade may be established in the sense here intended, not only by an ordinance or resolution for that purpose, but also by any improvement of the street indicating permanency.²⁰

The right of recovery is in all cases limited to the property in front of which the change is made. Where the grade of a street on which the plaintiff abutted was raised on a part near but not in front of plaintiff, it was held he could not recover, although his property was damaged.²¹

Upon a review of all the Ohio cases, therefore, it appears

²⁰The court say: "While we recognize the general rule to be, that no liability on the part of a municipality for injury to abutting property, by reason of improvement of a street, exists where such improvement is properly made, yet this rule is subject, as we have seen, to the exception that where abutting property is improved with reference to an existing street, so graded or improved under the authority of the public agents having the control thereof, as to indicate, fairly and reasonably, permanency in the character of the street improvement, a liability is cast upon the city or village for injury resulting from subsequent changes. And it would

seem to follow, as a logical sequence, that if, before a permanent grade is thus established, the owner of an abutting lot improves the same with reference to a reasonable grade to be established in the future and his anticipations are realized in the subsequent establishment of the grade, he should thereafter, in respect to such improvement, be entitled to enjoy the same right in the grade of the street which was thus fairly and reasonably anticipated, as if he had improved his lot after the grade had been so established."

²¹Eagle White Lead Company v. Cincinnati, 1 Cinn. Supr. Ct. 154, 1871.

that no recovery can be had in any case for damages to unimproved property by reason of a change of grade, that where property is improved and the improvements are adjusted to an established grade, whether built before or after its establishment, a recovery may be had for any damages occasioned by a change of grade, and finally that if improved property is damaged by an unreasonable grade or by an unreasonable exercise of the power to grade, then there may be a recovery.

In all the later cases the right of recovery is based upon the constitutional guaranty that private property shall not be taken for public use without just compensation. The *private property* which is *taken* in such cases is spoken of as the right of access.²² But the *right* of access exists the same, whether the property is improved or unimproved, and whether a grade has been established or not. If to interfere with it in one case is a *taking*, then such interference should be a taking in every case. No good ground exists for a distinction. That there *ought* to be compensation in some cases and not in others is a consideration which addresses itself to the legislature and not to the courts. The uncertain, rambling and contradictory condition of the Ohio cases on this subject is itself evidence that they are not founded upon a logical basis.

§ 99. **The law in Kentucky.**—It appears from cases already cited (*ante*, § 95) that the earlier decisions in Kentucky accord with the prevailing doctrine, but in a somewhat recent case the court of that State has taken an intermediate ground.¹ The plaintiff, a rolling-mill company in the city of Louisville, owned an entire block of ground upon which it had erected extensive works at a cost of some two hundred thousand dollars. The premises and adjacent streets were subject to an annual overflow from the Ohio river. The works were constructed in such manner that their only outlet

²² *Crawford v. Village of Delaware*, 7 Ohio St. at 469.

§ 99.

¹ *Louisville v. Rolling Mill Co.*, 3 Bush, 416, 1867.

was onto and over Brook street. The city passed an ordinance for raising the grade of Brook street so that, at the point of the company's gateway, which was their only means of ingress and egress, the street would be twelve feet above the company's lot. The ordinance also required the company either to fill up their lot or build a containing wall for the protection of the street, and provided that, in default of the company doing so, the city might construct the same at the company's expense. It appeared that the result of this improvement would be to render the property of the company almost worthless, and besides, if the ordinance was carried out as to the retaining wall, it would compel the company to incur a large expense to accomplish the destruction of its own property. It was one of the "hard cases" so proverbial for "bad law." The court seem to have been appalled by the magnitude of the loss with which the company was threatened, and granted an injunction restraining the work until compensation should be made to the company. The decision, which is by a majority of the court, seems to be based upon the ground that the case was an extraordinary one, in which all the ordinary principles and presumptions failed; that, while lot-owners may be taxed specially for local improvements, yet such right rests upon the fact that special benefits are conferred and that when the foundation of the right fails, as in this case, the right is gone, and that, while such lot-owners may be presumed to have purchased in contemplation of the right of the public to make such improvements as are ordinary and usual, yet, that this was of such an extraordinary and unusual character that the law would not presume that it was assented to by the plaintiff when it purchased the property. It does not seem to us that this decision, as put by the court, is either logical or sound. It is treated in the opinion as the case of raising the grade of a street for its improvement. In this view there is nothing extraordinary or unusual about the improvement. It is not unusual for a street to be raised or lowered ten feet.

The only extraordinary and unusual feature presented by the case is the very large amount of damage accruing to the complainant. Had it not been for this feature of the case, that is, the extreme hardship of it, the bill would undoubtedly have been summarily dismissed. The only possible ground which we can see for justifying the decision is that it was proposed to raise the grade of the street, not for the purpose of improving the street for use as a highway, but to form a dike or levee against the river. But even this view would not warrant the injunction, but only an action for damages. There is no logical ground for a distinction between usual and slight changes and great and unusual changes in the grade of a street. There is no reason why compensation should be given for the large damage caused by raising the grade ten feet, and none for the small damage by raising the grade one foot. The damages are the same in kind in all cases where the grade of a street is changed, and logically there should be a right to recover in all cases or in none.²

§ 100. Rights of abutting owners.—Interfering with the access to abutting property by a change of grade is only one of the many species of injury which may be inflicted upon such property by the improvement and use of streets. That such interference is not a *taking* of private property within the meaning of the constitution may be regarded as judicially settled. But, in regard to many other species of injury resulting from street improvements, the law is not so certain. As we have already seen, to constitute a *taking*, when no title or interest passes, a private right must be impaired or destroyed.¹ Therefore, to determine whether certain damages, resulting to abutting property from the use or improvement of a street, amount to a *taking*, we must inquire

²See comments of Judge Dillon on this case in his work on Municipal Corporations, § 784, note.

¹Ante, § 56.

§ 100.

whether any private right has been interfered with. If yes, and the damages result from such interference, then there has been a *taking*, and the right to compensation follows. We are thus led to inquire what private rights, if any, an abutting owner has in, or in respect to, the street in front of his property. As these questions arise almost wholly with respect to urban property, we shall, in this discussion, have regard mainly to the conditions of urban life. The grade of country roads is seldom interfered with, and when it is, it seldom results in damage to adjacent property. While highways are established in the country largely for the accommodation of the general public in traveling from place to place, streets are laid out in cities and villages, either partly or wholly, for the purpose of affording access and *frontage* to the property through which they pass. As the country road of to-day may become the city street of fifty years hence, it is evident that the same rules must apply to both. It having been always one of the recognized uses and purposes of establishing streets, to afford access and frontage to the property through which they pass, we think that with the establishment of a street there attach to the adjacent property, as appurtenant to and parcel of it, the private rights of access and of light and air.² But as all streets are estab-

² *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio & Miss. R. R. Co.*, 7 Ind. 479; *Renssaler v. Leopold*, 106 Ind. 29; *Indiana, Bloomington & Western Ry. Co. v. Eberle*, 110 Ind. 542; *Transylvania University v. Lexington*, 3 B. Mon. 25, 27; *Chicago v. Union Building Association*, 102 Ills. 379, 397; *Crawford v. Delaware*, 7 Ohio St. 459; *Jackson v. Jackson*, 16 Ohio St. 163; *Lexington & Ohio R. R. Co. v. Applegate*, 8 Dana, 289; *Lackland v. North Mo. R. R. Co.*, 31 Mo. 180; *Thurston v. St. Joseph*, 51 Mo. 510; *Elizabethtown etc. R. R. Co. v.*

Combs, 10 Bush, Ky. 382; *Ander son v. Turbeville*, 6 Coldw. 150; *People v. Kerr*, 27 N. Y. 188, 215; *Kellinger v. 42d. St. R. R. Co.*, 50 N. Y. 205; *Burlington & Mo. R. R. Co. v. Reinhacke*, 15 Neb. 279; *Denver v. Bayer*, 7 Col. 113; and see *post*, §§ 114, 122. In *Indiana, Bloomington & Western Ry. Co. v. Eberle*, 110 Ind. 542, 545 the court say: "Whatever may be the rule of decision elsewhere, nothing is better settled in this State, than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the

lished primarily for the public use and general good, the right of the public is paramount to the right of the individual. And so the private rights of access and frontage are held and enjoyed subject to the paramount right of the public to use and improve the street for the purposes of a highway. And as these private rights are thus subject to the right of the public to improve, it follows that, when such improvements are made, no private right is interfered with, and consequently no private property is *taken*. This is the reasoning and the ground upon which, it seems to us, the decisions already referred to in this chapter must rest. If the right of access is *subject* to the right of the public to *improve*, then, when access is rendered less convenient by the exercise

street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress to and egress from the lots. It is distinguished from the interest of the general public, in that it becomes a right appendant, and legally adhering to, the contiguous grounds and the improvements thereon, as the owner may have adapted them to the street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. It cannot, therefore, be perverted from the uses to which it was originally dedicated, or devoted to uses inconsistent with street purposes, without the abutting lot-owner's consent, until due compensation be first made according to law for any injury and damage which may directly result from such interference; nor can a street be invaded so as to inflict

special and peculiar damage or injury upon the adjacent lot-owner's property, without rendering the wrong-doer liable for such damage.

* * * The interest in the street which is peculiar and personal to the abutting lot-owner, which is distinct and different from that of the general public, is the right to have free access over it to his lot and buildings, substantially in the manner he would have enjoyed the right in case there had been no interference with the street. The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away or materially impaired without liability to the owner to the extent of the damage actually incurred. In this respect, and in this only, is the interest of the abutting property-owner different in the street in front of, and beyond the line of, his lot, from that of the public." Similar views will be found expressed in nearly all the cases cited in this note.

of that right by the public, the owner has no legal ground of complaint. It follows also that, as these private rights are subject *only* to the use and improvement of the street by the public *for the purpose of a highway*, an interference with these rights by the use or improvement of the street for any *other* purpose or by any *other* agency is a *taking* of private property to the extent of such interference.³

So much as to the rights of abutting owners *in streets*. What are their rights *in respect* to the street and their relations to the public as proprietor of it? The public is *in fact* an adjoining proprietor, whether it owns the fee or only an easement. Has the public any greater right than an individual proprietor, or does it hold the street subject to the same limitations and conditions that attach to private ownership? We think the latter. In the use of the street the public is subject to the same limitations that an individual would be who held the street as his private property. The abutting owner has the same rights with respect to the use of the street, that he has with respect to the use of any other adjacent property. Consequently, he has a right to the support of his soil by that of the street, a right to the exclusive possession of his inclosure as against encroachments from the street, a right not to be injured by any interference with the flow of surface water or running streams caused by the use of the street which would be actionable if made by an individual, and, generally, a right not to be injured by any *unreasonable* use of the land which forms the street. These rights, unlike those of access and frontage, are absolute and paramount in the individual, and the public must so use and improve the streets as not to interfere with such rights, or else make "just compensation" for the damages occasioned by such interference.

It is evident that these rights exist in the abutting owner, unless they are taken or acquired by the public when the

³Shawneetown *v.* Mason, 82 Ills. 58 Wis. 250; Buchner *v.* Chicago, 337; Winchester *v.* Stevens Point, M. & S. P. Ry. Co., 60 Wis. 264.

street is established. They always exist with respect to adjoining property, unless they have been *expressly* reserved or granted in favor of other property. These rights are never *expressly* granted, released or condemned when a street is established. The *land* alone is taken, or granted, or dedicated, as the case may be. But *land* is always understood to have attached to it these inseparable rights and obligations relating to its use and enjoyment. When the public take land for a street *in invitum*, why should they be held to have acquired by implication something which they did not ask for? Why should a grant or dedication of land to the public, for a particular use, be held to have vested in the public more than a grant of the same land, for the same use, to an individual, would vest in him? The use of the land for a street does not necessarily require that these rights of support, etc., should be in the public. It is always possible and practicable to improve a street without interfering with such rights. It is vastly more for the public interest that the public should occasionally incur increased expense in making improvements, to avoid interfering with such rights, than that the public should in all cases be compelled to pay for the loss of such rights when a street is established. It has been said, in some cases, that a jury or other tribunal for assessing damages, when a street is laid out, take into consideration the possibility of future damage by improving the street, and increase their allowance accordingly.⁴ We think the fact is otherwise, but the impossibility of forming an accurate or even approximate estimate of such damages is sufficient to rebut any presumption of their having been included in the assessment. Who can estimate what the needs of the public will require, or the whims of public officers suggest? To attempt to include such damages is to send the jury into the realm of pure speculation. The more reasonable, the more practicable and the juster view is that such damages are not the subject of assessment in such cases.⁵ While these views

⁴ See authorities cited *ante*, § 97. ⁵ *Post*, chap. xxiv.

as to the rights of abutting owners do not accord with all the decided cases—no views can do that—they are supported, if not by the more numerous, at least by the later and better-reasoned cases. We shall go more fully into the decisions in the treatment of the separate rights to which we have referred in the sections which follow.

§ 101. Lowering grade.—Right to support of soil.—

We have stated in the last section the reasons in support of the position that the abutting owner has a right to the support of his soil in that of the street.¹ It follows that an interference with this right, by cutting down a street and removing the support of the adjacent soil, is a *taking* for which compensation must be made. It must be confessed, however, that the *weight* of authority is against this position.² The older cases make no distinction between the different kinds of damages which may be occasioned to abutting property by the improvement of the streets. All such damages are treated as consequential and remediless. Yet, in some of these cases, and in others by the same courts, the rights and liabilities of the public with respect to the adjoining owner are held to be governed by the law of adjoining proprietors. But adjoining proprietors have mutual rights of support, and, if the analogy is carried out, it must be held that the adjacent owner has a right to the support of his soil in that of the street. This seems to us the juster view, and some of the more recent cases have so adjudicated.³ In such cases recovery may be had for injury to improvements where

§ 101.

¹ See also *post*, § 151.

² Mayor etc. of Rome *v.* Omberg, 28 Ga. 46; Mitchell *v.* Mayor etc. of Rome, 49 Ga. 19; Radcliff *v.* Brooklyn, 4 N. Y. 195; Fellows *v.* City of New Haven, 44 Conn. 240; City of Delphi *v.* Evans, 36 Ind. 90; Mears *v.* Commissioners of Wilmington, 9 Ired. L. 73; Cheever *v.* Shedd, 13

Blatch. 258; Callendar *v.* Marsh, 1 Pick. 418; City of Quincy *v.* Jones, 76 Ills. 281.

³ Dyer *v.* St. Paul, 27 Minn. 457; Armstrong *v.* St. Paul, 30 Minn. 299; Keating *v.* Cincinnati, 38 Ohio St. 141; Aurora *v.* Fox, 78 Ind. 1; and see Moore *v.* Albany, 98 N. Y. 376.

their weight did not cause the slide.⁴ Where the excavation of a street causes a slide which reaches property not abutting on the street, the right to compensation would seem to be clear since it cannot be presumed that the owner was compensated therefor when the street was established.⁵

§ 102. Raising grade.—Encroachment of the filling.—The right of exclusion, or the right of complete possession and enjoyment, is one of the essential elements of property in land. If any one has a right to encroach upon my land in any way, then I have not complete control of it, nor a full and absolute property in it. The public have no right, in raising the grade of a street, to allow the filling to slide or encroach upon the adjoining land. Such an occupation of or encroachment upon adjacent property is a *taking*.¹ Such a direct invasion of one's property is without right and might undoubtedly be enjoined. It is the duty of the public in such a case to support the filling by a retaining wall in the street itself. But if this is not done and an action is brought for damages and a recovery had, the public thereby

⁴ Keating *v.* Cincinnati, 38 Ohio St. 141.

⁵ Keating *v.* Cincinnati, 38 Ohio St. 142.

§ 102.

¹ Dodson *v.* Cincinnati, 34 Ohio St. 276; Bradwell *v.* City of Kansas, 75 Mo. 213; Hendershott *v.* Ottumwa, 46 Ia. 658. *Contra:* Fellows *v.* City of New Haven, 44 Conn. 240; Shaw *v.* Crocker, 42 Cal. 435; Mayo *v.* Springfield, 136 Mass. 10; Mayo *v.* Same, 138 Mass. 70; and see Moore *v.* Albany, 98 N. Y. 396. In Bradwell *v.* City of Kansas the defendant raised the grade of a street about even with the top of plaintiff's house, and the filling encroached upon his lot to such an extent as to crush and ruin his house. The court say: "Moreover, section 16

article 1 of the Constitution of 1865, provided that: 'no private property ought to be taken or applied to public use, without just compensation.' Here the city and its servant took the property of plaintiff's within the meaning of that section. The taking of property within that prohibition may be either total or absolute, or a taking *pro tanto*. Any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking and entitles him to compensation. So a partial destruction or diminution of value of property by an act of government which directly and not merely incidentally affects it, is to that extent an appropriation."

acquire a right of lateral support for the causeway in the street.² If the property is vacant, the damages could hardly exceed the cost of a retaining wall and of removing the filling which had fallen upon the lot. If the property is improved, any injury to the improvements would be included.³

§ 103. Damages from surface water.—*Nevins v. City of Peoria*,¹ is a leading case upon this question. The City of Peoria graded its streets in such a manner as to cause a stream of water and mud to flow on to the plaintiff's property in times of rain, and also to cause a pond to accumulate upon adjacent property, which, by becoming stagnant, diffused unwholesome vapors over the plaintiff's premises. The city was held liable, on the ground that the damages complained of were a taking, within the meaning of the constitution.² It was held that the city had no greater power over its streets than a private individual had over his own land, and that the law of adjoining proprietors was applicable. This is the true rule to be applied in all such cases. In any given case, the

¹ *Dodson v. Cincinnati*, 34 Ohio St. 276.

² *Bradwell v. City of Kansas*, 75 Mo. 213.

§ 103.

³ 41 Ills. 502, 508, 1866.

The court say: "The city is the owner of the streets, and the legislature has given it power to grade them. But it has no more power over them than a private individual has over his own land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without being responsible itself. Neither State nor municipal government can take private property for public use without due

compensation, and this benign provision of our constitution is to be applied by the courts whenever the property of the citizen is invaded, and without reference to the degree." This case has been followed and approved in the following subsequent decisions in the same State: *City of Aurora v. Gillett*, 56 Ills. 132; *City of Aurora v. Reed*, 57 Ills. 29; *City of Dixon v. Baker*, 65 Ills. 518; *Tearney v. Smith*, 86 Ills. 391. In *Aurora v. Reed* the street in question was improved while the plaintiff's lot was vacant. He afterwards built upon his lot, and the water ran into his basement. It was held that this circumstance made no difference, that he had a right to improve his lot and enjoy it free from any such invasion or annoyance.

test is: If an individual owned the streets in question, and had made the same works, would he be liable for the damages complained of? It is now almost uniformly held that, if a city so grades or otherwise improves its streets as to collect surface water in a stream and pour it directly upon private property, it will be liable for the ensuing damages.³ This is a direct and entirely unauthorized invasion of property rights. There is, however, considerable dissent from this view, especially in the earlier cases.⁴ Where a natural outlet for surface water is obstructed by raising the grade of a

³ *Troy v. Coleman*, 58 Ala. 570; *Union Springs v. Jones*, 58 Ala. 654; *Indianapolis v. Lawyer*, 38 Ind. 348; *Weis v. Madison*, 75 Ind. 241; *Evansville v. Decker*, 84 Ind. 325; *North Vernon v. Voegler*, 89 Ind. 77; *Crawfordsville v. Bond*, 96 Ind. 236; *Manning v. Lowell*, 130 Mass. 21; *Pennoyer v. Saginaw*, 8 Mich. 296; *Ashley v. Port Huron*, 35 Mich. 296; *Cubit v. O'Dett*, 51 Mich. 347; *Kobs v. Minneapolis*, 22 Minn. 159; *O'Brien v. St. Paul*, 25 Minn. 331; *Thurston v. St. Joseph*, 51 Mo. 510; *Field v. West Orange*, 36 N. J. Eq. 118; *Same v. Same*, 29 Alb. L. J. 397; *West Orange v. Field*, 37 N. J. L. 600; *Byrnes v. Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun, 587; *Noonan v. Albany*, 79 N. Y. 470; *Seifert v. Brooklyn*, 101 N. Y. 136; *Rhodes v. Cleveland*, 10 Ohio, 159; *Limerick etc. Turnpike Co.'s Appeal*, 80 Pa. St. 425; *Huddleston v. West Bellevue*, 111 Pa. S. 110; *Inmann v. Trip*, 11 R. I. 520; *Gillison v. Charleston*, 16 W. Va. 282; *Pettigrew v. Evansville*, 25 Wis. 223; *Town of Sullivan v. Phillips*, 110 Ind. 320.

⁴ *Bronson v. Wallingford*, 54 Conn. 513; *Roll v. Augusta*, 34 Ga. 326;

Conwell v. Emrie, 4 Ind. 209; *Vincennes v. Richards*, 23 Ind. 381; *Platter v. Seymour*, 86 Ind. 323; *Cummings v. Seymour*, 79 Ind. 491; *Alden v. Minneapolis*, 24 Minn. 254; *St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. City of St. Louis*, 14 Mo. 20; *Hoffman v. St. Louis*, 15 Mo. 651. (Last three cases overruled in *Thurston v. St. Joseph*, 51 Mo. 510); *Steinmeyer v. St. Louis*, 3 Mo. App. 256; *Foster v. St. Louis*, 4 Mo. App. 564; *Same v. Same*, 71 Mo. 157; *Stewart v. Clinton*, 79 Mo. 603; *Flagg v. Worcester*, 13 Gray, 601; *Turner v. Dartmouth*, 13 Allen, 291; *Mayor etc. of Cumberland v. Williamson*, 50 Md. 138; *Durkee v. Town of Union*, 38 N. J. L. 21; *Kavanaugh v. Brooklyn*, 38 Barb. 232; *Mills v. Brooklyn*, 32 N. Y. 489; *Lynch v. Mayor etc. of New York*, 76 N. Y. 60; *Wright v. Wilmington*, 92 N. C. 156; *Wakefield v. Newell*, 12 R. I. 75; *Allen v. Chippewa Falls*, 52 Wis. 430; *Waters v. Bay View*, 61 Wis. 642; *Heth v. Fond du Lac*, 63 Wis. 228; see also the following cases where the lots were below grade: *Freyburg v. Davenport*, 63 Ia. 119; *Gilfeather v. Council Bluffs*, 69 Ia. 310;

street, and the water is thus caused to accumulate and stand on private property, the corporation will be liable.⁵ But where the law of the State is that every owner of land may improve his lot as he pleases, without liability on account of surface water, there will, of course, be no liability on the part of municipal corporations for any interference with the flow of surface water whereby it is dammed back or turned upon private property.⁶ In Iowa it is held that, where the injury to adjoining property could be foreseen, and it was practicable and reasonable to prevent it by the construction of sewers and culverts, it is the duty of the corporation to do so, and that for neglect of this duty it will be liable.⁷ The liability is put upon the ground of a want of care and skill in the construction of the works. Where surface water is caused to accumulate in a pond which, by becoming stagnant, diffuses unwholesome vapors over the neighborhood, the corporation will be liable, provided the accumulation is due to its wrongful act as by obstructing a natural outlet for such water.⁸

Morris v. Council Bluffs, 67 Ia. 343; *Hessing v. District of Columbia*, 3 Mackey, 572; *Gilluly v. Madison*, 63 Wis. 518.

⁵ *Kemper v. Louisville*, 14 Bush (Ky.) 87; *McClure v. City of Red Wing*, 28 Minn. 186. A similar case was differently decided in *Hoyt v. Hudson*, 27 Wis. 656, where it was held that the defendant was not liable for obstructing a ravine which formed the natural outlet of surface water.

⁶ *Wilson v. Mayor etc. of New York*, 1 Denio, 595; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Gould v. Booth*, 66 N. Y. 62; *Walter v. County Commissioners*, 35 Md. 385; *Sprague v. Worcester*, 13 Gray, 193; *Dickinson v. Worcester*, 7 Allen, 19; *Hoyt v. Hudson*, 27 Wis. 656.

So held also where a natural water-course was intercepted; *Mayor etc. of Philadelphia v. Randolph*, 4 W. & S. 514.

⁷ *Cotes v. Davenport*, 9 Ia. 227; *Templin v. Iowa City*, 14 Ia. 59; *Ellis v. Same*, 29 Ia. 229; *Damour v. Lyons City*, 44 Ia. 276; *Russell v. Burlington*, 30 Ia. 262; *Ross v. Clinton*, 46 Ia. 606; *Powers v. Council Bluffs*, 50 Ia. 197; see also *Commissioners of Kensington v. Wood*, 10 Pa. S. 93; *Rowe v. Addison*, 34 N. H. 306; *Parker v. Nashau*, 59 N. H. 402; *Clark v. Rochester*, 43 Hun, 271.

⁸ *Nevins v. Peoria*, 41 Ills. 502; *Weeks v. Milwaukee*, 10 Wis. 242; *Smith v. Milwaukee*, 18 Wis. 63. *Contra*: *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Taylor v. St. Louis*,

§ 104. Interfering with natural streams.—Where a municipal corporation, in improving its streets or in building or repairing a bridge, interferes with the flow of a natural stream, it will be liable for any damage resulting to private property.¹ If a city substitutes a drain or sewer of insufficient capacity for a natural watercourse, and the water is set back upon private property, it will be liable.² And, generally, a city interferes with a stream of water at its peril.³

§ 105. Unlawful change of grade.—A recovery may be had in all cases where the change of grade is unlawful,¹ as when the statute requires the consent of a certain proportion of the property holders, and the change is made without such consent,² or provides that the work shall not be done until after an assessment of benefits to defray the expense has been confirmed, and such provision is disregarded,³ or when the change is made by a railroad company or individuals without authority.⁴ A city was held liable where the grade of a street was changed, not for the purpose of improving the street, but to get material to be used in other parts of the city.⁵

14 Mo. 20; *Russell v. Burlington*,
30 Ia. 262; *Allen v. City of Paris*, 1
Tex. App. Civil Cas. p. 506.

§ 104.

¹ *Mayor etc. of Helena v. Thompson*, 29 Ark. 569; *McCord v. High*, 24 Ia. 336; *Lawrence v. Inhabitants of Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 Gray 544; but see *Mayor etc. of Philadelphia v. Randolph*, 4 W. & S. 514; *Ely v. Rochester*, 26 Barb. 133.

² *Mayor etc. of Helena v. Thompson*, 29 Ark. 569. A similar case was differently and it seems to us wrongly decided in *Collins v. Philadelphia*, 93 Pa. S. 272.

³ In *McMahon v. Council Bluffs*, 12 Ia. 268, it was held that a bill would not lie to prevent a city

changing the bed of a stream so as to cause the same to flow in the street in front of the plaintiff's property.

§ 105.

¹ *Hill v. St. Louis*, 59 Mo. 412; *Freeland v. City of Muscatine*, 9 Ia. 461; *Roberts v. Chicago*, 26 Ills. 249; *Leman v. Mayor etc. of New York*, 5 Bos. 414; *Meinzer v. Racine*, 68 Wis. 241.

² *Crossett v. Janesville*, 28 Wis. 420; *Mott v. Mayor etc. of New York*, 2 Hilton, 358.

³ *Dore v. Milwaukee*, 42 Wis. 108.

⁴ *Karst v. St. Paul S. & T. F. R. Co.*, 22 Minn. 118; *Same v. Same*, 23 Minn. 401; *Price v. Knott*, 8 Oreg. 438.

⁵ *Mayor etc. of Macon v. Hill*, 58 Ga. 595.

§ 106. **When the work is negligently done.**—Damages which result from negligence or unskillfulness in doing the work are actionable.¹ In such cases the question of a *taking* does not arise. The *gist* of the action is negligence, and the recovery is limited to such damages as result from that cause.

§ 107. **Power to establish grades a continuing one.**—It is immaterial whether the damages complained of are caused by bringing the natural surface of the street into conformity with the first established grade, or by changing a grade already established. The power to improve and graduate streets is a continuing power, which municipal corporations or public authorities possess for the public benefit, and which is not exhausted by the first exercise nor capable of being bargained away. This question first arose in a very early case in the Supreme Court of the United States.¹ The corporation of Georgetown, having power to graduate and level streets, passed an ordinance to fix the grade of certain streets, and provided that the grade so established should forever thereafter be considered as the true graduation of the streets so graduated and be binding upon the corporation and all other persons whatever, and be forever thereafter regarded in making improvements on said streets. The plaintiff improved his lot with reference to the grade so established, and the corporation afterwards passed an ordinance changing the grade. The suit was to enjoin the change. The court held that the plaintiff had no remedy, that the power in question was a continuing one, and that the corporation could not, by contract or otherwise, abridge or annul its legislative functions. All the authorities are in accord with this decision.²

§ 106.

North Vernon *v.* Voegler, 103 Ind.

¹ Smith *v.* City Council of Alexandria, 33 Graft. 208; Wegmann *v.* City of Jefferson, 61 Mo. 55; Thompson *v.* Booneville, 61 Mo. 282; Werth *v.* Springfield, 78 Mo. 107; Mears *v.* Wilmington, 9 Ired. L. 73;

314.

§ 107.

¹ Goszler *v.* Georgetown, 6 Wheat. 593. ² Keasy *v.* Louisville, 4 Dana, 154; Creal *v.* Keokuk, 4 G. Greene, Ia.

§ 108. Power of city to make compensation.—The justice of the claim for compensation in such cases is so plain, that any public corporation would undoubtedly be sustained by the courts in the voluntary discharge of such a claim. And where a city, by ordinances, establishes a grade and pledges its faith that such grade shall not thereafter be changed to the injury of any individual without full compensation, the city will be compelled to live up to its pledge.¹

§ 109. Miscellaneous cases.—A city is not liable for inconvenience occasioned by a ditch along a street which is constructed under proper authority, even though it becomes enlarged by erosion so as greatly to impair access to adjoining property.¹ Where a turnpike company takes a highway, it will have the same right to repair and improve it as the highway commissioners, and will not be liable for consequential damages for which the commissioners are not liable.² The owner of water pipes in a highway cannot recover for being obliged to raise his pipes in consequence of a change of grade,³ nor can a recovery be had for damage to business during the progress of improvements on a street.⁴ Where the charter of a city provided that the council should establish the general grade of its streets *as soon as practicable*, and that the city should pay for damages caused by any

47; Russell *v.* Burlington, 30 Ia. 262; Kokomo *v.* Mahon, 100 Ind. 242; Peddicord *v.* Baltimore etc. H. R. R. Co., 34 Md. 463; City of Pontiac *v.* Carter, 32 Mich. 164; Hoffman *v.* St. Louis, 15 Mo. 651; Schattner *v.* City of Kansas, 53 Mo. 162; Waddell *v.* Mayor etc. of New York, 8 Barb. 95; Rounds *v.* Mumford, 2 R. I. 154; Matter of Furman Street, 17 Wend. 649; Reynolds *v.* Mayor etc. of Shreveport, 13 La. An. 426; Macy *v.* Indianapolis, 17 Ind. 267; Methodist Episcopal Church *v.* Wyandotte, 31 Kan. 721.

§ 108.

¹ Goodall *v.* Milwaukee, 5 Wis. 32; and see Fisk *v.* Springfield, 116 Mass. 88.

§ 109.

Lambar *v.* St. Louis, 15 Mo. 610; Benjamin *v.* Wheeler, 8 Gray, 409; but see Carondelet Canal & Nav. Co. *v.* New Orleans, 38 La. An. 308.

² Dexter *v.* Broat, 16 Barb. 337.

³ Jamaica Pond Aqueduct Co. *v.* Brookline, 121 Mass. 5.

⁴ Plant *v.* Long Island R. R. Co., 10 Barb. 26.

change of such grades, in a case arising under the charter it was held that the court could not determine *when* it was *practicable* for the city to establish general grades, and consequently could not cast the city in damages on the ground of neglect to comply with the law.⁵ It has been held that a tunnel beneath the surface of the street,⁶ or the open approach to a tunnel in the center of the street,⁷ or a causeway forming the approach to a bridge,⁸ do not entitle the abutting owner to compensation. If the grade is raised, not for the purpose of improving the street, but for the purpose of forming a dike, the abutting owner may recover for the damage to his property.⁹ No action will lie on account of changes in the relative width of roadway and sidewalk.¹⁰

II. *Railroads in Streets.*

§ 110. **In general.**—It is common all over the country for railroads to be laid down upon the streets of cities and villages. The loss which has been occasioned to individuals by this means is very great; the suits which have been instituted to recover for such loss are very numerous; the decisions which have been rendered therein by the different courts, and even by the same courts at different times, are conflicting and irreconcilable. In considering whether such loss is a *taking*, we shall inquire, *first*, whether a railroad is one of the ordinary and legitimate uses for which highways and streets are established; *second*, the right to compensation when the fee is in the adjoining owner, and, *third*, the right to compensation when the fee is in the public.

§ 111. **Is a railroad a legitimate use of a highway?**—If this question is answered in the affirmative, it is plain that

⁵ Schattner *v.* City of Kansas, 53 Mo. 162.

⁸ Newport & Cincinnati Bridge Co. *v.* Foote, 9 Bush, 264; Parker *v.* Boston R. R. Co., 3 Cush. 107.

⁶ Hodgkinson *v.* Long Island R. R. Co., 4 Edwards Ch. 411; Adams *v.* Saratoga & Washington R. R. Co., 11 Barb. 414.

⁹ Shawneetown *v.* Mason, 82 Ills. 337; Winchester *v.* Stevens Point, 58 Wis. 350.

⁷ Chicago *v.* Rumsey, 87 Ills. 348.

¹⁰ Munson *v.* Mallory, 36 Conn.

the abutting owner cannot recover for any damage resulting from such use. And so the answer to this question may dispose of the whole subject. To us it seems so clear that a railroad is foreign to the legitimate uses of a highway, that we never have been able to understand how a court could reach a contrary conclusion. Highways are established to accommodate the public in traveling from place to place. From time immemorial, prior to the discovery of steam, they were for the common use of every citizen, by any means of locomotion he chose to select. They were not used by one person in any way which was not open to all. No one had a private right or any exclusive privilege therein. It was free to all upon like conditions. Such being the character of the public highway, it was subject to use by any new means of locomotion which could be employed by all the public, and was not destructive of the old methods of travel. A carriage propelled upon the ordinary surface of the road by steam or electricity would be just as legitimate as a carriage drawn by horses. Such use would be equally open to every citizen. The railroad does not fall within the scope of such uses. It requires a permanent structure in the street, the use of which is private and exclusive. It gives to an individual or corporation a franchise and easement in the street,¹ inconsistent with the public right. To hold that a railroad is one of the proper and legitimate uses of a street leads to the absurd consequence that a street might be filled with parallel tracks which would practically exclude all ordinary travel and still be devoted to the ordinary uses of a highway. The law ought not to tolerate such a consequence. We shall not review the authorities or attempt to reconcile them. They will be found in the note.²

165; see *Carter v. Chicago*, 57 Ills. 283; *Chicago v. Wright*, 69 Ills. 318. *Lake R. R. Co. v. Delamore*, 114 U. S. 501.

§ 111.

¹ *New Orleans v. Spanish Fort &*

² We shall cite in this note only cases in which the particular point is discussed. The same point is

This question first arose in this country in the State of New York, in *Fletcher v. The Auburn & Syracuse R. R. Co.*, 25 Wend. 462, 1841. The defendant constructed its road across a highway near plaintiff's premises, on an embankment four feet high, in such manner as to impede access thereto and to cause them to be frequently inundated with water. The defendants were duly authorized by the legislature, but the court say that this authority was only intended to protect the company from indictment for a public nuisance, and not against claims for private damages arising from consequential injury to adjacent owners, and, further, that if, by a fair construction of the grant, the power conferred was broad enough to protect the company against consequential damages to private interests, the grant, to that extent, would be void, since it would be a violation of the fundamental law of the land. The right to recover was based upon the con-

involved in other cases subsequently cited.

First, cases holding a railroad not to be one of the legitimate uses of a street: *Southern Pacific R. R. Co. v. Reed*, 41 Cal. 256; *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Cox v. Louisville R. R. Co.*, 48 Ind. 178; *Kucheman v. C. C. & D. Ry. Co.*, 46 Ia. 366; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ills. 439; *Phipps v. West Maryland R. R. Co.*, 66 Md. 319; *Springfield v. Connecticut Riv. R. R. Co.*, 4 Cush. 68, 71; *Grand Rapids & Indiana R. R. Co. v. Heisel*, 47 Mich. 393; *Harrington v. St. Paul & Sioux City R. R. Co.*, 17 Minn. 215; *Hastings & Grand Island R. R. Co. v. Ingalls*, 15 Neb. 123; *Williams v. New York Central R. R. Co.*, 16 N. Y. 97; *Fanning v. Osborn & Co.*, 34 Hun, 121; *Chamberlain v. Elizabethport Steam*

Cordage Co., 41 N. J. Eq. 43; *Railroad Company v. Williams*, 35 Ohio St. 168; *Ford v. Chicago & N. W. R. R. Co.*, 14 Wis. 609; *Carl v. Sheboygan & Fond du Lac R. R. Co.*, 46 Wis. 625.

Second, cases holding the contrary: *Milburn v. Cedar Rapids*, 12 Ia. 246; *Cook v. Burlington*, 36 Ia. 357. These cases are overruled by 46 Ia. 366, *ante*. *Moses v. Pittsburgh etc. R. R. Co.*, 21 Ills. 516; *Murphy v. Chicago*, 29 Ills. 279. These cases are also overruled by 67 Ills. 439, *ante*. But see *City of Olney v. Wharf*, 115 Ills. 519; *Porter v. North Missouri R. R. Co.*, 33 Mo. 128; *Chapman v. Albany & Schenectady R. R. Co.*, 10 Barb. 360; *Morris & Essex R. R. Co. v. Newark*, 10 N. J. Eq. 352; *Faust v. Passenger Ry. Co.*, 3 Phil. R. 164; *Garnett v. Jacksonville etc. R. R. Co.*, 20 Fla. 889; and see cases cited in the following notes.

stitution and treated as a matter beyond doubt. This doctrine was affirmed in a similar case which arose a year later in the same court.³ In the latter case it was urged that the use of the highway by the defendant was only in accordance with the original design for which the way was laid out, viz., the accommodation of the public, and that for this compensation had been made. But the court held that the railroad was a new and distinct user, different from the original design, and constituted an additional burden or easement on the land.⁴ Following these cases are a number of decisions in the Supreme Court in which the doctrine is maintained that a railroad, upon a public street, is a use in accordance with the legitimate purposes of a street, being simply a new and improved mode of public travel.⁵ The law of the State was, however, finally established by the Court of Appeals in favor of the earlier cases, in Williams *v.* New York Central R. R. Co., 16 N. Y. 97, 108.⁶ It can now be safely said that the weight of authority is in support of the text.

³ Trustees etc. *v.* The Auburn & Rochester R. R. Co., 3 Hill, 567, 1842.

⁴ See also Mahon *v.* Utica & Schenectady R. R. Co., Hill & Denio's Supplement, 156, 1843.

⁵ These cases are Drake *v.* Hudson River R. R. Co., 7 Barb. 508, 1849; Plant *v.* Long Island R. R. Co., 10 Barb. 26, 1850; Chapman *v.* Albany & Schenectady R. R. Co., 10 Barb. 360, 1851; Adams *v.* Saratoga & Washington R. R. Co. 11 Barb. 414 1851; Hentz *v.* Long Island R. R. Co., 13 Barb. 646, 1852; Milhau *v.* Sharp, 15 Barb. 193, 1853; Williams *v.* New York Central R. R. Co., 18 Barb. 222, 1854; Covey *v.* Buffalo, etc. R. R. Co., 23 Barb. 482, 1856. In these decisions the cases of Fletcher *v.* Auburn & Syracuse

R. R. Co. and Trustees etc. *v.* Auburn & Rochester R. R. Co., *ante*, are regarded as distinguishable or as overruled by Radcliff *v.* Mayor etc. of Brooklyn, 4 N. Y. 195.

⁶ The court say: "If the only difference consisted in the introduction of a new motive power, it would not be material. But is there no distinction between the common right of every man to use upon the road a conveyance of his own at will, and the right of a corporation to use its conveyances to the exclusion of all others; between the right of a man to travel in his own carriage without pay, and the right to travel in the car of a railroad company on paying their price?" Again, "The right of the public in a highway is an easement, and one that

§ 112. Right to Compensation.—If it be conceded that a railroad is one of the uses for which a street was originally designed, it of course follows that the abutting owner is not entitled to compensation when a railroad is laid in front of his property. In such case the establishment of a railroad on a street does not differ in principle from the establishment of a stage line along the same street or the introduction of some new kind of vehicle. Accordingly, all courts which maintain this doctrine, hold that there is no right to compensation.¹ The doctrine itself is practically obsolete, having been overruled in nearly every State that formerly adopted it.

§ 113. Right to compensation: Fee in abutting owner.—With respect to the interest of the abutting owner, highways may be divided into two classes: *First*, those in which the public have an easement only; *second*, those in which the public have the fee. In respect to the first class, the abutting owner is entitled to every right and advantage, in that part of the street of which he owns the fee, not required by the public. He has the entire right and property in the soil, subject to the easement of the public.¹ The easement

is vested in the whole public. Is not the right of a railroad company, if it has a right to construct its track upon the road, also an easement? This cannot be denied, nor that the latter easement is enjoyed, not by the public at large, but by a corporation; because it will not be pretended that every man would have a right to go and lay down his timbers, and his iron rails, and make a railroad upon a highway. Here, then, are two easements; one vested in the public, the other in the railroad company. These easements are property, and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be that

it is carved out and is a part of the public easement, and is therefore the gift of the public. This would do if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. Ought not the latter, then, to have been consulted?"

§ 112.

¹ See last note, part *second*; also, *Huges v. Miss. & Mo. R. R. Co.*, 12 Ia. 261; *Louisville & Frankfort R. R. Co. v. Brown*, 17 B. Mon. 763; *Elizabethtown & Paducah R. R. Co.*, 79 Ky. 52; *Faust v. Passenger Ry. Co.*, 3 Phil. 164.

§ 113.

¹ See *post*, § 589.

of the public is the right to use and improve the street for the purposes of a highway only. A railroad on a street, being foreign to such purposes,² is an interference with the adjoining owners' proprietary rights in the soil, and an acquisition or taking of an estate or interest in his land, for which he is entitled to compensation as in other cases.³ If the

² See *ante*, § 111.

³ *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; *Nicholson v. New York & New Haven R. R. Co.*, 22 Conn. 73; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ills. 439; *Protzman v. Indianapolis & Cinn. R. R. Co.*, 9 Ind. 467; *Cox v. Louisville R. R. Co.*, 48 Ind. 178 (an elaborate case); *Indiana Central Ry. Co. v. Boden*, 10 Ind. 96; *New Albany & Salem R. R. Co. v. O'Dailey*, 12 Ind. 551; *Indianapolis etc. Ry. Co. v. Smith*, 52 Ind. 428; *Terre Haute & Logansport R. R. Co. v. Bissell*, 108 Ind. 113; *Kucheman v. C. C. & D. Ry. Co.*, 46 Ia. 366; *Grand Rapids & Ind. R. R. Co. v. Heisel*, 38 Mich. 62; S. C. 47 Mich. 393; *Gray v. First Div. of St. Paul & Pacific R. R. Co.*, 13 Minn. 315; *Molitor v. Same*, 14 Minn. 285; *Schurmeier v. St. Paul & Pacific R. R. Co.*, 10 Minn. 82; *Harrington v. St. Paul & Sioux City R. R. Co.*, 17 Minn. 215; *Adams v. Hastings & Dakota R. R. Co.*, 18 Minn. 260; *Hartz v. St. Paul & Sioux City R. R. Co.*, 21 Minn. 358; *Phipps v. West Md. R. R. Co.*, 66 Md. 319; *Starr v. Camden etc. R. R. Co.*, 24 N. J. L. 592; *Chamberlain v. Elizabethport Steam Cordage Co.*, 41 N. J. Eq. 48; *Washington Cemetery v. Prospect Park & Coney Island R. R. Co.*, 7 Hun, 655; *Matter of Prospect Park etc. R. R. Co.*, 13 Hun, 345; *Hussner v. Brooklyn City R. R. Co.*, 30 Hun, 409; *People*

v. Law, 22 How. Pr. 109; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; *Carpenter v. Oswego & S. R. R. Co.*, 24 N. Y. 655; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423. For other New York cases see note, *ante*. *Parrott v. Cincinnati etc. R. R. Co.*, 10 Ohio St. 624; *Cincinnati etc. R. R. Co v. Cumminsville*, 14 Ohio St. 523; *Railroad Co. v. Williams*, 35 Ohio St. 168; *Ford v. Chicago & N. W. Ry. Co.*, 14 Wis. 609; *Pomeroy v. Milwaukee & Chi. R. R. Co.*, 16 Wis. 640; *Hegar v. Chicago & N. W. Ry. Co.* 26 Wis. 624; *Sherman v. Mil. Lake Shore & Western R. R. Co.*, 40 Wis. 645; *Chapman v. Oshkosh & Miss R. R. Co.*, 33 Wis. 629; *Carl v. Sheboygan & Fond du Lac R. R. Co.*, 46 Wis. 625; *Blesch v. C. & N. W. Ry. Co.*, 48 Wis. 168; *Buckner v. Chi. Mil. & N. W. Ry. Co.*, 56 Wis. 403; *Hanlin v. Chicago & N. W. Ry. Co.*, 61 Wis. 515; *Southern Pacific R. R. Co. v. Reed*, 41 Cal. 256; *Carson v. Central R. R. Co.*, 35 Cal. 325; *Weyl v. Sonoma Valley R. R. Co.*, 69 Cal. 202. To the contrary are the following cases: *Harrison v. New Orleans, Pacific R. R. Co.*, 34 La. An. 462; *Snyder v. Pennsylvania R. R. Co.*, 55 Pa. S. 340; *Phila. & Trenton R. R. Co.*, 6 Whart. 25; *McLauchlin v. Railroad Co.*, 5 Rich. S. C. 583; *Perry v. New Orleans M. & C. R. R. Co.*, 55 Ala. 413.

abutting owner has title to the center of the street only, and the railroad is laid wholly on the half of the street beyond his line, his right to compensation would be controlled by the same principles as where the fee of the whole is in the public, which is discussed in the following sections.⁴ So, where a railroad is laid upon a turnpike, the owner of the fee may have compensation for the additional burden.⁵ Where a railroad company is authorized to appropriate a highway and lay out a new one to accommodate the public, the appropriation of the highway amounts to a vacation of it, the title reverts to the owner, and he is entitled to compensation as if no highway existed.⁶

§ 114. Fee in the public: Rights of abutting owners.

—Though the fee of a street is in the public, yet it is not an absolute, but only a qualified or conditional fee.¹ The pub-

⁴ See *Terre Haute & Logansport R. R. Co. v. Bissell*, 108 Ind. 113; *Heiss v. Milwaukee & Lake Winnebago R. R. Co.* 69 Wis. 555.

⁵ *Mahon v. Utica & Schenectady R. R. Co.*, Supl. to *Hill & Denio*, 156; *Mifflin v. Railroad Co.*, 16 Pa. S. 182. In the latter case the turnpike was vested in the railroad company by act of the legislature.

⁶ *Phillips v. Dunkirk, Warren & Pittsburgh R. R. Co.*, 78 Pa. S. 177.

§ 114.

¹ *Kimball v. Kenosha*, 4 Wis. 321; *Goodall v. Milwaukee*, 5 Wis. 32; *People v. Kerr*, 27 N. Y. 188. Though the city of New York has the fee, "still in my opinion the interest or estate thus conferred upon the city is limited and not absolute, limited by the purposes of the grant, notwithstanding the broad language of the statute." *Id.* See *Abenbroth v. Manhattan Ry.*

Co., 52 N. Y. Supr. Ct. 274. In *Matter of Gilbert Elevated Ry. Co.*, 38 Hun, 437, 448, 452-3, the court approve the following language from the commissioners' report: "The city takes the fee in terms, but only for one specified purpose, viz., in trust to keep the land open as a public street. The fee is not an absolute, unqualified, unconditional fee. The city cannot sell or convey it, or incumber it in any way, or consent that it shall be incumbered. It cannot build upon it, or permit others to do so. The land could not be sold for the debts of the city, for its estate is only a trust estate. The act provides what the city can do with the fee, and that is to keep it open as a public street, and that is all the city can do with it and is all the right the public has taken away from the original owner. The whole duty, power and trust of the city, in the

lic (whether represented by city, State or county) holds the fee in trust for public use as a street, and for no other purpose,² and when the use ceases the fee reverts to him from whom it was acquired, unless otherwise provided by statute.³ The abutting owner has a private right of access to his property over the street, which is as inviolable as his property in the lot itself.⁴ This private right of access is subordinate to

fee, is to keep it open, the fee being taken because the city can thereby better perform its duty and its trust in that regard than if any other quality of estate were taken.

* * * * * Has not every lot-owner a special private right of property in the light, air and access afforded him by an open street? We think he has, without reference to whether he has a title to the land in the street or not. If he has not, and the arguments of the petitioner's learned counsel be correct, the legislature may, without compensation to the lot-owner, empower the petitioners to build solid masonry walls within six inches of the lot-owner's front, and two, three or more stories in height, so long as the only use made of the structure is to carry the public. Or, it may empower some other private corporation to build some similar structure, from side to side of the street, for a market or some other purpose, by simply declaring it to be for the public use. We find, as matter of fact, that the light, air and access of the complainant's lots are interfered with and taken, to an appreciable extent, by the petitioner's acquisition of the lands in question, and, as matter of law, that these are private property rights, and, as ease-

ments, appurtenant to the lots fronting on the street, or otherwise, belonging to the abutting property owners, whether the lot owners have or have not title to the land itself in the street."

² *Schurmeier v. St. Paul & Pacific R. R. Co.*, 10 Minn. 82; *Stanley v. Davenport*, 54 Ia. 463, 468; *People v. Kerr*, 27 N. Y. 188; *Carter v. Chicago*, 57 Ills. 283; *Chicago v. Wright*, 69 Ills. 318. "The grant is expressly upon trust (though dedicated or confiscated), for a public purpose, that the lands may be appropriated and used forever as public streets. * * * * The city has neither the right nor the power to apply any such property to other than public uses, and those included within the objects of the grant. Whatever may be the quantity or the quality of the estate of the city of New York in its streets, that estate is essentially public and not private property, and the city, in holding it, is the agent and trustee of the public and not a private owner for profit or emolument." *People v. Kerr*, at 197 (27 N. Y. 188).

³ *Gebhart v. Reeves*, 75 Ills. 301; *Helen v. Webster*, 85 Ills. 116.

⁴ *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio & Miss. R. R. Co.*, 7 Ind. 479; *Protzman v. Ind. & Cinn.*,

the use and improvement of the street by the public as a public highway, but any interference with the right for any other purpose is an invasion of his property for which an action will lie. The existence of this private right in all cases may be reasoned out as follows: When the owner of a tract of land lays the same out into lots and streets, and sells the lots, the purchasers of such lots acquire as appurtenant thereto a private right of way and access over the streets.⁵ This private right arises without any express grant, and in the absence of any statute.⁶ The law presumes that the parties had in mind the advantages to be derived from the use of the proposed streets, and implies a right to such use as a part of the grant. This position is not open to controversy, and is as good sense as it is good law. If several persons, owners of distinct parts of a tract, should join in laying the same out into streets and lots, the result would be the same. The law would imply the grant of mutual easements of way and access, appurtenant to the respective lots, and this, as before, in the absence of any statute or express mention of such easements. These private rights or easements are the

R. R. Co., 9 Ind. 467; Chicago *v.* Union Building Association, 102 Ills. 379; Transylvania University *v.* Lexington, 3 B. Mon. 25, 27; Lexington & Ohio R. R. Co. *v.* Applegate, 8 Dana, 289; Elizabethtown etc. R. R. Co. *v.* Combs, 10 Bush, 382; Grand Rapids etc. R. R. Co. *v.* Heisel, 38 Mich. 62; Lackland *v.* North Missouri R. R. Co., 31 Mo. 180; Thurston *v.* St. Joseph, 51 Mo. 510; Matter of Lewis Street, 2 Wend. 472; Livingston *v.* Mayor etc. of New York, 8 Wend. 85; People *v.* Kerr, 27 N. Y. 188, 215; Kellinger *v.* Forty-second Street R. R. Co., 50 N. Y. 206, 211; Crawford *v.* Delaware, 7 Ohio St. 459; Jackson *v.* Jackson, 16 Ohio St. 163;

Anderson *v.* Turbeville, 6 Coldw. 150; South Carolina R. R. Co. *v.* Steiner, 44 Ga. 546; J. M. & I. R. R. Co. *v.* Esterle, 13 Bush, 667; C. B. U. P. R. R. Co. *v.* Twine, 23 Kan. 585; Falkner *v.* New York, West Shore & Buffalo Ry. Co., 17 Abb. N. C. 279.

⁵ Thurston *v.* St. Joseph, 51 Mo. 510; Pratt *v.* Buffalo City Ry. Co., 19 Hun, 30; Dubuque *v.* Malony, 9 Ia. 450; Indianapolis *v.* Kingsbury, 101 Ind. 200; Matter of Lewis Street, 2 Wend. 472; Livingston *v.* Mayor etc. of New York, 8 Wend. 85; Storg *v.* New York El. R. R. Co., 90 N. Y. 122, 165.

⁶ Story *v.* New York El. R. R. Co., 90 N. Y. 122, 145.

presumed, as well as the real, consideration for the grant or dedication of a part of the tract to public use. These private rights remain the same whether the streets are accepted by the public or not. If, instead of making a gift of the streets to the public, the proprietors should voluntarily grant the streets for a consideration agreed upon and paid by the public, it would still be true in fact, and therefore presumed by law, that, in fixing the consideration to be paid, the parties had in mind the advantages to be derived from the use of the streets. That is, the consideration to each proprietor would be, the right to make use of the streets in connection with his lots, and a certain sum of money paid. The first part of this consideration would be utterly fallacious, unless the right in question is protected by the law of the land the same as any other right. To make the right a part consideration of the grant, and then to allow the public to invade or destroy it at pleasure, would be a fraud which the law will neither impute nor allow.⁷ Therefore, in the case of such a grant, there arises by operation of law a private right to use the streets in connection with the lots of each proprietor, which

⁷ “The claim made that the owner of property taken for a street, obtains, through the award of the commissioners, full compensation for his property, is unfounded, unless the benefits for which he is assessed are inviolably secured to him by such proceedings. Any other construction of the statute would render it an efficient engine of fraud and injustice. An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property. These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities, in raising the fund necessary to defray the cost of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property.” *Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268, 290, 291.

is as inviolable as any other right of property. If the streets, instead of being established by dedication or voluntary grant, are acquired by forced sale or condemnation, how is the matter changed? The price to be paid, instead of being agreed upon, is ascertained in some mode provided by law. The transfer of title is accomplished by legal proceedings, instead of a deed of the parties. In fixing the price to be paid to each proprietor, the advantages to be derived from the use of the street or streets are taken into consideration. Generally, he actually pays a fixed price for these advantages, in the form of an assessment of benefits upon his remaining property. Now, it would be the grossest inequity to compel a man to pay for advantages, whether in the form of deductions from the price to be paid or of an assessment of benefits, unless those advantages are secured to him by a clear title. The result of every such proceeding, therefore, is that there is created and attached to the lot or tract of each proprietor through which the street runs, a *private right*, independent of the *public easement*, to use the street for the purposes of access to the lot and of outlet to the general system of highways. The proceedings have precisely the same effect as a voluntary grant by the several proprietors, and, in case of a voluntary grant, the law will imply a transfer of mutual easements of way and access appurtenant to the several lots.⁸

The existence of these private rights and easements is entirely independent of the mode in which the highway is established, or of the estate or interest which the public

⁸ "The proceedings by which land is acquired by the exercise of the right of eminent domain amount to a statutory conveyance of the same to the public or the corporation, and there is no distinction between such a conveyance and a voluntary conveyance made for public use. Where property is acquired for public use by proceedings *in*

invitum, the statute which authorizes the acquisition constitutes the contract between the citizen and the public, and where the interest has once been acquired it cannot be changed or enlarged without further compensation." Story *v.* New York El. R. R. Co., 90 N. Y. 122, 172.

acquires in the soil of the street, whether a fee or less. The extent or limits of such rights and easements cannot well be defined. But, in general, they include the right to use the street as an outlet from the abutting property to a connecting highway, by any mode of travel or conveyance appropriate to a highway; also, the right to use the street in front of the property, in connection with the use and enjoyment of the property, in such manner as is customary or reasonable. These views are fully sustained by the opinions in *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122.⁹

§ 115. Fee in the public: Right to compensation.—It having been determined that, though the fee of a street is in the public, the abutting owner has certain private rights therein, appurtenant to his property, it follows that, when those rights are interfered with under the power of the eminent

⁹ “What are the rights of a lot-holder in reference to the adjacent streets and alleys? The owner in fee of a tract of land may have it surveyed into town lots, streets and alleys, and, without selling any of the lots or acknowledging the plat, he may destroy the survey and vacate the streets and alleys. But if he convey away any of the lots, the right of the free use of the adjacent streets will pass to the grantees as appurtenant to their lots; and such grantees will not only have a servitude or easement in the adjacent streets and alleys as appurtenant to the lots, but the conveyance itself would be a dedication of the streets and alleys to the public as well as to the private use of the lots. This would be the result without any statutory dedication by acknowledging and filing the plat with the county recorder. The effect of a statutory dedication, however, is precisely the same.

It vests in the adjacent lot-holder the right to the use of the streets as appurtenant to his lot, and this easement is as much property as the lot itself. It is a property interest, independent of the right of the public highways, and the lot-holder is as much entitled to protection in the enjoyment of this appurtenant easement as he is in the enjoyment of the lot itself. Hence, whatever injures or destroys this easement, is to that extent a damage to the lot. So if in grading a street it be raised so high as to throw the surface water back upon the lot, or prevent a free access to the street; or if the street be excavated so low as to render the easement of no use to the lot, the lot-holder is thereby damaged to the extent of the loss of such easement.” *Thurston v. City of St. Joseph*, 51 Mo. 510. And see *post*, § 122.

domain, there has been a *taking* within the constitution. The existence and operation of a railroad in the street is necessarily some interference with those rights, and, to the extent of such interference, a right to compensation exists.¹ For any physical injury to the abutting property, as by casting cinders upon it, polluting the air with smoke and gases, or by vibrations communicated through the soil to an extent which would be actionable if the property was not a street, a recovery may be had.² With respect to this class of injuries the abutting owner's rights are the same as though the street was private property, and these rights are discussed elsewhere.³ The tendency of the later decisions is towards the protection of private rights and the more accurate ascertainment and definition of those rights. It is now well settled by the great weight of authority that, where the fee of a street is in the abutting owner, he may recover for the additional burden caused by a railroad laid on the street. The cases which deny compensation in any case, on the ground that a railroad is a legitimate use of a highway, are so clearly against good sense and reason that we do not think they require further discussion. The right to recover where the fee is in the public is involved in so much doubt by the authorities that we have collected in a note all the cases which

§ 115.

¹Pacific R. R. Co. v. Reed, 41 Cal. 256; Ford v. Santa Cruz R. R. Co., 59 Cal. 290; South Carolina Railraad Co. v. Steiner, 44 Ga. 546; C. B. U. P. R. Co. v. Twine, 23 Kan. 585; Elizabethtown etc. R. R. Co. v. Combs, 10 Bush, 382; J. M. & I. R. R. Co. v. Esterle, 18 Bush, Ky. 667; Schurmeier v. St. Paul & Pacific R. R. Co., 10 Minn. 82; Story v. New York Elevated R. R. Co., 90 N. Y. 122; G. C. & S. Fe. R. Co. v. Eddins, 29 Alb. L. J. June 1884, 518.

²South Carolina R. R. Co. v. Steiner, 44 Ga. 546; Atchison & Nebraska R. R. Co. v. Garside, 10 Kan. 552; Crosby v. Owensboro etc. R. R. Co., 10 Bush, 288; Elizabethtown R. R. Co. v. Combs, 10 Bush, 382; J. M. & I. R. R. Co. v. Esterle, 18 Bush. 667; Randle v. Pacific R. R. Co., 65 Mo. 325; Parrott v. Cincinnati etc. R. R. Co., 3 Ohio St. 330; Same v. Same, 10 Ohio St. 624; G. C. & S. Fe. R. Co. v. Eddins, 29 Alb. L. J. 518.

³See *post*, § 152.

involve the question, with such comment as seemed appropriate.⁴

** Alabama.* No recovery, whether fee in owner or public. *Parry v. New Orleans M. & C. R. R. Co.*, 55 Ala. 413.

California. Fee in public, no compensation. *Carson v. Central R. R. Co.* 35 Cal. 325. Overruled by later cases. *Southern Pacific R. R. Co. v. Reed*, 41 Cal. 256; *Schulte v. North Pacific Transportation Co.*, 50 Cal. 592; *Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290. But no recovery can be had unless actual damages are sustained. *Hogan v. Central Pacific R. R. Co.*, 71 Cal. 83.

Colorado. In favor of recovery. *Dever v. Bayer*, 7 Col. 113.

Georgia. Earlier cases against recovery. *Savannah, A. & G. R. R. Co. v. Shields*, 33 Ga. 601; *Roll v. City Council of Augusta*, 34 Ga. 326; Overruled in *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546, 560. In this case the court say: "The owners of lands and tenements on Washington street are entitled to have and enjoy all the rights and privileges which legally appertain thereto, *incorporeal* as well as corporeal; for when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same. If the railroad companies, by permission of the public authorities, have located their road on the public street of the city, and by the use thereof, in running their trains, have invaded any of the legal rights of the owners of the lands and tenements on the street by hindering, obstructing or disturbing them in the regular use and lawful enjoyment of the same, then the owners of

such lands and tenements are entitled to recover such damages as they have actually sustained by such invasion of their legal rights to the enjoyment of their property, although the railroad companies may not have located their road on any part of it. The invading, hindering obstructing or disturbing them in the regular use and lawful enjoyment of their property is an interference with their private legal rights to that property, and, to that extent, is the taking of private property for public use, for which just compensation should be made."

Illinois. Fee in public, no compensation, on the ground that a railroad is a legitimate use. *Moses v. Pittsburgh, Ft. W. & C. R. R. Co.*, 21 Ills. 516. The ground of this case overruled in *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ills. 439; see also *C. B. & Q. R. R. Co. v. McGinnis*, 79 Ills. 269. The right to recover is now settled by the constitution; *ante* § 23.

Indiana. *Tate v. Ohio & Miss. R. R. Co.*, 7 Ind. 479; *Hutton v. Indiana Cent. R. R. Co.*, 7 Ind. 522; *Protzman v. Indianapolis & Cin. R. R. Co.*, 9 Ind. 467; *Indiana Cent. R. R. Co. v. Broden*, 10 Ind. 96; *New Albany & Salem R. R. Co. v. O'Daily*, 12 Ind. 551; *Same v. Same*, 13 Ind. 353; *Cox v. Louisville R. R. Co.*, 48 Ind. 178; *Dwenger v. Chicago & Grand Trunk R. R. Co.*, 98 Ind. 153. These cases leave the question in doubt where the fee is in the public and the railroad is laid on the surface of the street.

§ 116. Authority to occupy a street, how granted and construed.—Before a railroad company can lawfully occupy a street, it must have an authority to do so from the legisla-

Iowa. Rule of no compensation where fee in public is firmly upheld. *Milburn v. Cedar Rapids*, 12 Ia. 246; *Hughes v. Miss. & Mo. R. R. Co.*, 12 Ia. 261; *Clinton v. Cedar Rapids, etc. R. R. Co.*, 24 Ia. 455; *Slatten v. Des Moines Valley R. R. Co.*, 29 Ia. 148; *Davenport v. Stevenson*, 34 Ia. 225; *Ingraham v. C. D. & M. R. R. Co.*, 34 Ia. 249; *Ingram v. Same*, 38 Ia. 669; *Chicago etc. R. R. Co. v. Newton*, 36 Ia. 299; *Hine v. K & D. M. R. R. Co.*, 42 Ia. 636; *Cadle v. Muscatine Western R. R. Co.*, 44 Ia. 11; *Frith v. Dubuque*, 45 Ia. 406; *Davis v. C. & N. W. Ry. Co.*, 46 Ia. 389; *Simplot v. Chicago, M. & St. Paul Ry. Co.*, 5 McCrary, 158. The ground taken, in some of the cases, that a railroad is a legitimate use of a street, is overruled in *Kucheman v. C. C. & D. Ry. Co.*, 46 Ia. 366.

Kansas. No recovery, fee in public. *Atchison & Nebraska R. R. Co. v. Garside*, 10 Kan. 552. This case is virtually, though not expressly, overruled in the later cases of *C. B. U. P. R. R. Co. v. Twine*, 23 Kan. 585; *Same v. Andrews*, 26 Kan. 702; *Central Branch Union Pacific R. R. Co. v. Andrews*, 30 Kan. 590.

Kentucky. The general doctrine is that the abutting owner cannot recover, whether fee in the public or otherwise. *Lexington & Ohio R. R. Co. v. Applegate*, 8 Dana, (Ky.) 289; *Wolf v. Covington & Lexington R. R. Co.*, 15 B. Mon. 404; *Louisville and Frankfort R. R. Co. v. Brown*, 17 B. Mon. 763; *Cosby v. Owensboro & Russellville R. R. Co.*,

10 Bush, (Ky.) 288; *Elizabethtown & Paducah R. R. Co. v. Thompson*, 79 Ky. 52. But the abutting owner's right to use the street is recognized as property, and any *unreasonable use* of the street by a railroad is actionable. *Elizabethtown etc. R. R. Co. v. Combs*, 10 Bush, 382; *J. M. & I. R. R. Co. v. Esterle*, 13 Bush, 667. Exactly at what point the use becomes *unreasonable* and what rule is to be applied in determining what is an unreasonable use the cases do not inform us. But, when it is conceded that the abutting owners have a private right to use the street, we think a right to recover follows in every case of a disturbance of that right.

Louisiana. No right to compensation in any case. *New Orleans, M. & C. R. R. Co.*, 26 La. An. 517; *Koehmel v. Same*, 27 La. An. 442; *Harrison v. New Orleans Pacific R. R. Co.*, 34 La. An. 462; *Hill v. Chicago, St. Louis & New Orleans R. R. Co.*, 38 La. An. 599. But an unreasonable location in a street so as to take part of plaintiff's awning was restrained in *Laviosa v. Chi. St. L. & N. O. R. R. Co.*, 1 McGloin, La. 299.

Michigan. Right to recover when fee in public not directly passed upon; but see *Grand Rapids etc. R. R. Co. v. Heisel*, 38 Mich. 62; *Same v. Same*, 47 Mich. 393.

Minnesota. Abutting owner may have compensation, though fee in the public. *Schurmeir v. St. Paul & Pacific R. R. Co.*, 10 Minn. 82,

ture, or from some municipal corporation having power to grant it. A railroad cannot occupy a street under its general authority to make a location, but such right must be ex-

105; *Cash v. Union Depot etc. Co.*, 32 Minn. 101.

Mississippi. See *Donnaker v. State of Mississippi*, 8 S. & M. 649; *New Orleans, J. & G. N. R. R. Co. v. Moye*, 39 Miss. 374. Neither of these cases passes directly upon the right to compensation when the fee is in the abutting owner.

Missouri. In this State no distinction appears to have been based upon the ownership of the fee. No damages can be recovered for a railroad on the surface of a street, if built and operated in a proper manner. *Lackland v. North Mo. R. R. Co.*, 31 Mo. 180; *Same v. Same*, 34 Mo. 259; *Randle v. Pacific R. R. Co.*, 65 Mo. 325; *Swenson v. Lexington*, 69 Mo. 157; *Botto v. Mo. Pacific R. R. Co.*, 11 Mo. App. 589; *Cross v. St. Louis, K. C. & N. Ry. Co.*, 77 Mo. 318.

Nebraska. The abutting owner may recover, though the fee is in the public. *Burlington & Missouri Riv. R. R. Co. v. Reinhackle*, 15 Neb. 279.

New Jersey. *Morris & Essex R. R. Co. v. Newark*, 10 N. J. Eq. 352.

New York. The right to compensation, when the fee is in the public, would seem to be settled by the elevated railroad cases. *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122; *Mahady v. Brunswick R. R. Co.*, 91 N. Y. 148; *Matter of East River Bridge etc.*, 26 Hun, 490.

Nevada. *Virginia & T. R. R. Co. v. Lynch*, 13 Nev. 92.

Ohio. *Parrott v. Cincinnati etc. R. R. Co.*, 3 Ohio St. 330; S. C. 10

Ohio St. 624; *Railroad Co. v. Hambleton*, 40 Ohio St. 496.

Pennsylvania. Right to compensation denied in all cases. *Phil. & Trenton R. R. Co.*, 6 Wharton, 25; *Mercer v. Pittsburgh, Ft. W. & C. R. R. Co.*, 36 Pa. S. 99; *Snyder v. Pennsylvania R. R. Co.*, 55 Pa. S. 340; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. S. 325; *Black v. Phil. & R. R. R. Co.*, 58 Pa. S. 249; *Danville, H. & W. R. R. Co. v. Commonwealth*, 73 Pa. S. 29; *Struthers v. Dunkirk etc. Ry. Co.*, 87 Pa. S. 282. In the latter case the court was urged to overrule former decisions, but refused to do so. See also *Philadelphia v. Empire Passenger R. R. Co.*, 3 Brews. 547; *Faust v. Passenger Ry. Co.*, 3 Phil. R. 164.

South Carolina. Recovery denied without regard to fee: *McLaughlin v. Railroad Co.*, 5 Rich. (S. C.) 583.

Texas. Fee in the public, no compensation. *H. & T. C. R. R. Co. v. Odum*, 53 Tex. 343; overruled in *G. C. & S. Fe R. Co. v. Eddins*, 29 Alb. L. J. 518.

Vermont. *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 49; S. C. 28 Vt. 142; *Richardson v. Same*, 25 Vt. 465.

West Virginia. The propriety of distinctions based upon the ownership of the fee is much discussed in *Spencer v. Point Pleasant & Ohio R. R. Co.*, 23 W. Va. 406, 426-432, but the case is decided on other grounds.

pressly granted or necessarily implied.¹ A municipal corporation cannot give a valid consent to such occupation without express authority for that purpose.² Such authority, whether obtained directly from the legislature or from a local municipality, only protects the company to the extent of the public right or easement in the street, and leaves the company to deal with private rights as in other cases.³ If the abutting owner has the fee, he is entitled to the same rights and remedies as though the public easement did not exist, and may maintain trespass,⁴ ejectment⁵ or bill for injunction.⁶ If the fee is in the public, as both title and possession would be in a third party, the only remedy of the abutting owner is an action on the case.

§ 116.

¹ State *v.* Hoboken, 35 N. J. L. 205; Cooper *v.* Alden, Harr. Mich. 72; Morris & Essex R. R. Co., *v.* Newark, 10 N. J. Eq. 352; Springfield *v.* Conn. River R. R. Co. 4 Cush. 63; Davis *v.* Mayor etc. of New York, 14 N. Y. 506.

² Perry *v.* New Orleans & Chattanooga R. R. Co., 55 Ala. 413; Covington St. Ry. Co. *v.* City of Covington, 9 Bush. 127; 2 Dillon, Munic. Corp. § 705. A city having power to give such consent and not being restricted to any particular mode, may do so by resolution or vote, as well as by ordinance. Merchant's Union Barb Wire Co. *v.* Chicago, B. & Q. R. R. Co. 70 Ia. 105. A provision in a city charter authorizing the laying of railroads in streets on consent of a majority of the land-owners was held to refer to horse railroads only. Chamberlain *v.* Elizabethport Steam Cordage Co., 41 N. J. Eq. 43. A city has no power to authorize railroads upon streets for private use. Heath *v.* Des Moines

& St. Louis Ry. Co., 61 Ia. 11; Mikesell *v.* Durkee, 34 Kan. 509; Macon *v.* Harris, 75 Ga. 761; S. C. 73 Ga. 428; State *v.* Trenton, 36 N. J. L. 79; Fanning *v.* Osborne & Co., 34 Hun. 121; S. C. 102 N. Y. 441. Nor can a city grant to a railroad the exclusive use of a street. St. Louis, Alton & Terre Haute R. R. Co. *v.* Belleville, 20 Ills. App. 580.

³ Gray *v.* St. Paul & Pacific R. R. Co., 13 Minn. 315; Cape Girardeau etc. Road Co. *v.* Renfoe, 58 Mo. 265; Washington Cemetery *v.* P. P. & C. I. R. R. Co. 68 N. Y. 591; Matter of New York El. R. R. Co., 70 N. Y. 327, 354.

⁴ Post, § 649, and, generally, as to remedies in such cases, see post, chap. xxviii.

⁵ Wager *v.* Troy Union R. R. Co 25 N. Y. 526; Carpenter *v.* Oswego & S. R. R. Co., 24 N. Y. 655. *Contra:* Edwardsville R. R. Co. *v.* Sawyer, 92 Ills. 377. See post, § 646.

⁶ Imlay *v.* Union Branch R. R. Co., 26 Conn. 249; Cox *v.* Louisville R. R. Co., 48 Ind. 178; Henderson

§ 117. Rights of company as to manner of constructing and operating road.—If the grant of authority specifies the particular part of the street to be occupied, or imposes any conditions as to construction or operation, such provisions must be complied with.¹ Every such grant is accompanied with the implied condition, that the road shall be so constructed and operated as to produce no unnecessary or unreasonable interference with public or private rights. This necessarily follows from the fact that the user is a joint one, and that the highway is not abandoned, though the soil is devoted to an additional public use. Thus, under a general authority to occupy a street, the road must be laid substantially at the grade of the street, that is, with only such elevations and depressions as are necessary to secure a regular grade,² and in the traveled roadway, and not over the curb or sidewalk.³ Under such general authority only a single track can be laid down, and that can only be used for purposes of transportation.⁴ The company, having once located its track, has exhausted its right of choice, and may not move it to a different

¹ New York Central R. R. Co., 78 N. Y. 423; Harrington *v.* St. Paul & Sioux City R. R. Co., 17 Minn. 215; Ford *v.* Chicago & N. W. Ry. Co., 14 Wis. 609; *post*, § 635.

§ 117.

¹ Pacific R. R. Co. *v.* Leavenworth City, 1 Dill. 393.

² Tate *v.* Ohio & Miss. R. R. Co., 7 Ind. 479; Hutton *v.* Indiana Central Ry. Co., 7 Ind. 522; Protzman *v.* Indianapolis & Cin. R. R. Co., 9 Ind. 467; Lackland *v.* North Missouri R. R. Co., 31 Mo. 180; S. C. 34 Mo., 259; Randle *v.* Pacific R. R. Co., 65 Mo. 325; Swenson *v.* Lexington, 69 Mo. 157; Cross *v.* St. Louis, etc. Ry. Co., 77 Mo. 318; Savannah A. & G. R. R. Co. *v.* Shiels, 33 Ga. 601. The municipality may establish a grade which

will accommodate the railroad without any other liability than in case of an ordinary change of grade. Protzman *v.* Indianapolis & Cin. R. R. Co., 9 Ind. 467.

³ Lavison *v.* Chicago, St. L. & N. O. Ry. Co., 1 McGloin La. 299; but see *contra*, Koelman *v.* New Orleans, M. & C. R. R. Co., 27 La. An. 442.

⁴ Lacland *v.* North Missouri R. R. Co., 31 Mo. 180; Southern Pacific R. R. Co. *v.* Reed, 41 Cal. 256; *contra*: Davis *v.* C. & N.W. Ry. Co., 46 Ia. 389; and see Street Railway Co. *v.* West Side Ry. Co., 48 Mich. 433. In Indianapolis & St. Louis R. R. Co. *v.* Calvert, 110 Ind. 555, it was held that one who had granted the right to lay one track in the street in front of his property could not enjoin the construction of a switch

location.⁵ The company may not build a depot⁶ or passenger platform⁷ in the street, or turn it into a switch yard or freight delivery.⁸ When the road is constructed unlawfully, or without authority,⁹ or in a negligent and improper manner,¹⁰ or when it is so operated as to unnecessarily obstruct the street,¹¹ the company will be liable. The remedies in such cases will be discussed elsewhere.¹²

§ 118. Railroad across highways.—A railroad cannot be laid across a highway without compensation to the owner of the fee.¹ Generally, the mode of crossing and the duties of the company in respect to the same are defined by statute. Crossings above or below grade are frequently made, requiring alteration in the surface of the street to make suitable approaches. For damages resulting from such lateral ap-

which was laid on the same ties and projected fourteen inches for a space of nineteen feet opposite his property.

⁵ Little Miami R. R. Co. v. Maylor, 2 Ohio St. 235; especially if the new position is more injurious to abutting property. Dubach v. Hannibal & St. Joseph R. R. Co., 89 Mo. 483. See *contra*, Snyder v. Pennsylvania R. R. Co., 55 Pa. S. 340.

⁶ Barney v. Keokuk, 4 Dill. 593, affirmed 94 U. S. 324; Cooper v. Alden, Harr. Mich. 72. Authority to construct an elevated railroad on a street does not authorize a depot or stairs on an intersecting street. Mattage v. New York El. Ry. Co., 67 How. Pr. 232.

⁷ Higbee v. Camden & Amboy R. R. Co., 19 N. J. Eq. 276; 20 N. J. Eq. 435.

⁸ Lackland v. North Missouri R. R. Co., 31 Mo. 180; Trook v. B. & P. R. R. Co., 3 McArtour, D. C. 392; Randle v. Pacific R. R. Co., 65 Mo.

325; Grand Rapids etc. R. R. Co. v. Heisel, 38 Mich. 62; 47 Mich. 393; Mahady v. Brunswick Ry. Co., 91 N. Y. 148; Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316.

⁹ Morris & Essex R. R. Co. v. Newark 10 N. J. Eq. 352; Parrot v. Cincinnati etc. R. R. Co., 3 Ohio St. 330; Cooper v. Alden, Harr. Mich. 72; Garnett v. Jacksonville, etc. R. R. Co., 20 Fla. 889; Knickerbocker Ice Co. v. Philadelphia & Reading R. R. Co., 15 Phila. 48.

¹⁰ Cadle v. Muscatine Western R. R. Co., 44 Ia. 11; Brewer v. Boston C. & F. R. R. Co., 113 Mass. 52.

¹¹ Frith v. Dubuque, 45 Ia. 406; Atchison & Nebraska R. R. Co. v. Garside, 10 Kan. 552; and see Green v. New York Central R. R. Co., 65 How. Pr. 154.

¹² *Post*, chap. xxviii.

§ 118.

¹ Trustees v. Auburn & Rochester R. R. Co., 3 Hill, 567; Starr v. Camden etc. R. R. Co., 24 N. J. L. 592.

proaches, the right to recover depends upon principles already discussed in this chapter. Different States hold different doctrines. If the crossing above or below grade is wholly unnecessary, the company will be liable for damages caused by the lateral approaches.² As such changes of grade are made solely to accommodate the railroad company, and not at all for the purpose of improving the highway for travel, being always, in fact, a detriment to the highway as such, the abutting owners should receive compensation for any injury to their rights in the street as already defined, as by interfering with access or light and air, as well as for actual invasion of their lots, as by turning surface water onto them or otherwise. Some courts have allowed a recovery for such damages,³ and others have denied it.⁴ Where a railroad crosses a *cul de sac*, and so interferes with, the access to property thereon, a recovery may be had, although the surface of the street is not interfered with.⁵ But where a street is crossed by a cut two blocks away from the plaintiff's property, he cannot recover as his right of access or outlet is not interfered with.⁶

² Louisville & Nashville R. R. Co. v. Hodge, 6 Bush, 141; Farrant v. First Division of St. Paul & Pac. Ry. Co., 13 Minn. 311. The company may make *necessary* alterations; Commonwealth v. Hartford & New Haven R. R. Co., 14 Gray, 379.

³ Buchner v. C. M. & N. W. Ry. Co., 56 Wis. 403; Buchner v. Chicago, Mil. & St. Paul Ry. Co., 60 Wis. 264; Indianapolis etc. R. R. Co. v. Smith, 52 Ind. 428; Kaiser v. St. Paul S. & T. F. R. R. Co., 22 Minn. 149; Nicholson v. New York & New Haven R. R. Co., 22 Conn. 74.

⁴ Whittier v. Portland & Kennebec R. R. Co., 38 Me. 26; Towle v.

Eastern Railroad, 17 N. H. 519; Buck v. Conn. & Pass. River R. R. Co., 42 Vt. 370; Richardson v. Vermont Central R. R. Co. 25 Vt. 465; Conklin v. New York, Ontario & Western Ry. Co., 102 N. Y. 107.

⁵ Brakken v. Minneapolis & St. Louis Ry. Co., 29 Minn. 41.

⁶ Shaubut v. St. Paul & Sioux City R. R. Co., 21 Minn. 502; and see Brakken v. Minneapolis & St. Louis Ry. Co., 32 Minn. 425; S. C. 31 Minn. 45, and 29 Minn. 41; also Rochette v. Chicago, Mil. & St. Paul Ry. Co., 32 Minn. 201; Barnum v. Minnesota Transfer Co., 33 Minn. 365.

§ 119. Right of municipality having the fee to receive compensation.—As we have already had occasion to observe a municipal corporation, though holding the fee of its streets, holds them simply as a trustee for the public. It has no such private right or interest therein, as entitles it to compensation when a railroad is laid thereon by legislative authority, though without its consent.¹ But where a railroad company made an exclusive appropriation of a part of a public highway including a bridge, and tore down the bridge and used the materials, it was held that the town could recover therefor,² being put in this respect upon the same footing as a turnpike company. Where a railroad is unlawfully upon a street of a municipality, it can maintain an action for its removal.³

§ 120. When the owner is estopped from claiming damages.—Where the owner of property urges or induces a railroad company to locate its road upon the adjacent street, he will, after the invitation has been acted upon, be estopped from claiming damages or enjoining the operation of the road.¹ It has been held that lawful authority to occupy a street will be presumed after the lapse of twenty years.²

§ 121. Measure of damages: Remedies.—A discussion of the proper measure of damages and of the elements which may properly be considered in all cases where a recovery

§ 119.

¹ *Milwaukee v. Milwaukee & Beloit R. R. Co.*, 7 Wis. 85; *Clinton v. Cedar Rapids & Mo. River R. R. Co.*, 24 Ia. 455; *Chicago etc. R. R. Co. v. Newton*, 36 Ia. 299; *Savannah & Thunderbolt R. R. Co. v. Savannah*, 45 Ga. 602; *People v. Kerr*, 27 N. Y. 188; *contra: Donnaker v. State*, 8 S. & M. 649.

² *Troy v. Cheshire R. R. Co.*, 23 N. H. 83.

³ *Rio Grande R. R. Co. v. Browns-*

ville, 45 Tex. 88; *Morris & Essex R. R. Co. v. Newark*, 10 N. J. Eq. 352.

§ 120.

¹ *Wolf v. Covington & Lexington R. R. Co.*, 15 B. Mon. 404; *Miller v. Railroad Co.*, 6 Hill 61; *Murdock v. Prospect Park & Coney Island R. R. Co.* 10 Hun, 598.

² *Higbee v. Camden & Amboy R. R. Co.*, 20 N. J. Eq. 435; *Morris & Essex R. R. Co. v. Prudden*, 20 N. J. Eq. 530.

may be had for injuries by a railroad laid in a public street, together with a consideration of the proper remedies to be resorted to in such cases, are reserved for a subsequent part of this treatise, to which the reader is referred.¹

§ 122. Further, as to rights of abutting owners.—In former sections¹ we have discussed at considerable length the rights of abutting owners upon highways. In this connection, we desire to advert especially to a right which has already been mentioned, and which is subject to impairment by the construction and operation of elevated railways. We refer to the right to light and air. When a highway is established, and irrespective of the mode by which it is established, or of the interest acquired by the public in the soil, there is attached to the abutting property a right to receive light and air from the space above the surface of the street. This right stands upon the same footing as the right of access. It arises in the same manner,² and, like it, is subordinate to the right of the public to improve the highway for purposes of travel. The existence and nature of this right are very ably expounded in an opinion of the Court of Errors and Appeals of New Jersey, which is worthy of special attention.³ Complainant owned land abutting on the Morris Canal, and had erected a building with windows overlooking

§ 121.

¹ *Measure of Damages, post*, § 493.

A few of the leading cases are here cited. *Inlay v. Union Branch R. R. Co.*, 26 Conn. 249; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Henderson v. N. Y. Central R. R. Co.*, 78 N. Y. 423. As to the apportionment of damages where only part of the track is on the land of the abutting owner, see *Blesch v. C. & N. W. Ry. Co.*, 48 Wis. 168; *S. C. 43 Wis. 183*; *Kucherman v. C. C. & D. Ry. Co.*, 46 Ia.

366. Remedies, post, chapters xxvii and xxviii.

§ 122.

¹ *Ante*, §§ 100, 114.

² *Ante*, § 114. In *Codman v. Evans*, 5 Allen, 308, 311, the court say that an abutting owner who owns the fee is entitled "to have the whole space occupied by a street open from the soil upwards for the free admission of light and air and the prospect unobstructed from any point."

³ *Barnett v. Johnson*, 15 N. J. Eq 481, 487.

the canal. The fee of the right of way occupied by the canal was vested in the Canal Company for public use as a canal. The Canal Company authorized the defendant to erect a building over the canal and adjacent to complainant's lot, the effect of which would be to close up the windows in complainant's building and completely cut him off from light, air or access over the canal. The court held, fourteen judges concurring, that, though the canal was a public highway and the fee was vested in the company, yet the complainant had a right to light and air which, though subordinate to the use of the land as a public highway, was paramount to any other use, and that, as the building was not for the improvement of the canal as a highway, its erection should be enjoined. The court say:

"There are, it appears to me, two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage; the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air.

"In the first place, has not the adjacent owner upon the '*alta regia via*,' the ordinary public highway, of common right the privilege of receiving from it light and air? Universal usage is common law. What has this been? Men do not first build cities, and then lay out roads through them, but they first lay out roads, and then cities spring up along their lines. As a matter of fact and history, have not all villages, towns and cities in this country and in all others, now and at all times past, been built upon this assumed right of adjacency? Is not every window and every door in every house in every city, town, and village the assertion and maintenance of this right?

"When people build upon the public highway, do they in-

quire or care who owns the fee of the road-bed? Do they act or rely upon any other consideration, except that it is a public highway and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, whithout which cities could not have been built; and without the enforcement of which they would soon become tenantless? It is a right essential to the very existence of dense communities. What must be the consequence, to permit the accidental owner of a part or the whole of the road-bed to wall up or throw a thin curtain in front of the adjacent buildings or by any other contrivance shut out from them the light and air? Suppose the owner of the fee should try the experiment to the east of the complainant's house, and wall up Broad street, would it be tolerated for a moment, or, if enforced, would it not soon turn our streets into tunnels, and seal up cities in darkness?

“ If it be said that there are no cases sustaining this right, so there are none establishing this right, to light and air at all, or to the right of passage. It is a right founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at definance all legislative enactment and all judicial decisions. It is the mode by which the sovereign power, in the exercise of its eminent domain, since land has become the object of private ownership, ‘*ab imo usque ad cælum*,’ at the same time that it creates a right of passage, opens up and reserves to all, as the increasing density of the population demands it, the use of the common elements of light and air. We cannot conclude othewise than that a right so essential, so universal in its exercise in all time and among all nations, exists, not, as was said in the case of *Gough v. Bell*, 2 Zab, 441, by a common law local to New Jersey, but by a law common to the whole civilized world.”

This case anticipates the principle upon which compen-

sation was at last secured in the elevated railway cases in New York.⁴

§ 123. Right to compensation in case of elevated railways.—The principles which apply to elevated railroads do not differ from those which apply to surface roads. They are clearly not within the ordinary and legitimate uses for which highways are established. If the fee of the street is in the abutting owner, he is entitled to compensation, as in case of the ordinary steam railroad.¹ If the fee is not in the abutting owner, he is still entitled to recover for damages occasioned to his property by interfering with his right of access and his right to light and air. These rights are property, and, to impair or destroy them is a *taking*. Various questions in reference to the elevated railways of New York City have come before the courts of New York,² but the right to compensation was not authoritatively passed upon until the decision made by the Court of Appeals in *Story v. New York Elevated Railroad Co.*, 90 N. Y. 122.³ Plaintiff owned an improved lot abutting on Front street, in which the defendant proposed to construct “a road upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside the edge of the side-

¹Further authorities in support of the conclusions in this section will be found in the cases cited in the next section.

§ 123.

¹*Ante*, § 113.

²Matter of New York Elevated R. R. Co., 70 N. Y. 327; Matter of Gilbert Elevated Ry. Co., 70 N. Y. 361; Matter of Kings County Elevated Ry. Co., 82 N. Y. 95; Sixth Ave. Ry. Co. v. Gilbert Elevated Ry. 43 N. Y. Supr. Ct. 292; S. C. 41; N. Y. Sup. Ct. 489; Matter of East River Bridge & Rapid Transit Co., 10 Abb. New Cases, 245; Matter of East River Bridge etc. Co., 26 Hun,

490; *Matter of Brooklyn Rapid Transit Co.*, 62 How. Pr. 404. A collection of Elevated Railway cases with a note will be found in Vol. 3, Abbott's New Cases, as follows: *Patten v. New York Elevated R. R. Co.*, p. 306, Ninth Ave. R. R. Co. v. Same, p. 347; Sixth Ave. R. R. v. Gilbert Elevated R. R. Co., p. 372; *Matter of New York Elevated R. R. Co.*, p. 401; *Gilbert Elevated R. R. Co. v. Anderson*, p. 434; *Spader v. New York Elevated R. R. Co.*, p. 467; *Story v. Same*, p. 478.

³Decided Oct. 17th, 1882, found also in 11 Abb. New Cases, p. 236.

walk, and carrying girders, from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad." The cars intended for the road, when placed thereon, would extend eleven feet above the tracks, would project two feet over the sidewalk on either side of the street and reach within nine feet of plaintiff's buildings. It was found as matter of fact that the existence of this structure and operation of the road would interfere with access to the plaintiff's premises, and would, to some extent, intercept the light and air from his building and impair the enjoyment and value of his property. The lot and street in question were originally a part of a tract of land platted and sold by the city of New York, and in the deeds from the city it is declared that "the said several streets shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for the inhabitants of the said city, and all others passing and returning through or by the same, in like manner as the other streets of the said city now are or lawfully ought to be." Front street was one of the streets referred to. Plaintiff's lot was originally conveyed as bounded on Front street, and whatever rights in the street had attached to the lot originally were duly vested in the plaintiff. The case was principally considered on the theory that the fee of the street was in the city. It was held that the original purchaser acquired certain rights in the street, in the nature of an easement therein appurtenant to his lot. "But what is the extent of this easement?" says the court. (p. 146). "What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way. The street occupies the surface and to its uses the rights of the adjacent lots are subordinate, but above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner. To hold otherwise would enable the city to derogate from its own grant, and violate the arrangement on the faith

of which the lot was purchased. This in effect was an agreement, that if the grantee would buy the lot abutting on the street, he might have the use of light and air over the open space designated as a street. In this case it is found by the trial court in substance, that the structure proposed by the defendant, and intended for the street opposite the plaintiff's premises, would cause an actual diminution of light, depreciate the value of the plaintiff's warehouse and thus work his injury. In doing this thing the defendant will take his property as much as if it took the tenement itself."⁴

Although, in this particular case, the street in question was laid out by the city itself, which also originally granted the plaintiff's lot with a covenant that the street should forever remain open as a public street, yet the principles of the

⁴The conclusions of the court upon the whole case are given by Tracy, J., as follows:

"First. That the plaintiff, by force of the grant of the city, made to his grantors, has a right or privilege in Front street, which enables him to have the same kept open and continued as a public street for the benefit of his abutting property.

"Second. That this right or privilege constitutes an easement, in the bed of the street, which attaches to the abutting property of the plaintiff, and constitutes private property, within the meaning of the constitution, of which he cannot be deprived without compensation.

"Third. That such a structure as the court found the defendant was about to erect in Front street, and which it has since erected, is inconsistent with the use of Front street as a public street.

"Fourth. That the plaintiff's property has been taken and appropriated by the defendant for public

use without compensation being made therefore.

Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character—and, if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff—he has the right to restrain the erection and continuance of the road by injunction.

Sixth. That the statutes under which the defendant is organized authorize it to acquire such property as may be necessary for its construction and operation by the exercise of the right of eminent domain.

Seventh. The injunction prohibiting the continuance of the road in Front street, should not be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same." pp. 178, 179. The decision of the court is by Andrews, Ch. J., Rapallo, Danforth,

decision will apply with equal force to property abutting upon streets established by private dedication or by condemnation. In platting and conveying the property the city acted merely as a private party. The deeds of conveyance executed by the city did not expressly transfer any rights in the streets as appurtenant to the abutting property, nor define *how* the streets were to be used and enjoyed, except in general terms which would have been implied by law. The meaning of the covenant in the deed, that the streets in question are to be kept open, as public streets, "in like manner as the other streets of the said city now are or lawfully ought to be," is to be determined by reference to the general law and custom which regulates the uses of streets in cities. The court does not determine whether an elevated railroad is a legitimate use of Front street by reference to the deed of the city, but by reference to the manner in which the streets of a city have been immemorially used and enjoyed. Had the property in question been platted and sold by a private individual, the purchasers would have acquired the same rights in Front street as the grantees of the city acquired. And so, had the streets in question been established by condemnation, the result to the abutting property would have been the same.⁵ In short, the right to light, air and access over a public street is a universal and inseparable constituent of abutting property. Such right is property, as sacred as the lot itself, and cannot be interfered with or taken for public use without compensation.⁶

These views in regard to the logical scope of the decision in the Story case are confirmed by the more recent case of *Lahr v. Metropolitan Elevated R. R. Co.*, 104 N. Y. 268. In the latter case the Court of Appeals was strenuously urged to reconsider or modify its decision in the Story case, or at

and Tracy, JJ. Miller, Earl and Finch, JJ., dissent.

R. R. Co., 12 Abb. New Cases, 276; *Glover v. Manhattan Ry. Co.*, 66 How. Pr. 77.

⁵ *Ante*, § 114.

⁶ *Peyser v. New York Elevated*

least confine its application to property held by grant from the city itself upon covenants similar to those in question in the Story case. But the court refused to do either, and expressly approved of its former decision and declared that, "wherever the principles of that case logically lead us we feel constrained to go, and give full effect to the rule therein stated, that abutters upon public streets in cities are entitled to such damages, as they may have sustained by reason of a diversion of the street from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses."⁷

⁷ "We hold that the Story case has definitely determined:

First. That an elevated railroad in the streets of a city, operated by steam power and constructed as to form, equipments and dimensions like that described in the Story case, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon the property of abutting owners.

Second. That abutters upon a public street, claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street is to be laid out in front of such property shall forever thereafter continue for the free and common passage of, and as public streets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, acquire an easement in the bed of the street

for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

Third. That the ownership of such easement is an interest in real estate, constituting property within the meaning of that term, as used in the constitution of the State, and requires compensation to be made therefor before it can lawfully be taken from its owner, for public use.

Fourth. That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam engines, generating gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damage occasioned by such taking."

Accordingly, in the case last referred to, the principles of the Story case were applied where the street was established by condemnation and the fee acquired by the public for use as a highway. In another case it appeared that the street was established under an act which provided that the streets opened thereunder should be converted to the use of the public in the manner "now designated and settled by law, and *in such other manner as the legislature may hereafter deem proper to enact.*" It was held, however, that the legislature could not enact that an elevated railroad should be operated in the street without compensation to the abutting owners.⁸

Since the decision in the Story case, there have been numerous decisions in elevated railway cases by the inferior courts of New York, relating chiefly to the question of damages, but often discussing at more or less length the principles upon which the right to recover is founded. These cases are collected in a note below,⁹ and will be further considered in the chapter on damages.¹⁰

§ 124.—Horse railroads in streets.—It has been determined in numerous decisions, and without dissent except in the State of New York, that the use of a street by a horse railroad constructed and operated in the ordinary manner falls within the purposes for which streets are established and

Lahr v. Met. El. R. R. Co., 104 N. Y. 268, 288.

⁸ *American Primitive Methodist Society v. Brooklyn El. R. R. Co.*, 46 Hun, 530.

⁹ *Matter of New York Elevated R. R. Co.* (Story Case), 36 Hun, 427; *Pond v. Metropolitan Elevated R. R. Co.*, 42 Hun, 567; *Matter of New York Elevated R. R. Co.* (Story Case), 44 Hun, 117; *Caro v. Metropolitan Elevated R. R. Co.*, 46 N. Y. Supr. Ct. 138; *Taylor v. Same*, 50 N. Y. Supr. Ct. 311; *Glover v. Manhattan Ry. Co.*, 51 N.

Y. Supr. Ct. 1; *Drucker v. Same*, 51 N. Y. Supr. Ct. 429; *Ireland v. Metropolitan El. R. R. Co.*, 52 N. Y. Supr. Ct. 450; *Peyser v. Same*, 12 Daly, 70; *Same v. Same*, 13 Daly, 122; *Abendroth v. Manhattan R. R. Co.*, 19 Abb. N. C. 247; *Third Ave. R. R. Co. v. New York Elevated R. R. Co.*, 19 Abb. N. C. 261; *Mattlage v. New York Elevated R. R. Co.*, 67 How. Pr. 232; *Fifth National Bank v. Same*, 28 Fed. R. 231.

¹⁰ *Post*, chap. xx, § 493.

maintained, and consequently, that for any damages resulting from such use to the abutting owner, he can recover no compensation, whether the fee of the street is in him or in the public.¹ In New York State, after various decisions which left the matter in doubt,² it was finally held, in *Craig v. Rochester City & Brighton R. R. Co.*,³ that a horse railroad was an additional burden upon the soil, for which the abutting owner, having the fee, was entitled to compensation. In a later case it was determined that, where the fee of the street is in the public, the laying of a horse railroad on the surface of the street, under lawful authority from the municipality, was not a taking of any property of the abutting owner.⁴

That a difference exists between the ordinary horse railway and the ordinary steam railway is obvious; but is the differ-

§ 124.

¹ *Carson v. Central R. R. Co.*, 35 Cal. 325; *Market Street Ry. Co. v. Central R. R. Co.*, 51 Cal. 583; *Elliott v. Fair Haven & Westville R.R. Co.*, 32 Conn. 579, (a *nisi prius* case only); *Savannah & Thunderbolt R. R. Co. v. Savannah*, 45 Ga. 602; *Eichels v. Evansville Street Ry. Co.*, 78 Ind. 261; *Clinton v. Clinton & Lyons Horse Railway Co.*, 37 Ia. 61; *Stange v. Hill & West Dubuque Street Ry. Co.*, 54 Ia. 669; *Stanley v. Davenport*, 54 Ia. 463; *Brown v. Duplessis*, 14 La. An. 842; *Briggs v. Lewiston & Auburn R. R. Co.*, 79 Me. 363; *Piddicord v. Baltimore etc. R. R. Co.*, 34 Md. 463; *Hiss v. Baltimore etc. Ry. Co.*, 52 Md. 242; *Hodges v. Baltimore Passenger Ry. Co.*, 58 Md. 603; *Attorney General v. Metropolitan R. R. Co.*, 125 Mass. 515; *Hinchman v. Patterson H. R. R. Co.*, 17 N. J. Eq. 75; *Hogencamp v. Same*, 17 N. J. Eq. 83; *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken H. R. R. Co.*, 20 N. J. Eq. 61; *Patterson etc. H. R. R.*

Co. v. Patterson, 24 N. J. Eq. 158; *West Jersey R. R. Co. v. Cape May etc. R. R. Co.*, 34 N. J. Eq. 164; *Street Railway v. Cumminsville*, 14 Ohio St. 524; *Peterson v. Navy Yard, etc. Ry. Co.*, 5 Phil. 199; *Texas & Pacific Ry. Co. v. Rosedale Ry. Co.*, 64 Tex. 80; *Hobart v. Milwaukee City Ry. Co.*, 27 Wis. 194; *Van Bokelen v. Brooklyn City Ry. Co.*, 5 Blatch. 379.

² *Davis v. Mayor, etc. of New York*, 14 N. Y. 506; *Milhau v. Sharp*, 15 Barb. 193; 27 N. Y. 611; *Wetmore v. Story*, 22 Barb. 414; *Mason v. Brooklyn City etc. R. R. Co.*, 35 Barb. 373; *People v. Law*, 34 Barb. 494; *People v. Kerr*, 37 Barb. 357; 27 N. Y. 188; 25 How. Pr. 258.

³ *Craig v. Rochester City etc. R. R. Co.*, 39 Barb. 494; 39 N. Y. 404; see also *Thayer v. Rochester City, etc. R. R. Co.*, 15 Abb. N. C. 52.

⁴ *Kellinger v. Forty-second Street etc. R. R. Co.*, 50 N. Y. 206; see also *Mahady v. Brunswick R. R. Co.*, 91 N. Y. 148.

ence anything more than one of degree? The steam road, with its engines and cars of usual size and weight, might be successfully operated upon strap rails so laid as to be easily crossed and as conveniently used longitudinally by ordinary vehicles as the horse railroad track. On the other hand, the cars of the ordinary street railway may be propelled, not only by animal power, but also by steam or electricity, either in the form of a cable, or of a small locomotive.⁵ The manner of laying down the track, the shape and size of the rails, the size and weight of the cars, and the motive power, are all accidental circumstances, all subject to change and modification as new principles are discovered or improvements made. The essential characteristic of both kinds of roads is that there is granted to a private corporation or individual an exclusive franchise, right or easement in the soil of the street.⁶ To the extent to which the right is private and exclusive, it is foreign to, and subversive of, the character of the street as a public highway. To hold otherwise is, it seems to us, to establish a principle which may lead to the total exclusion of ordinary travel from a public street. If the principle of the horse railroad cases is sound, then a street may be so filled with tracks, with cars running so frequently, as practically to exclude all other travel and traffic from the street. If one track is a legitimate use, any number of tracks is legitimate. It rests simply with the proper public authorities to determine how many tracks will best subserve the public interests. But what may best subserve the public interests, may be very detrimental to particular private interests. A street filled from line to line with street railway tracks upon each of which cars are run at short intervals, propelled it may be by the steam cable, or by some other modern contrivance

⁵ *Craig v. Rochester City etc. R. R. Co.*, 39 Barb. 494.

⁶ *Chicago & Western Indiana R. R. Co. v. St. Louis etc. R. R. Co.*, 15 Ills. App. 587; *Chicago & North-*

Western Ry. Co. v. Jefferson, 14 Ills. App. 615; *Railroad Co. v. Railroad Co.*, 36 Ohio St. 239; *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. S. 150.

even more objectionable, would present very few characteristics of the "common public highway" maintained for the free and common use of all the "king's subjects." The fact that street railways are seldom productive of any detriment to adjoining property and deviate but little from the use of the street by ordinary vehicles, should not be made the groundwork of legal rules that prevent compensation, when in fact serious inconvenience and damage result.

A recent decision in Minnesota illustrates the results to which the logic of the horse railway cases tends. The plaintiff, who owned the fee of the street, brought ejectment against a railroad company which had laid down and was operating its road in the street. The road was built of ordinary T rails and planked so as to be readily crossed. It extended from within the city of Minneapolis to Lake Minnetonka, eighteen miles beyond the city. Within the city it was operated like an ordinary horse railway, except that the cars were run in trains and propelled by steam motors enclosed in cabs. Outside the city it was operated as an ordinary steam railroad. It was held to be a proper and legitimate use of the street as a highway and no additional burden upon the land, and, consequently, that the plaintiff could not maintain his suit to dispossess the company.⁷ It was admitted that if a horse railroad occupied the entire breadth of a street, and ran cars every minute or two, it would be an illegitimate use of the street. It seem to us that, as already explained, this virtually admits away the ground upon which the decision rests.

§ 125. Horse-railroads: Miscellaneous points. — A city or municipal corporation cannot, under its general power to control and regulate its streets, give a valid authority to a horse-railroad company to occupy a street.¹ If laid without

⁷ *Newell v. Minneapolis, Lyndale & Minnetonka Ry. Co.*, 35 Minn. 112.

§ 125.

¹ *Covington Street Ry. Co. v. Covington*, 9 Bush, 127; *Davis v. New*

authority, the road is a public nuisance, and abutting owners suffering special damage thereby may recover for such damages,² or enjoin the continuance of the road.³ But a bill cannot be maintained for that purpose by one who does not own property upon the street, though he be a tax-payer.⁴ The city or municipality in which the title in fee of its streets is vested in trust for the general public, has no such interest in the soil as entitles it to compensation or prevents the legislature from authorizing their occupation by street railways without its consent.⁵ A street cannot be converted into a yard for the storing or deposit of cars,⁶ and for any unreasonable use of the street resulting in special damage to the abutting owner he may have redress. The abutting owner has no easement in the street for backing up teams to the sidewalk for the purpose of loading and unloading freight, and the interference with such use of the street by laying a horse-railroad therein affords no ground for an injunction or suit for damages.⁷ The fact that the track is placed on one side of the street, instead of the middle,⁸ or so near the curbstone as not to leave room for a carriage to stand while cars are passing,⁹ or even over the sidewalk itself,¹⁰ makes no difference in the right to damages.¹¹ It has been held that

York, 14 N. Y. 506; *People v. Kerr*, 27 N. Y. 188; *Milhau v. Sharp*, 27 N. Y. 611.

² *Stange v. Hill & West Dubuque Street Ry. Co.*, 54 Ia. 669.

³ *Wetmore v. Story*, 22 Barb. 414; *Milhau v. Sharp*, 27 N. Y. 611.

⁴ *Davis v. New York*, 14 N. Y. 506.

⁵ *Clinton v. Clinton & Lyons H. Ry. Co.*, 37 Ia. 61; *Savannah & Thunderbolt R. R. Co. v. Savannah*, 45 Ga. 602; *People v. Kerr*, 27 N. Y. 188.

⁶ *Mahady v. Brunswick R. R. Co.*, 91 N. Y. 148.

⁷ *Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194.

⁸ *Kellinger v. Forty-second Street etc. R. R. Co.*, 50 N. Y. 206.

⁹ *Carson v. Central R. R. Co.*, 35 Cal. 325.

¹⁰ *Clark v. Second etc. Street R. R. Co.*, 3 Phil. 259.

¹¹ But in Ohio it is held that if the track is so located as to be an obstruction to the convenient access to the abutting property, the owner is entitled to compensation. *Street Railway v. Cumminsville*, 14 Ohio St. 523.

steam cannot be employed as a motive power upon street railways without special legislative authority.¹²

III. *Other Uses of Streets.*

§ 126. Uses of streets generally.—In regard to the uses which the public authorities can make, or authorize to be made, of the land acquired for streets, the general rule is that streets are laid out primarily to accommodate the public in traveling from place to place, and that the right attaches to do whatever is necessary or proper to facilitate such travel in the usual and ordinary modes. But, while the purpose of streets is primarily for public travel, yet in populous districts it has been the immemorial custom to employ them for other purposes of a public nature which, though having little or no connection with the uses or improvement of the street as a highway, are not inconsistent with such use. “No structure upon the street can be authorized which is inconsistent with the continued use of the same as an open public street.”¹ “Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of a street as a street, must be largely a question of fact depending upon the nature and character of the structure authorized.”² As to the use which may be made of streets beneath the surface, it is difficult to lay down a general rule. But we think it may be said that it is a proper use of streets in populous districts to authorize the laying beneath the surface of the necessary pipes, cables, wires or other appliances for securing drainage or distributing to the inhabitants water, light, heat, power or any matter of general necessity or convenience. Such use of the streets is no obstruction to travel, except temporarily, during the process of construction or repair, and is within the principle of the uses which have been

¹² *Stanley v. Davenport*, 54 Ia. 463. R. Co., 90 N. Y. at p. 177.

§ 126.

² Same at p. 170.

¹ *Story v. New York Elevated R.*

made of urban streets, at least since the days of ancient Rome.

§ 127. Sewers and drains.—Drainage is necessary for the proper construction and maintenance of highways, both in city and country. The manner in which this drainage can be best secured is solely a question for the proper authorities. In the country, an open drain may suffice, but in the city, where the whole surface of the street is needed for travel, a covered sewer is required. As the proper drainage of households and cellars, and the prompt removal of the liquid refuse from dwellings, are necessary to the public health, and therefore matters of public concern, the public may provide the means for such drainage and removal and construct public sewers in the streets for that purpose.¹ The making of a drain or open ditch on the side of a street, if for the amelioration of the street, is a proper use of the street,

§ 127.

¹ Cone *v.* Hartford; 28 Conn. 363, 372; Boston *v.* Richardson, 18 Allen, 146, 159; Warren *v.* Grand Haven, 30 Mich. 24; Kelsey *v.* King, 32 Barb. 410; Allison *v.* Cincinnati, 2 Cinn. Supr. Ct. 462; Cincinnati *v.* Penny, 21 Ohio St. 499; Traphagen *v.* Jersey City, 29 N. J. Eq. 206; Stoudinger *v.* Newark, 28 N. J. Eq. 187; S. C. on appeal, 28 N. J. Eq. 446; Leeds *v.* Richmond, 102 Ind. 372; White *v.* Yazoo City, 27 Miss. 357; McMahon *v.* Council Bluffs, 12 Ia. 268; Glasby *v.* Morris, 18 N. J. Eq. 72. In Cone *v.* Hartford, the court say: "There cannot be a doubt that, in the laying out and establishment of a highway, the right of repairing and maintaining, as well as of originally constructing it, is embraced, and therefore, when damages are assessed to a person for laying out and constructing a road upon his land, those damages

include compensation as well for the repairing of such road as its original construction. Such reparation embraces and extends to the making of such gutters, drains and sewers as are necessary and proper in order to preserve the highway in good condition for the purposes for which it was made. And, for these purposes, we have no doubt that it is as competent to construct drains and sewers below, as it is upon the surface of the ground. On ordinary country roads the gutters upon their sides are usually deemed sufficient to carry off the water and filth upon them. In populous places, however, where they accumulate in greater quantities, or where it may be necessary for the public to use, for passing and other proper purposes, every part of the highway, it is frequently requisite to make the drains of the highway beneath its surface, and the safety

for which the abutting owner has no legal ground of complaint.²

§ 128. Water pipes.—Water is a prime necessity, and in densely populated districts cannot be obtained from the soil without danger to health. A supply of pure water, therefore, becomes a matter of public concern, and its distribution by public authority by means of pipes laid in the public streets is an ancient and universal custom. Such a supply is not only a requisite to the public health, but for the public safety as well, in order to afford the means of extinguishing fires and preventing conflagrations, and may even be connected with the use of the street for travel, when used for sprinkling. Such a use of urban streets is proper and legitimate.¹ Such use of streets is, however, limited to cities and villages. To lay pipes in a country highway for the purpose of conducting water to a town, would be an additional burden for which the owner of the fee would be entitled to compensation.²

§ 129. Gas pipes.—Gas is not, like water, a necessity in the sense of being absolutely indispensable, but it has become a practical necessity in all urban communities. The right to lay pipes in the streets of cities and villages for the distribution of gas has never been questioned, but has often, indirectly, received judicial sanction.¹ But a country highway cannot be used for the purpose of conveying natural

as well as the commodiousness of the public travel, and the healthfulness of the people in its vicinity may also require it. It is no objection, therefore, to a sewer in a highway, that it is made beneath the surface of the ground, if the circumstances render it proper so to construct it."

² *White v. Yazoo City*, 27 Miss. 357; *McMahon v. Council Bluffs*, 12 Ia. 268.

§ 128.

¹ *Crooke v. Flatbush Water Works Co.*, 29 Hun, 245; *Same v. Same*, 27 Hun, 72.

² See *post*, § 129, note 2.

§ 129.

¹ *Story v. New York Elevated R. R. Co.*, 90 N. Y. at p. 161; *West v. Bancroft*, 32 Vt. p. 371; *Thompkins v. Hodgson*, 2 Hun, 146; questioned in *Boston v. Richards*, 13 Allen, 146, 160.

gas to a distant city.² This is an additional burden, for which compensation must be made.

§ 130. **Steam, electricity, etc.**—Within the principle of the foregoing cases would be the laying of pipes in streets, for the purpose of conducting and distributing gas or steam for heating, or the laying of subterranean cables or wires for supplying electricity, either for lighting or other general use.¹ So poles may be set and wires strung in a street for the purpose of lighting the same by electric light,² or operating a fire-alarin, or aiding the public service.

§ 131. **Telegraph and telephone lines.**—The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, but are entirely foreign to its use. Where the fee of the street is in the abutting owner, he is clearly entitled to compensation for the additional burden placed upon his land.¹ When the fee is in the public, the abutting

² Bloomfield etc. Gas Light Co. v. Calkins, 62 N. Y. 386; S. C. 1 Thomp. etc., 541, 549; Sterling's Appeal, 111 Pa. S. 35.

§ 130.

¹ Carli v. Railroad Co., 28 Minn. at p. 376.

² People v. Thompson, 65 How. Pr. 407.

§ 131.

¹ Board of Trade Tel. Co. v. Barnett, 107 Ills. 507; Dusenbury v. Mutual Union Tel. Co., 11 Abb. New Cases, 440; Metropolitan Telephone and Telegraph Co. v. Colwell Lead Co., 50 N. Y. Supr. Ct. 488; Tiffany v. United States Illuminating Co., 51 N. Y. Supr. Ct. 280; S. C. 67 How. Pr. 73; Broome v. New York & New Jersey Telephone Co., 42 N. J. Eq. 141. In the latter case a mandatory injunc-

tion was granted to compel the removal of poles set in the highway in front of plaintiff's premises, the fee of the street being in him, and the erection of other poles was prohibited. In Roake v. American Telephone Co., 41 N. J. Eq. 35, the chancellor refused to enjoin the erection of poles, on the ground that the plaintiff's right was not clear and the injury was not irreparable. And see Hewitt v. Western Union Tel. Co., 4 Mackey, 424. In Pierce v. Drew, 136 Mass. 75, and Julia Building Association v. Bell Telephone Co., 88 Mo. 258, lines of telegraph and telephone are held to be legitimate uses of a highway as such, and consequently that they may be constructed without compensation to the abutting owner. In Pierce v. Drew two of

owner may recover for any interference with his rights in the street. It is evident that poles and wires may be so placed as not to afford the slightest impediment to the access of light and air or to ingress and egress. In such case there is no taking, because there is no damage.² Whether there is or is not damage, is a question of fact, and, if damage can be shown, the remedy is clear upon the authority of cases discussed in previous sections of this chapter.³

§ 132. Markets.—A public market is entirely foreign to the legitimate uses of a public highway, and when a part of the highway is devoted to such use by legislative authority, the abutting owner is entitled to compensation, whether the fee is in him or in the public.¹ But, where fifty feet in the middle of a street was condemned for market purposes, the abutting owners cannot enjoin its use for that purpose on

the judges filed a dissenting opinion and the two opinions contain about all that can be said on either side of the question.

¹Gay *v.* Mutual Union Tel. Co., 12 Mo. App. 485; Forsyth *v.* Baltimore & Ohio Tel. Co., same, p. 494.

²A city cannot grant the right to place poles and wires in a street unless authorized to do so by the legislature. Domestic Telegraph Co. *v.* Newark, 49 N. J. L. 344.

§ 132.

³State *v.* Lavanac, 34 N. J. L. 201, 205; Lutterloh *v.* Town of Cedar Keys, 15 Fla. 306; State *v.* Mobile, 5 Porter, Ala. 279. In the first case the court say: "I think the true rule is that land taken by the public for a particular use cannot be applied, under such a sequestration, to any other use, to the detriment of the land-owner. This is the only rule which will

adequately protect the constitutional right of the citizen. To permit land taken for one purpose, and for which the land-owner has been compensated, to be applied to another and additional purpose, for which he has received no compensation, would be a mere evasion of the spirit of the fundamental law of the State. Land taken and applied for the ordinary purposes of a street would often be an improvement of the adjacent property; an appropriation of it to the uses of a market would, perhaps, as often be destructive of one-half of the value of such property." In Philadelphia *v.* Slocum, 14 Phil. 141, it was held that where land was dedicated for a street with a proviso that a certain space in the center should be used for market purposes, the city might abandon the market and improve the whole as a street.

account of the concourse of teams in front of their property thereby occasioned.²

§ 133. **Miscellaneous uses.**—A well or cistern may be constructed in a street for the purpose of obtaining water to be used in sprinkling the streets or extinguishing fires or convenience of the public, provided this can be done without damage to the abutting owner or destruction of the public use.¹ The sprinkling of streets is one mode of making their use more convenient, and the public may use the street for such appliances for that purpose as are reasonable under the circumstances. But the plea that a structure is for use in the amelioration of the streets will not justify the serious obstruction of a street by the indirect means of such amelioration, as by the erection of pumping works in a street, or a mill for sawing lumber or crushing stone for a pavement. The erection of a pound for the confinement of stray animals, or of a jail or lock-up upon a public street, is a misappropriation which may be enjoined by the abutting owner,² or for which trespass will lie.³ The erection of ornamental or memorial statuary at proper places in public streets is sanctioned by long and universal usage, and may be regarded as a legitimate use of the same.⁴ The erection of lamps for street lighting, of hydrants, fire plugs, drinking fountains and watering troughs, all fall within the principles heretofore laid down as to the appropriate use of streets. Where the

² *Henkle v. Detroit*, 49 Mich. 249.

§ 133.

¹ *West v. Bancroft*, 32 Vt. 367; *Barter v. Commonwealth*, 3 Penn. & Watts, 253. In *Dubuque v. Malony*, 9 Ia. 450, the city had constructed a brick cistern in the street for similar purposes, and the defendant, in digging for the foundation of his building, removed the support of the soil so that it burst

and was destroyed. The city sued for damages, and a recovery was denied on the ground that such use of the street, the fee being in the abutting owners, was not justified.

² *Lutterloh v. Town of Cedar Keys*, 15 Fla. 306.

³ *Winchester v. Capron*, 63 N. H. 605.

⁴ *Thompson v. Hodgson*, 2 Hun, 146.

abutter owns the fee, it has been held that a city cannot authorize the use of the street for a hack stand.⁵ Where the fee is in the abutting owner, he is entitled to the herbage growing thereon, and a law or ordinance allowing it to be depastured by the public is void.⁶ As to the taking of a highway for a turnpike or ferry landing, the reader is referred to a subsequent section.⁷

§ 134. Vacating streets.—We have seen that the owner of property abutting on a public street, no matter how established, and without regard to the ownership of the ultimate fee, has certain private rights in the street, among which is the right of access, which includes the right to use the street for the purpose of passing to and fro between his premises and some connecting thoroughfare.¹ These private rights are entirely distinct from the public right or easement, subordinate to it, but not dependent upon it. Consequently, the public may abandon its rights without impairing the private easement. The power to vacate streets is as indisputable as the power to establish them, and is one of the powers usually conferred upon municipal corporations. But this power extends only to the public easement. A street cannot be closed so as to prevent access to abutting property, without

⁵ McCaffrey *v.* Smith, 41 Hun, 117.

⁶ Woodruff *v.* Neal, 28 Conn. 165; Cole *v.* Drew, 44 Vt. 49. *Contra:* Hardenburg *v.* Lockwood, 25 Barb. 9. Where such a law was in force when the highway was laid out, it was held that compensation was made in view of such statute, and that act was valid as to such highway. Griffin *v.* Martin, 7 Barb. 297.

⁷ Post, §§ 140, 141.

§ 134.

¹ *Ante*, § 114. “Every owner of ground on any street in Lexington,

has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services, and a convenient outlet to other streets. And of this right the legislature cannot deprive him, without his consent, or a just compensation in money.” Transylvania University *v.* Lexington, 3 B. Mon. 25, 27; and see Anderson *v.* Turbeville, 6 Coldw. 150; Kellinger *v.* Forty-second Street R. R. Co., 50 N. Y. 206.

the consent of the owners of such property, or compensation paid.² This right of access does not extend beyond the necessity of the case, and, therefore, is limited to so much of the street in front of each proprietor as will afford him a convenient outlet to some connecting street.³ Consequently, when part of a street is vacated, those whose property does not abut upon the vacated portion and who have access to their property by the remaining portion of the street, cannot complain.⁴ It has been held that the vacation and closing of one street afforded no ground of complaint when access remained by other streets,⁵ but we should doubt this proposition as universally applicable.

These conclusions in regard to the vacation and closing up

² *Transylvania University v. Lexington*, 3 B. Mon. 25, 27; *Anderson v. Turbeville*, 6 Coldw. 150, 157. In the latter case the court say: "The owners of lots bordering upon a public street have an easement of way in the street, in addition to the use of it in common with the people generally. This additional right of way is private property, within the protection of the law, as much as if it were corporeal property, and cannot be taken for public use without just compensation." See also *dictum* in *Heller v. Railroad Co.*, 28 Kan. p. 628.

³ "The extent of this appurtenant right, depending on circumstances, may not, in a particular case, be easily definable with mathematical precision. As far as it exists, however, it partakes of the character of private property, and is therefore protected by the fundamental law, as property. But it cannot, as to each proprietor of ground, be co-extensive with all the streets and alleys of the city. As a private

right, it must, like that of vicinage, be limited by its own nature and end; that is, chiefly, by the necessity of convenient access to, and outlet from the ground of each proprietor." *Transylvania University v. Lexington*, 3 B. Mon. 25, 27.

⁴ *Pollack v. Trustees of San Francisco Orphan Asylum*, 48 Cal. 490; *Chicago v. Union Building Association*, 102 Ills. 379; *Hessing v. Scott*, 107 Ills. 600; *East St. Louis v. O'Flynn*, 119 Ills. 200; *Gray v. Iowa Land Co.*, 26 Ia. 387; *Dempsey v. Burlington*, 66 Ia. 687; *Heller v. Atchison, T. & S. F. R. R. Co.*, 28 Kan. 622, 625; *Castle v. County of Berkshire*, 11 Gray, 26; *People v. Supervisors*, 20 Mich. 95; *Petition of Concord*, 50 N. H. 530; *Commissioners of Coffey County v. Venard*, 10 Kan. 95, 100; *Kings County Fire Ins. Co. v. Stevens*, 101 N. Y. 411; *McGee's Appeal*, 114 Pa. S. 470; *Bailey v. Culver*, 12 Mo. App. 175.

⁵ *Fearing v. Irwin*, 55 N. Y. 486; *Coster v. Mayor*, 43 N. Y. 399; *Smith v. Boston*, 7 Cush. 254.

of streets are a logical and necessary sequence from the conclusions heretofore reached as to the rights of abutting owners.⁶ But, although our conclusions as to the rights of abutting owners are abundantly fortified by authority, the only direct decisions as to the right of an abutting owner to compensation for loss of access, by vacating and closing a street, are against the right. This doctrine has been promulgated by the Supreme Court of Iowa. First it was decided that, when part of a country road was vacated, one not abutting upon the part vacated could not recover damages.⁷ This is in accordance with the general doctrine as above stated. But this decision was immediately followed by one holding that one abutting on the part vacated could not recover damages.⁸ The latter case was held not to differ in principle from the former. Finally comes the case of Barr *v.* City of Oskaloosa, 45 Ia. 275. Plaintiff owned two lots upon Kossuth street, in Oskaloosa. The lots and street were platted by one White. The fee of the street was in the public, the reversion in White. The plaintiff's lots were improved, at an expense of several thousand dollars, with dwellings occupied by tenants. The Central Railroad Company procured a quitclaim from White, of Kossuth street, secured from the City Council an ordinance vacating the street, and then proceeded to cut down the grade six feet and fill it with railroad tracks constructed and used in such manner as to prevent access to the plaintiff's premises and preclude all travel on the street by the plaintiff or the public. The value of plaintiff's property was almost wholly destroyed. In a suit against the city and railroad company the plaintiff set up the foregoing facts, the defendants demurred, and the demurrer was sustained. The decision was based upon Brady *v.* Shinkle and Ellsworth *v.* Chickasaw County, *supra*. It was held that, on vacation of the street, the title vested in

⁶ As to the rights of abutting owners, see *ante*, §§ 100, 114, 122. ⁸ Ellsworth *v.* Chickasaw County, 40 Ia. 571.

⁷ Brady *v.* Shinkle, 40 Ia. 576.

the railroad company under its deed from White, that plaintiff ceased to have any rights in the soil of the street, and could no more complain of the building of the railroad upon it than he could if it had been built on an adjacent lot. The result in this case must certainly strike the average layman as a great outrage. It is calculated to make one lose faith in the efficacy of constitutions or the justice of the law. It shows that the rights of the individual cannot be safely trusted to the good faith or judgment of a city council. It is an argument in favor of the liberal construction of constitutional limitations in favor of individual rights. The conclusions which we have reached in this chapter as to the rights of abutting owners are more consonant to reason, as they certainly are to every one's sense of what is just and fair.⁹ It has been held that a city could not vacate a street for twenty years, during which it was to be put to private use;¹⁰ also that a street could not be narrowed without compensation to those abutting thereon.¹¹ Where a statute provided that a city should not vacate a street "when objected to by property owners adjacent thereto or by those having a direct or substantial interest therein," it was held that one just outside of the city limits, at whose land the street terminated, was not within the statute, and consequently could not defeat the vacation by objecting.¹²

⁹ See also *Marshalltown v. Forney*, 61 Ia. 578.

¹¹ *Rensselaer v. Leopold*, 106 Ind.

29.

¹⁰ *Glasgow v. St. Louis*, 87 Mo. 678, affirming S. C. 15 Mo. App. 112.

¹² *House v. Greensburg*, 93 Ind.

533.

CHAPTER VI.

OTHER CASES OF TAKING.

§ 135. **Impairing franchises.**—A franchise may be defined as a privilege or authority vested in certain persons by grant of the sovereign, to exercise powers or to do and perform acts which without such grant they could not do or perform.¹ The right to construct, maintain and operate a toll-bridge, ferry, turnpike, railroad, canal and the like is a franchise, which must emanate directly or indirectly from the sovereign power.² The property in connection with which the franchise is made available, and the franchise itself, are, of course, subject to the power of eminent domain like all other property.³ When a part of the property or the whole property and franchise are taken for public use there is no doubt as to the nature of the act or the right to compensation.⁴ But toll-bridges, ferries, turnpikes, rail-

§ 135.

¹ *Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co.*, 11 Leigh (Va.) 42.

² *Dyer v. Tuskaloosa Bridge Co.*, 2 Porter (Ala.) 296; *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 63; *Binghamton Bridge*, 3 Wall. 51, 81.

³ *La Fayette Plank Road Co. v. New Albany & Salem R. R. Co.*, 13 Ind. 90; *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 40; *State v. Noyes*,

47 Me. 189; *White River Turnpike Co. v. Vermont Central R. R. Co.*, 21 Vt. 590; *Brainard v. Missisquoi R. R. Co.*, 48 Vt. 107; *West River Bridge Co. v. Dix*, 6 How. 507, 543. The legislature may repeal the charter of a corporation, where the right to do so is reserved, and may authorize a new company to take any of the property of the old upon making compensation. *Greenwood v. Freight Co.*, 105 U. S. 13.

⁴ *Matter of Flatbush Avenue, 1 Barb.* 236; *Seneca Road Co. v. Auburn & Rochester R. R. Co.*, 5 Hill,

roads and the like are often very seriously injured by the construction of competing lines which draw away patronage and impair the value of the franchise. The question arises under what circumstances, if at all, the owners of the franchise so impaired may claim compensation, as a matter of constitutional right.

§ 136. When the franchise is not exclusive.—The grant of a franchise may be exclusive, or the grant may be silent in that respect. A toll-bridge or ferry is often granted with a provision that no other bridge or ferry shall be erected within a certain distance above or below the one granted, and this exclusiveness may be limited or unlimited in its duration. So a railroad, turnpike, canal or other means of travel or communication may be granted between two points with a proviso excluding any similar grant. As all grants by the sovereign are construed in favor of the sovereign, the grant of a franchise will not be deemed exclusive unless so expressed.¹ Where the grant is not by its terms exclusive, the legislature is not precluded from granting a similar franchise or erecting a rival way or structure, the result of which may be to greatly impair or even totally destroy the value of the former grant, and such damage is not a *taking* of the former franchise which entitles its owner to compensation. This principle was settled in the leading case of *Charles River Bridge v. Warren Bridge*,² and has been con-

170; *Boston Water Power Co. v. Boston & W. R. R. Co.*, 23 Pick. 360; *Matter of Hamilton Avenue*, 14 Barb. 405. See *post*, § 136, n. 4.

§ 136.

¹ *Janesville Bridge Co. v. Stoughton*, 1 Pinney, 667; *Lake v. Vir-*

ginia & Truckee R. R. Co.

7 Nev. 294; *Johnson v. Crow*, 87 Pa. S. 184; *Power v. Village of Athens*, 99 N. Y. 592; S. C. 26 Hun, 282; see *Town of Golconda v. Field*, 108 Ills. 419.

² 7 Pick. 344; affd. in 11 Pet. 420.

firmed by numerous decisions.³ Of course, if any property is taken, compensation must be made.⁴

§ 137. When the franchise is exclusive.—When the grant of a franchise is exclusive, this is but a circumstance which increases its value without changing its essential character. It is still property, and subject to the power of eminent domain.¹ The power to take a franchise for public use will

³ *Janesville Bridge Co. v. Stoughton*, 1 Pinney, 667; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44. In the latter case plaintiff had a toll-bridge across the Mohawk River, and defendant erected a free bridge within forty-nine feet of it, the effect of which was totally to destroy the value of the plaintiff's franchise. It was held that the plaintiff was without remedy. *Sommerville v. Wimbush*, 7 Gratt. 205; *Day v. Stetson*, 8 Me. 365; *State v. Noyes*, 47 Me. 189; *Piatt v. Covington & Cincinnati Bridge Co.*, 8 Bush, 31; *Dyer v. Tuskaloosa Bridge Co.*, 2 Porter (Ala.) 296; *Bush v. Peru Bridge Co.*, 3 Ind. 21; *Bartram v. Central Turnpike Co.*, 25 Cal. 283; *Phelps v. Parish of Morehouse*, 12 La. An. 649; *Washington & Balt. Turnpike Road v. Balt. & Ohio R. R. Co.*, 10 G. & J. 392; *Salem & Hamburg Turnpike Co. v. Town of Lyme*, 18 Conn. 451; *La Fayette Plank Road Co. v. New Albany & Salem R. R. Co.*, 13 Ind. 90; *Balt. & Havre de Grace Turnpike Co. v. Union R. R. Co.*, 35 Md. 224; *East St. Louis Connecting Ry. Co. v. East St. Louis Union Ry. Co.*, 108 Ills. 265. It makes no difference that the State itself is largely interested in the management and profits of the new enterprise.

Turnpike Co. v. State, 3 Wall. 210; *New York & Harlem R. R. Co. v. Forty-second Street R. R. Co.*, 50 Barb. 285; *affd. same*, p. 309; S. C. 26 How. Pr. 68; *Brooklyn City etc. R. R. Co. v. Coney Island etc. R. R. Co.*, 35 Barb. 364; *Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co.*, 11 Leigh, 42; *Illinois & Michigan Canal v. Chicago & Rock Island R. R. Co.*, 14 Ills. 314; *Matter of Hamilton Avenue*, 14 Barb. 405; *White River Turnpike Co. v. Vermont Central R. R. Co.*, 21 Vt. 590. *Contra*: *Newburg Turnpike Co. v. Miller*, 5 Johns. Ch. 101; *Franklin & Columbia Turnpike Co. v. County Court*, 8 Humph. 342; *Hall v. Ragsdale*, 4 Stew. & Porter, 252; and see *Hudson etc. Del. Canal Co. v. N. Y. & Erie R. R. Co.*, 9 Paige, 323.

⁴ *Matter of Flatbush Avenue*, 1 Barb. 286; *Seneca Road Co. v. Auburn & Rochester R. R. Co.*, 5 Hill, 170; *La Fayette Plank R. Co. v. New Albany & Salem R. R. Co.*, 13 Ind. 90; *Baltimore etc. Co. v. Union R. R. Co.*, 35 Md. 224; *Moses v. Sanford*, 11 Lea (Tenn) 731; *Pittsburgh & Lake Erie R. R. Co. v. Jones*, 111 Pa. S. 204.

§ 137.

¹ *Post*, §§ 274, 275; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Salem & Hamburg Turnpike*

be discussed in a subsequent chapter.² The question now is, what impairment of its value or interference with its exercise or enjoyment will amount to a *taking*. In so far as it is exclusive, it will be protected by the law. The exclusive right is property, which cannot be interfered with, except for public use and upon just compensation made.³ The exercise of a rival franchise within the express terms of the grant is a *taking*, and may be enjoined unless compensation is provided.⁴ An act granting a franchise is a contract between the grantee and the State, and any subsequent act impairing its obligation is void.⁵ If the original grant is not exclusive, but is made exclusive by a subsequent act without any consideration, such subsequent act is not binding upon the State and may be disregarded.⁶ It is otherwise if there is a consideration for such subsequent act.⁷ An exclusive franchise or privilege in a matter of public concern can be created only by the sovereign power. It cannot be secured by contract with individuals or corporations. Thus the grant by a railroad company of the exclusive right of maintaining a telegraph line along its right of way,⁸ or the grant by an individual of the exclusive right

Co. *v.* Lyme, 18 Conn. 451; Piscataqua Bridge Co. *v.* N. H. Bridge Co., 7 N. H. 35; La Fayette Plank Road Co. *v.* New Albany & Salem R. R. Co., 13 Ind. 90; Boston & Lowell R. R. Co. *v.* Salem & Lowell R. R. Co., 2 Gray, 1; Boston Water Power Co. *v.* Boston & W. R. R. Co., 23 Pick. 360; Philadelphia & Gray's Ferry Passenger Ry. Co.'s Appeal, 102 Pa. S. 123.

² *Post*, §§ 274, 275.

³ Piscataqua Bridge Co. *v.* N. H. Bridge Co., 7 N. H. 35.

⁴ St. Louis R. R. Co. *v.* N. W. St. Louis Ry. Co., 69 Mo. 65; Boston & Lowell R. R. Co. *v.* Salem & Lowell

R. R. Co., 2 Gray, 1; Piscataqua Bridge Co. *v.* N. H. Bridge Co., 7 N. H. 35; Binghamton Bridge, 3 Wall. 51; Power *v.* Village of Athens, 99 N. Y. 592; S. C. 26 Hun, 28¹.

⁵ Dartmouth College *v.* Woodward, 4 Wheat. 625; Binghamton Bridge, 3 Wall. 51.

⁶ Johnson *v.* Crow, 87 Pa. S. 184.

⁷ East Hartford *v.* Hartford Bridge Co., 17 Conn. 79; S. C. 16 Conn. 149; 10 How. 511.

⁸ Western Union Tel. Co. *v.* Am. Union Tel. Co., 65 Ga. 160; Baltimore & Ohio Tel. Co. *v.* Western Union Tel. Co., 24 Fed. R. 319.

of constructing pipe lines over his land for the transportation of oil is void as against public policy.⁹

§ 138. What is an interference with an exclusive franchise? Bridges and ferries.—The grant of the right to maintain a toll-bridge with a provision that no other bridge or ferry shall be allowed for a certain distance above or below the same, is not violated by the erection of a railroad bridge within the specified limits which is used exclusively for the passage of trains as a part of the general line of the road.¹ In such case there is no taking and no right to compensation. But such grant is, of course, violated by the erection of a bridge for ordinary travel.² The grant of an exclusive privilege being in derogation of common right and tending to create monopolies, should receive a strict construction. The grant of “the exclusive right and privilege of building and maintaining a bridge across the Kansas River at the city of Lawrence for the period of twenty-one years,” was held not to be violated by the establishment of a ferry at the same place.³ The converse of this proposition is denied in two cases in which it is held that the exclusive right of maintain-

⁹ West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 60. As to power of a municipal corporation to grant exclusive rights and franchises, see Jackson County H. R. R. Co. v. Inter-State Rapid Transit Ry. Co., 24 Fed. R. 306; and St. Louis Gas Light Co. v. St. Louis Gas, Fuel & Power Co., 16 Mo. App. 52.

§ 138.

¹ Mohawk Bridge Co. v. Utica & Schenectady R. R. Co., 6 Paige, 554; Thompson v. New York & Harlem R. R. Co., 3 Sandf. Ch. 625; McRee v. Wilmington R. R. Co., 2 Jones Law, 186; McLeod v. Savannah, Albany & Gulf R. R. Co., 25 Ga. 445; Bridge Co. v. Hoboken Land

& Improvement Co., 13 N. J. Eq. 81, affirmed in Court of Errors and Appeals, Same, p. 503, affirmed in Supreme Court of United States, 1 Wall. 116; Lake v. Virginia & Truckee R. R. Co., 7 Nev. 291; *contra*: Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 40.

² Piscataqua Bridge Co. v. New Hampshire Bridge, 7 N. H. 35; Binghamton Bridge, 3 Wall. 51; Horrell v. Ellsworth, 17 Ala. 576.

³ Parrott v. Lawrence, 2 Dill. 332; see also Bush v. Peru Bridge Co., 3 Ind. 21; and see, in support of the general proposition, Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210.

ing a ferry within certain limits is violated by the erection of a toll-bridge within those limits.⁴

§ 139. Same: Other franchises.—While, in the absence of any exclusive right, the construction of free public roads, the effect of which may be to diminish tolls, is not actionable, yet the construction of such roads for the express purpose of enabling the traveling public to avoid toll-gates is an act of bad faith and will be enjoined.¹ The operation of a steam railroad alongside a turnpike is held not to be an unwarrantable interference with the franchise of the turnpike company.²

Where a railroad is authorized between two places with a provision that no other road shall be authorized between the same places for thirty years, the formation of a continuous line between the two places by an arrangement between three distinct companies is a violation which will be enjoined.³ The exclusive right of constructing a railroad is not violated by the construction of a horse railway within the specified limits.⁴ The exclusive privilege of transporting passengers between certain points is not interfered with by a road for merchandise only.⁵ A dummy railroad upon a street is an interference with the exclusive privilege of operating a horse railroad on the same street.⁶ But such exclusive privilege is not violated by the construction of another horse railroad on the same street for a short distance only.

⁴ *Gates v. McDaniel*, 2 Stew. 211; and *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; see also *Queen v. Cambrian Ry. Co.*, 40 L. J. Q. B. 169.

§ 139.

¹ *Franklin & Columbia Turnpike Co. v. County Court of Maury*, 8 Humph. 342; *Hall v. Ragsdale*, 4 Stew. & Porter, 252.

² *Bordentown etc. Turnpike Co.*

v. Camden & Amboy R. R. Co., 17 N. J. L. 314.

³ *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray, 1.

⁴ *Louisville & P. R. R. Co. v. Louisville City Ry. Co.*, 2 Duvall, 175.

⁵ *Richmond etc. R. R. Co. v. Louisa R. R. Co.*, 13 How. 71.

⁶ *Denver & S. Ry. Co. v. Denver City Ry. Co.*, 2 Col. 673.

merely as a connecting link.⁷ A competing omnibus line will not be allowed to use the track of a horse railroad company,⁸ and, although a horse railroad company has no exclusive right in a street, a new company will not be allowed to lay down its tracks so that one rail of the new track will be between the two rails of the old track, without compensation.⁹

It does not seem to have been customary to grant exclusive rights to canal companies. At least no cases appear in the reports based upon such a right. A competing railroad impairing the franchise of a canal is not a *taking*,¹⁰ but it has been intimated that a railroad within a few feet of a canal might produce actionable injury, if, by frightening the horses, or otherwise, it materially injured the rights and property of the company.¹¹

The forfeiture of a franchise is not a *taking* of property within the constitution.¹² Under the right reserved to amend the charter of a plank-road company, the legislature cannot require it to remove its gates within a populous city so as to throw open to the free use of the public two and a half miles of its road.¹³ This would be to deprive the company of its property without due process of law. Where the exclusive right of furnishing water within a certain borough was granted to a private company, the construction and operation of works by the borough itself was held to be no infringement of the grant.¹⁴

⁷ Street Railway Co. of Grand Rapids *v.* West Side Street Railway Co., 48 Mich. 433.

⁸ Camden Horse R. R. Co. *v.* Citizens Coach Co., 28 N. J. Eq. 145.

⁹ Union Passenger Ry. Co. *v.* Continental Ry. Co., 11 Phil. 321.

¹⁰ Illinois & Michigan Canal Co. *v.* C. & R. I. R. R. Co., 14 Ills. 314; Tuckahoe Canal Co. *v.* Tuckahoe etc. R. R. Co., 11 Leigh, 42.

¹¹ Hudson & Delaware Canal Co. *v.* N. Y. & Erie R. R. Co., 9 Paige, 323.

¹² State Bank *v.* State, 1 Blackf. 267.

¹³ Detroit *v.* Detroit & Howell Plank Road Co., 43 Mich. 140.

¹⁴ Lehigh Water Co.'s Appeal, 102 Pa. S. 515.

§ 140. **Change of use, or an additional use.** — We have already discussed this subject, in some of its aspects, in the chapter upon streets and highways.¹ We have there shown that land taken for a street could not be devoted to any additional use, distinct from its use as a highway, without compensation to the abutting owner for any interference with his rights. It may be laid down as a general proposition that, where an easement only is taken, the land will revert to the owner of the fee when it ceases to be used for the particular purpose for which it was taken.² The soil cannot be devoted to a different use, whether more or less onerous, without a new condemnation and compensation paid.³ When a fee simple estate is taken for public use, it may be either absolute or qualified. If absolute, then no individual has any interest in the land or its use, and it may be devoted to any purpose in the discretion of the legislature, or even sold to private parties.⁴ A qualified fee is one which is held in trust, as it were, for some particular public use or uses, the execution of which affects the value or enjoyment of particular property. In such case the owners of the property so affected have a right to the faithful execution of the trust, in the nature of an easement in the property so held in trust, and the legislature cannot divert it to a different use without compensation to the owners of the property affected. Thus lands taken for an asylum, jail or school-house are usually held by a fee simple absolute, while lands acquired for streets and public grounds, though held in fee, are nevertheless held in trust for the use specified.

§ 141. **Change of use: Instances.** — The different kinds of toll-roads are public highways, in the same sense, and to the same extent, as ordinary roads. The only difference is

§ 140.

notes, also *ante*, §§ 110–125, 130–133; and State *v.* Laverack, 34 N. J. L.

¹ *Ante*, chap. v.

201.

² *Post*, §§ 596, 597.

³ See cases cited in following

⁴ *Post*, § 593.

as to the manner of maintaining them.¹ Consequently, when a turnpike is laid out over a common highway,² or when a turnpike is made a common highway, to be maintained at the public expense,³ the owner of the fee is entitled to no compensation. There has, in fact, been no change of use, nor any additional burden cast upon the land. Where a highway is taken by a turnpike company, the company has the same right to repair and improve it, by changing the grade or otherwise, that the public had, and will not be liable for consequential damages resulting therefrom.⁴ Nor in such case is the town entitled to compensation for the expense of making the road in the first instance.⁵ It is generally held that a ferry landing upon a highway is an additional burden for which the owner of the fee is entitled to

§ 141.

¹ *State v. Maine*, 27 Conn. 641, and cases cited in the following notes.

² *Chagrin Falls & Cleveland Plank Road Co. v. Cane*, 2 Ohio St. 419; *Panton Turnpike Co. v. Bishop*, 11 Vt. 198; *Morgan v. Monmouth Plank Road Co.*, 26 N. J. L. 99; *Wright v. Carter*, 27 N. J. L. 76; *Nolensville v. Baker*, 4 Humph. 315; *Douglass v. Boonsborough Turnpike Co.*, 22 Md. 219; *Benedict v. Goit*, 3 Barb. 459; *Turner v. Rising Sun etc. Turnpike Co.*, 71 Ind. 547; *Stratton v. Elliott*, 83 Ind. 425; *Danville etc. Road Co. v. Campbell*, 87 Ind. 57; *Walker v. Caywood*, 31 N. Y. 51; but see, as involving a contrary doctrine, *Williams v. Natural Bridge Plank Road*, 21 Mo. 580, and *Cape Girardeau etc. Road Co. v. Renfroe*, 58 Mo. 265, 274. Where a public road is taken by a turnpike company the erection of a toll-house on the road is an additional burden. *Wright v.*

Carter, 27 N. J. L. 76, and remarks on this case in *State v. Laverack*, 34 N. J. L. at p. 207. Same point as to toll-house, *Stratton v. Elliott*, 83 Ind. 425; *Danville etc. Road Co. v. Campbell*, 87 Ind. 57.

³ *Murray v. Commissioners of Berkshire*, 12 Met. 455; *Pierce v. Somersworth*, 10 N. H. 369; *Barclay v. Lebanon*, 11 N. H. 19; *State v. Maine*, 27 Conn. 641; *Hingham & Quincy Bridge Co. v. County of Norfolk*, 6 Allen, 358; *Heath v. Barman*, 49 Barb. 496; *Heath v. Barmore*, 50 N. Y. 302; *Pittsburgh etc. R. Co. v. Commonwealth*, 104 Pa. S. 583.

⁴ *Benedict v. Goit*, 3 Barb. 459; *Douglass v. Boonesborough Turnpike Co.*, 22 Md. 219; but see *Williams v. Natural Bridge Turnpike Co.*, 21 Mo. 580.

⁵ *Town of Barnet v. Passumpsic Turnpike Co.*, 15 Vt. 757; see also *Monmouth County v. Red Bank etc. Turnpike Co.*, 18 N. J. Eq. 91.

compensation.⁶ Nor can a ferry landing be established upon a turnpike without compensation to the owner of the franchise.⁷ Land taken for a turnpike cannot be transferred to a railroad company without compensation to the owner of the fee.⁸ But a turnpike may be condemned for a railroad when authorized by the legislature, and in such case the owner of the fee is only entitled to compensation for the additional burden upon his soil, if any.⁹ A railroad on a canal bank is an additional use.¹⁰ Where a railroad company is authorized to condemn a canal, it has been held that the land does not revert to the owner of the fee, but the public easement is transferred to the railroad company, and the owner of the fee is only entitled to such damages as are occasioned by the new use.¹¹ But, if the public easement is voluntarily abandoned, the soil reverts to the owner of the fee. This right of reversion is property, of which the owner cannot be deprived without compensation. Accordingly, where a railroad company has an easement only, and transfers its right of way to a municipal corporation for a street, pursuant to an authority given by the legislature, and takes up and removes its track, the land reverts to the owner of the fee, and he can maintain ejectment therefor.¹² So where an easement is taken for a canal which is abandoned and the right of way transferred to a railroad company.¹³ A line of tele-

⁶ *Prosser v. Wapello*, 18 Ia. 327; *Prosser v. Davis*, 18 Ia. 367; *Pipkin v. Wynns*, 2 Dev. (N. C.) 402; *Chambers v. Farry*, 1 Yeates, 167; *Chess v. Manown*, 3 Watts, 219.

⁷ *Lexington etc. Turnpike Co. v. McMurtry*, 3 B. Mon. 516. *Contra: Clarke v. White*, 5 Bush, 353.

⁸ *Mahon v. New York Central R. R. Co.*, 24 N. Y. 658; *Ellicottville etc. Plank Road Co. v. Buffalo etc. R. R. Co.*, 20 Barb. 644.

⁹ *Brainard v. Missisquoi R. R.*

Co. 48 Vt. 107; *Mifflin v. Railroad Company*, 16 Pa. S. 182.

¹⁰ *La Fayette, Muncie & B. R. R. Co. v. Murdock*, 68 Ind. 137.

¹¹ *Hatch v. Cincinnati & Indiana R. R. Co.*, 18 Ohio St. 92; *Chase v. Sutton Manufacturing Co.*, 4 Cush. 152.

¹² *Heard v. Brooklyn*, 60 N. Y. 242; *Strong v. Same*, 68 N. Y. 1. Compare cases cited in last note.

¹³ *Pittsburg & Lake Erie R. R. Co. v. Bruce*, 102 Pa. S. 23.

graph on a railroad right of way is an additional burden,¹⁴ unless constructed for the use of the railroad company in the operation of its road and dispatch of its business.¹⁵ Land which is subject to a ferry landing may be used for a bridge without further compensation.¹⁶ The tracks of one horse railroad company cannot be used by another without compensation.¹⁷ Property abutting on an alley cannot be said to be damaged by taking the alley for a street, as the street affords the same privileges as the alley.¹⁸ A third-class road, on which the owner of the fee is allowed to maintain gates, cannot be changed to a second-class road, on which gates are not allowed without further compensation.¹⁹

§ 142. Interfering with an easement.—We have already seen that to interfere with or destroy any right appurtenant to property is a *taking* within the constitution.¹ We have heretofore treated only of those natural rights appurtenant to land which may be interfered with by works upon adjacent land. But one may have annexed to his land easements in the land of others, derived by grant or prescription. Such easements cannot be destroyed or impaired by public works without compensation.² This principle is well illustrated by the case of *Arnold v. Hudson River R. R. Co.*³ Arnold was the owner of a factory, with the right to take water from

¹⁴ See *Atlantic & Pacific Tel. Co. v. C. R. I. R. R. Co.*, 6 Bis. 158.

¹⁵ *Western Union Tel. Co. v. Rich*, 19 Kan. 517. In this case it was held that a telegraph was indispensable for the safe and proper operation of a railroad, and that it made no difference that the telegraph was being constructed by a distinct company and for the joint use of the two corporations.

¹⁶ *Hudson v. Cuero Land & Emigration Co.*, 47 Tex. 56.

¹⁷ *Jersey etc. R. R. Co. v. Jersey City & Hoboken H. R. R. Co.*, 20

N. J. Eq. 61; *Metropolitan R. R. Co. v. Highland Ry. Co.*, 118 Mass. 290.

¹⁸ *Fagan v. Chicago*, 84 Ills. 227.

¹⁹ *Bounds v. Kirven*, 63 Tex. 159.

§ 142.

¹ *Ante*, § 56.

² *Indianapolis & Cumberland Gravel Road Co. v. Belt Ry. Co.*, 110 Ind. 5; *Willey v. Norfolk Southern Ry. Co.*, 96 N. C. 408.

³ 55 N. Y. 661. See also, for comments on same case, *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y., p. 149.

a pond at some distance from his factory and convey it thereto, over the land of another, in a race way or trunk, either over or under the ground. For this purpose Arnold had built and had in use a trunk some six feet above the ground. The defendant, having acquired title to a portion of the intervening lands, took down the trunk, laid it beneath the ground and its tracks, and then raised the water by means of a penstock into the old trunk. Arnold permitted this to be done on the assurance of the company's agent that it would make the watercourse as good as formerly, and also keep the same in repair. The water-power was impaired, and the expense of repairs was increased. It was held that the easement was property within the constitution, and that the plaintiff was entitled to compensation. The principle of this case will apply to all easements.⁴ One who has a mere parol license to hunt and fish over lands has no such interest as entitles him to compensation for interference by a railroad company.⁵

§ 143. Possessory rights in public lands.—One having the mere naked possession of public lands is not entitled to compensation when the same are taken for public use.¹ The fact that such a person has a right to preëmpt, or intends to do so, is immaterial, unless he has actually taken steps, by entry and payment, to secure his right.² If the right of way through public lands is granted to a railroad company, one subsequently acquiring title thereto takes subject to such right of way.³ But it has been held that one having grow-

¹ See, in this connection, *Boston Gas Light Co. v. Old Colony & Newport Ry. Co.*, 14 Allen, 444.

² *Bird v. Great Eastern Ry. Co.*, 34 L. J. C. P. 366.

§ 143.

³ *Allard v. Loban*, 3 Martin, La. N. S. 293; *Doran v. Central Pacific R. R. Co.*, 24 Cal. 245; *Hobart v.*

Ford, 6 Nev. 77; *Rosa v. Missouri, Kansas & Texas Ry. Co.*, 18 Kan. 124; *contra*: *Cal. Northern R. R. Co. v. Gould*, 21 Cal. 254.

² *Western Pacific R. R. Co. v. Kerr*, 41 Cal. 489.

³ *Davis v. East Tenn. & Ga. R. R. Co.*, 1 Snead, 94.

ing crops upon public lands is entitled to compensation for injury thereto.⁴

§ 144. Mapping Territory into streets and blocks for future improvements.—It has been a common practice in the older cities for the legislature to authorize the public authorities to make a map of vacant lands, indicating the location of streets, alleys and public grounds for future improvement, and to provide that when the streets are opened they shall be opened as designated on the map, and that no improvements shall be placed upon the parts designated as streets or public grounds. It is evident that, if such an act is valid, the owner would be deprived or at least greatly restricted in the enjoyment of one of the most valuable rights of property, without any compensation, viz: the right of user. Consequently, so much of such an act as restricts the right to make improvements is void, and when such streets are opened the owners of property taken are entitled to compensation precisely the same as though the streets had not been previously designated.¹ The mere making of such a map or plat does not affect any right of property, and is not a taking.² If the owner conveys

⁴ *Gillan v. Hutchinson*, 16 Cal. 153; *Rosa v. Missouri, Kansas & Texas Ry. Co.*, 18 Kan. 124.

§ 144.

¹ *Moale v. Baltimore*, 5 Md. 314; *Stewart v. Baltimore*, 7 Md. 500; *Baltimore v. Hook*, 62 Md. 371; *State v. Carragan*, 36 N. J. L. 52; *Warren v. Bunnell*, 11 Vt. 600. Such an act was held valid in New York on the ground that it was passed before there was any limitation in the constitution of that State upon the power of eminent domain, and compensation for improvements placed within the lines of a proposed street was denied, although the street was not actually

laid out until seventeen years after the map was made. *Matter of Furman Street*, 17 Wend. 649. This case was followed in Pennsylvania, without noticing the ground on which it rested. *Forbes Street*, 70 Pa. S. 125; see also *District of City of Pittsburgh*, 2 W. & S. 320; *In re Sedgeley Avenue*, 88 Pa. S. 509; *Matter of Snyder Avenue*, 14 Phil. 346; *Matter of 127th Street*, 56 How. Pr. 60.

² *Clark v. City of Elizabeth*, 37 N. J. L. 120; *District of City of Pittsburgh*, 2 W. & S. 320; *State v. Seymour*, 35 N. J. L. 47; but see *State v. Hudson County Ave. Coms.*, 37 N. J. L. 12.

with reference to such map or plat, he thereby adopts the same and dedicates for public use so much of his land as is thereon designated for streets and public places,³ and when they are afterwards opened for use is entitled only to nominal damages.⁴

§ 145. Justifiable entries.—One of the constituent rights of property in land is the right of exclusion, that is, the right to exclude others from its possession and enjoyment. This right, however, is not absolute, but is subject to certain overruling necessities. Thus an entry upon land will be justified, not only without consent of the owner, but even against his positive prohibition, if necessary to escape bodily harm or secure property which is found there without the privity or fault of its owner. If a highway is impassible, one may go round the obstruction on private property.¹ All such entries, however, are limited by the necessities of the case and must be made with the least possible injury, and continued for only a reasonable time.² A somewhat similar necessity justifies an entry on private property for the purpose of making preliminary surveys. Unless this was allowable it would be almost impossible to construct a public work, such as a railway or canal. It has accordingly been held that an entry for preliminary surveys is not a taking, but may be justified on the ground of necessity.³ If possession be continued an unreasonable time, or any unnecessary damage is done, the persons making or authorizing the entry become

¹ Clark *v.* City of Elizabeth, 37 N. J. L. 120; Matter of Furman Street, 17 Wend. 649.

Bl. Com. 37; Ball *v.* Herbert, 3 T. R. 253.

² Orr *v.* Quimby, 54 N. H. 590.

³ See cases in last note and *post*, § 500; and see Morris Canal Co. *v.* Jersey City, 12 N. J. Eq. 252; Same on appeal, 547.

³ Cushman *v.* Smith, 34 Me. 247; Orr *v.* Quimby, 54 N. H. 590, 596; Polly *v.* Saratoga etc. R. R. Co., 9 Barb. 449; Bonaparte *v.* Camden &

§ 145.

Amboy R. R. Co., Bald. 205, 225; Stuart *v.* Baltimore, 7 Md. 500, 516; State *v.* Seymour, 35 N. J. L. 47, 53; Walther *v.* Warner, 25 Mo. 277.

¹ Morey *v.* Fitzgerald, 56 Vt. 487; Campbell *v.* Race, 7 Cush. 408; 2

trespassers *ab initio*.⁴ The possession gained by such entry cannot be continued for the purpose of construction,⁵ or the prosecution of experimental works.⁶ And so, on the same ground, and subject to the same limitations, an entry upon private property is justifiable for the purpose of measuring public boundaries,⁷ or making coast surveys by the general government.⁸ It has been held in Pennsylvania that the temporary occupation of private property adjacent to a railroad by shanties, stables, shops, etc., during the construction of the road, was justifiable without compensation.⁹ In the opinion of the court, the question is treated as one of statutory construction merely. It seems to us that such an intrusion is prohibited by the constitution.¹⁰

§ 146. Injuries by blasting.—It is a common practice in the construction of a railroad or other public work to resort to blasting, in consequence of which fragments of rocks are frequently projected beyond the limits of the company's land. Casting rock upon a man's land is a violation of his right of exclusion. All the authorities agree that there must be compensation for such damages. But some cases hold that such compensation is included in the original award, and that a separate action therefore will not lie.¹ Other cases hold the contrary doctrine, which seems to us the better rule.²

⁴ See last note.

⁵ *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517; *California & Pacific R. R. Co. v. Central Pacific R. R. Co.*, 47 Cal. 528; *Cushman v. Smith*, 34 Me. 247.

⁶ *Morris & Essex R. R. Co. v. Hudson Tunnel R. R. Co.*, 25 N. J. Eq. 384, 388.

⁷ *Winslow v. Gifford*, 6 Cushing. 327.

⁸ *Orr v. Quimby*, 54 N. H. 590, 596.

⁹ *Landerbrun v. Duffy*, 2 Pa. S. 308.

¹⁰ *St. Peter v. Denison*, 58 N. Y. 416.

§ 146.

¹ *Sabin v. Vermont Central R. R. Co.*, 25 Vt. 363; *Dodge v. County Commissioners of Essex*, 3 Met. 380; *Brown v. Providence, Warren & Bristol R. R. Co.*, 5 Gray, 35; *Whitehouse v. Androscoggin R. R. Co.*, 52 Me. 208; see also *Tibbetts v. Knox & Lincoln R. R. Co.*, 62 Me. 437; *Eaton v. E. & N. A. Ry. Co.*, 59 Me. 520.

² *Hay v. Cohoes Co.*, 2 N. Y. 159; S. C. 3 Barb. 42; *Tremain v. Same*, 2 N. Y. 163; *St. Peter v. Denison*, 58 N. Y. 416; *Carman v. Indiana*

One from whom no land has been taken, and who consequently has received no award of compensation, would be entitled to recover for such damages within the principle of either class of cases.³ Debris thus cast upon adjoining land must be removed in a reasonable time, even though there is no liability for the original intrusion.⁴ The question as to whether injuries from blasting should be included in the estimate of damages will be considered hereafter.⁵

§ 147. Injury to business.—All damages which result from the proper construction, use and operation of public works, where no right of property is taken or interfered with, are not a taking and are not actionable.¹ So, too, are all such loss and inconvenience as result from temporarily obstructing the use of public highways by land or water in consequence of the construction of improvements therein by the public authorities.² This results from the fact that the use of such highways in connection with private property is subordinate to the right of the public to make such improvements. For damage to business carried on in whole or in part upon property taken, the reader is referred to the chapter on damages.³

§ 148. Highways laid out adjacent to but not taking one's land.—Where a highway is laid out alongside of a person's land, but without taking any of it, it is held that he is not entitled to compensation, although the duty of maintaining

R. R. Co., 4 Ohio St. 399. As to the liability of the company for such damages where the work is done by a contractor, compare last case holding that it is, and last two cases of last note holding that it is not.

³ Dodge *v.* County Commissioners of Essex, 3 Met. 380; Carman *v.* Indiana R. R. Co., 4 Ohio St. 399.

⁴ Sabin *v.* Vermont Central R. R. Co., 25 Vt. 363; St. Peter *v.* Denison, 58 N. Y. 416.

⁵ Post, § 573; and see Matter of Thompson, 43 Hun, 416.

§ 147.

¹ Hooker *v.* New Haven & Northampton Co., 15 Conn. 312, 319.

² Northern Transportation Co. *v.* Chicago, 99 U. S. 635; S. C. 7 Biss. 45; Troy & Boston R. R. Co. *v.* Northern Turnpike Co., 16 Barb. 100; Plant *v.* Long Island R. R. Co., 10 Barb. 26.

³ Post, § 487.

the whole fence on his front is cast upon him, when before that he was only obliged to maintain half.¹ All the authorities are one way upon this question, but their correctness is questionable. Where by law the burden of maintaining a division fence is cast equally upon adjoining proprietors, there are mutual rights and obligations attached to the respective estates. Each has a right to compel the other to contribute his proportion. This right is appurtenant to the estate, for it passes with it. Likewise the obligation. When the adjoining estate is taken for a highway, this right is taken with it, and compensation to the extent of the loss should be made.

§ 149. Interfering with the right of exclusion.—Any invasion of property, except in case of necessity as heretofore explained, either upon, above or below the surface, and whether temporary or permanent, is a *taking*: as by constructing a ditch through it,¹ passing under it by a tunnel,² laying gas, water or sewer pipes in the soil, or extending structures over it, as a bridge or telephone wire. Even a temporary occupation, as for an annual training,³ or a road during sleighing time,⁴ can only be made pursuant to law, for a public use and upon compensation made.⁵ Nor can public authorities interfere with the control or use of a private way, except upon making compensation.⁶

§ 148.

¹ *Hoag v. Switzer*, 61 Ills. 294; *People v. Supervisors of Oneida County*, 19 Wend. 102; *Kennett's Petition*, 24 N. H. 139.

§ 149.

¹ *Reeves v. Treasurer of Wood County*, 8 Ohio St. 333; *Watson v. Trustee*, 21 Ohio St. 667; *People v. Haines*, 49 N. Y. 587; *Plummer v. Sturtevant*, 32 Me. 325. A statute in force since before the Revolution, permitting the surveyors of highways to enter upon land ad-

joining the way, for the purpose of constructing drains, but providing for no compensation, was held void in *Ward v. Peck*, 49 N. J. L. 42.

² *Sparrow v. Oxford, Worcester & Wolverhampton Ry. Co.*, 2 DeG. McN. & G. 94.

³ *Brigham v. Edmonds*, 7 Gray, 359.

⁴ *Holcomb v. Moore*, 4 Allen, 529; *Holden v. Cole*, 1 Pa. S. 303.

⁵ See *Markham v. Brown*, 37 Ga. 277.

⁶ *Morse v. Stocker*, 1 Allen, 150.

§ 150. Easement of levee in Louisiana.—Riparian property upon the Mississippi, in the State of Louisiana, is subject to the easement of levee, that is, the right of the State to use so much as may be necessary for the construction of proper levees and to repair or re-locate the same from time to time as the public exigencies may require.¹ This servitude was attached to the land at the time of its original grant.² But the land only is so subject, and if buildings are destroyed in constructing a levee, the owner is entitled to compensation.³ Nor does the servitude extend to the case where the necessity for the levee is created by some collateral or distinct improvement, such as the closing of a bayou.⁴

§ 151. Interfering with the right of support.—Every owner of land has a right to the lateral support of his soil in its natural condition, and no person is entitled to so excavate upon his own land as to deprive the soil of his neighbor of its natural support and thereby cause it to slide into the excavation.¹ This right extends only to the soil, and not to improvements placed upon it which increase the weight.² If,

§ 150.

¹ Mithoff *v.* Town of Carrollton, 12 La. An. 185; Bass *v.* State, 34 La. An. 494.

² Mithoff *v.* Town of Carrollton, 12 La. An. 185.

³ Cash *v.* Whitworth, 13 La. An. 401; Mithoff *v.* Carrollton, 12 La. An. 185; *contra*: Dubose *v.* Levee Commissioners, 11 La. An. 165; Hanson *v.* La Fayette, 18 La. 295.

⁴ Cash *v.* Whitworth, 13 La. An. 401.

§ 151.

¹ Thurston *v.* Hancock, 12 Mass. 226; Gilmore *v.* Driscoll, 122 Mass. 199, 201; Farrand *v.* Marshall, 19 Barb. 380; Washburn on Easements, pp. 514-516; Wood on Nuisances, § 172, and cases cited below. In

Gilmore *v.* Driscoll, the court (Gray, C. J.,) say: “Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition.” * * * * In the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him, without proof of negligence.”

² Lasala *v.* Holbrook, 4 Paige, 169; City of Quincy *v.* Jones, 76 Ills. 231; Wood on Nuisances, § 175.

in the execution of public works under authority of law, excavations are made and the soil of an individual gives way in consequence of being deprived of its lateral support, there is a *taking* to the extent of such deprivation, and the individual is entitled to compensation for the resulting damage. The *right* of lateral support is a part of his property in the land, as much so as his right of user, or of exclusion. When he is deprived of it his property is *taken* just as much as if his property was invaded. Notwithstanding the clear justice and logic of this position, there is, perhaps, as much authority against it as for it. It has been held that, where a railroad company excavated upon its own land, so that the plaintiff's soil slid into the excavation, the plaintiff was entitled to recover damages.³ The contrary doctrine has been held in precisely similar cases in Maine and Kentucky.⁴ In both these cases the railroad companies obtained title by deed, in the usual form. In Maine a recovery was denied, on the ground that the act of the legislature was an authority and license to the company to construct the road in the manner it did, and, as it had not been guilty of negligence, no action would lie. The court say: "It is a principle of the common law that a man must not dig so near the land of another as thereby to withdraw the natural support of the soil, and render it liable to break away and slide down of its own weight; but this principle does not apply to excavations made in pursuance of a license; and a license from the legislature, *if within its constitutional limits*, affords as ample protection as a license from the injured party." The *right* of support was thus conceded to exist. This *right* was *property*, and the legislature could not license a railroad company to take away the plaintiff's property without an equivalent as required by the constitution. Such a license was not "within

³ Richardson *v.* Vermont Central R. R. Co., 25 Vt. 465; Ludlow *v.* Miss. 479.

Hudson River R. R. Co., 6 Lans. ⁴ Boothby *v.* Androscoggin & 128; and see New Orleans, Baton Rouge etc. R. R. Co. *v.* Brown, 64 Kennebec R. R. Co., 51 Me. 318;

its constitutional limits." In the Kentucky case a recovery was denied, on the ground that the plaintiff sold the right of way to the company for use as a right of way, and it must be presumed that he estimated and obtained the damages which would result from such use. But the grant of land even to be excavated for materials does not authorize the grantee to deprive the adjoining land of the grantor of its support.⁵ The grant of land for a railroad or other public use is simply a grant of the land, *as land*, and it is still subject to the same obligations in respect to adjacent or neighboring land as if granted to a private individual for private use.⁶

Where the grade of a street is cut down and the soil of the abutting owner slides into the street, he is entitled to recover.⁷ But this question, so far as it relates to streets, is discussed elsewhere.⁸ In case of interfering with the right of support, the action accrues when the damage results, and not when the excavation is made.⁹

§ 152. Polluting the atmosphere.—The owner of land has a right that the air which comes upon his premises shall come in its natural condition, free from artificial impurities. This right has its correlative obligation, which is that one must not use his own premises in such a manner as to discharge into the atmosphere of his neighbor dust, smoke, noxious gases or other foreign matter which substantially affect its wholesomeness.¹ This right is very fully treated by Mr. Wood in his work on *Nuisances*, and a reference

Hortsman *v.* Covington & Lexington R. R. Co., 18 B. Mon. 218.

⁵ Ryckman *v.* Gillis, 6 Lans. 79; Ludlow *v.* Hudson River R. R. Co., 6 Lans. 128.

⁶ Post, §§ 566, 569.

⁷ Dyer *v.* St. Paul, 27 Minn. 457; Armstrong *v.* St. Paul, 30 Minn. 299; Keating *v.* Cincinnati, 38

Ohio St. 141; City of Aurora *v.* Fox, 78 Ind. 1; and see Moore *v.* Albany, 98 N. Y. 396.

⁸ *Ante*, § 101.

⁹ Ludlow *v.* Hudson River R. R. Co., 6 Lans. 128.

§ 152.

¹ Wood on *Nuisances*, §§ 469, 494.

thereto will suffice.² The right to pure air is property, and to interfere with the right for public use is to take property.³ "There can be no question that the erection of gas works, or the setting up of any other noxious trade in the vicinity of my premises, that emits noxious odors, which are sent over my lands in quantity and volume, sufficient to essentially interfere with the use of that air for the ordinary purposes of breath and life, so as to constitute a legal nuisance, is such a taking of my property as the legislature may not permit without compensation. What possible distinction can there be between the actual taking of my property, or a part of it, and occupying it for the erection of a railroad track or a gas house, and invading it by an agency that

² Wood on Nuisances, Chapters 13 and 14.

³ Baltimore & Potomac R. R. Co. v. Fifth Baptist Church, 108 U. S. 317; Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316; Cogswell v. New York, New Haven & Hartford R. R. Co., 103 N. Y. 10; Abendroth v. Manhattan El. Ry. Co., 19 Abb. N. C. 247; Caro v. Same, 46 N. Y. Supr. Ct. 138. But see Briesen v. Long Island R. R. Co., 31 Hun, 112. In Cogswell v. New York etc. R. R. Co. the court intimated pretty clearly that it would hold it a taking to fill the atmosphere of one's premises with smoke, soot, gases, etc., if called upon to do so, but decide the case on other grounds. In Pennsylvania R. R. Co. v. Angel the court say: "But, secondly, an act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon con-

dition that just compensation be first made to the owners. This principle rests upon the express terms of the constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it can not be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense; of course, mere statutory authority will not avail for such an interference with private property." p. 329

operates as an actual abridgement of its beneficial use, and possibly a complete and practical ouster? There certainly can be none. By the erection of such works a burden is imposed upon my property; the property itself is actually invaded by an invisible, yet a pernicious, agency, that seriously impairs its use and enjoyment, as well as its value. The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself, and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water; it is an incident of the land, annexed to and a part of it, and it is as sacred as my right to the land itself.

Therefore, I apprehend that the legislature has no power to shield one from liability for all the consequences of the exercise of an occupation that produces such results any more than it has to authorize the flooding of my lands or the permanent diversion of a stream."⁴ Legislative authority to carry on a business does not authorize it to be carried on in such a manner or at such a place that it will be a nuisance to neighboring property.⁵ An act which authorized a particular business at a particular place which *necessarily* defiled the air so as to create a nuisance would be void unless it was for public use, and, if for public use, such as manufacturing gas for a city, would be subject to the constitutional limitation of making compensation.⁶

§ 153. Miscellaneous decisions as to what constitutes a taking.—A leasehold interest in public property derived from the State cannot be taken without compensation.¹ A

⁴ Wood on Nuisances, 1st Ed. § 755. lie. Central R. R. Co. v. English, 73 Ga. 366; Quinn v. Chicago B. &

⁵ N. W. Fertilizing Co. v. Hyde Park, 70 Ills. 634, affirmed, 97 U. S. 659.

⁶ Wood on Nuisances, § 750. And generally where, in the construction and operation of public works, a nuisance is created, an action will

lie. Gould v. Rochester, 105 N. Y. 46; Morgan v. Binghamton, 32 Hun, 602; Suffolk v. Parker, 79 Va. 660.

§ 153.

¹ McCauley v. Waller, 12 Cal. 500; Same v. Brooks, 16 Cal. 11.

right to recover for flowage is a valuable right of property, within the protection of the constitution.² But one has no such vested right in an award of damages for property taken for public use as will prevent the legislature from authorizing a court to set it aside for good cause shown.³ The unauthorized use of a patented machine by the government is not a *taking*, but a mere infringement of a patent right.⁴ Fixing the maximum of fees to be allowed an attorney for defending a pauper charged with crime, does not violate the constitution as to the taking of private property for public use.⁵ One who furnishes books to a State under a contract for less than they are worth, has no claim against the State for the difference on the ground that his property has been taken for public use.⁶

§ 154. Damages from negligence.—Damages resulting from negligence are always actionable. Consequently a recovery may be had for all damages which result from the negligent or improper construction or operation of public works.¹ Such damages are, of course, not a taking, and are not included in the award of compensation.²

§ 155. Taking under the guise of taxation.—We have already distinguished the eminent domain power from that of taxation.¹ Many attempts have been made to invalidate

² *Neponset Meadow Co. v. Tileson*, 133 Mass. 189.

³ *Matter of Widening Broadway*, 61 Barb. 483.

⁴ *Pitcher v. United States*, 1 Ct. of Cl. 7.

⁵ *Samuels v. County of Dubuque*, 13 Ia. 536.

⁶ *Shoals v. State*, 2 Chand. Wis. 182.

§ 154.

¹ *Waterman v. Connecticut etc. R. R. Co.*, 30 Vt. 610; *Blood v. Nashua & Lowell R. R. Co.*, 2 Gray,

137; *Estabrooks v. Peterborough & Shirley R. R. Co.*, 12 Cush. 224;

Johnson v. Atlantic & St. Lawrence R. R. Co. 35 N. H. 569; *Terre Haute & Indiana R. R. Co. v. McKinley*, 33 Ind. 274; *Delaware etc. Canal Co. v. Lee*, 22 N. J. L. 243; *Bellinger v. New York Central R. R. Co.*, 23 N. Y. 42; *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. 512.

² Cases in last note. *Post*, §§ 483, 574.

¹ *Ante*, § 4.

§ 155.

a tax on the ground that it was a violation of the constitutional provision prohibiting the taking of private property for public use without just compensation. But, with a few exceptions, it has generally been held that this limitation has no application to the taxing power. The limitations upon that power are to be found in the nature of the power itself, and in other provisions of the constitution having express reference to taxation.² Accordingly it has been held that a water tax,³ a tax to pay bounties to soldiers,⁴ or a tax in aid of a railroad or similar public work,⁵ is not a *taking* of private property under the eminent domain power. The only instances in which a proposed tax has been held to be a *taking*, and so within the limitations imposed upon the exercise of the power of eminent domain by the legislature, are special assessments for local improvements and the taxation of farming lands for municipal purposes.⁶ We have discussed the question in reference to special assessments in a former chapter.⁷ It has been held in Kentucky that lands used simply for agricultural purposes cannot be annexed to a city and subjected to the payment of municipal taxes, for the reason that such a tax is an attempt to take private property for public use without just compensation, and is therefore void.⁸ These decisions have been followed in Iowa⁹ and in an early

² Cooley on Taxation, chap. 3.

³ Allen *v.* Drew, 44 Vt. 174.

⁴ State *v.* Demarest, 32 N. J. L. 528; Booth *v.* Woodbury, 32 Conn. 118.

⁵ Gibbons *v.* Mobile & Great Northern R. R. Co., 36 Ala. 410; Stein *v.* Mobile, 24 Ala. 591; President & Coms. of Revenue *v.* State, 45 Ala. 399; Stewart *v.* Supervisors of Polk County, 30 Ia. 9; Aurora *v.* West, 9 Ind. 74; Clarke *v.* Rochester, 24 Barb. 446; Grant *v.* Courier, 24 Barb. 232; Gibson *v.* Mason, 5 Nev. 283, 303; C. W. etc. R. R. Co.

v. Clinton County, 1 Ohio St. 101-2; Norris *v.* City of Waco, 57 Tex. 635; Gilman *v.* Sheboygan, 2 Black, 510; Pine Grove *v.* Talcott, 19 Wall. 666.

⁶ See, as to license tax, Livingston *v.* Paducah, 80 Ky. 656.

⁷ *Ante*, § 5.

⁸ Cheaney *v.* Hooser, 9 B. Mon. 330, 344; Covington *v.* Southgate, 15 B. Mon. 491; Sharp *v.* Dunavan, 17 B. Mon. 223; Malthers *v.* Shields, 2 Met. (Ky.) 553.

⁹ Morford *v.* Unger, 8 Ia. 82; Langworthy *v.* Dubuque, 13 Ia. 86;

case in Nebraska,¹⁰ which latter case however was subsequently overruled.¹¹ In Wisconsin it has been held that farming lands cannot be annexed to a village for the sole purpose of increasing its taxable property, and that the act of annexation itself was void.¹² The current of authority, however, as well as the reason of the matter, is clearly the other way.¹³ Municipal corporations, their existence, extent, and powers, are entirely within the control of the legislature, unless restrained by other provisions of the constitution than that relating to eminent domain. The legislature may divide or consolidate them, expand or contract their limits as it sees fit. These propositions are almost elementary and substantially undisputed. For the courts to say what lands within a municipal corporation may be taxed for municipal purposes, and what not, is clearly *judicial legislation* and involves insuperable difficulties. These are well pointed out by the Supreme Court of Nebraska in *Turner v. Althaus*,¹⁴ from which we quote as follows: "The rule contended for is, that the theory of compensation to the owner of property within the corporate limits of a city by way of protection or benefit, derived from the city government, applies to property used and occupied for city purposes, and is co-extensive, only, with that line or point where it ceases to operate beneficially to the proprietor in a municipal point of view. Who is the arbiter to define this line—and where is it to be exactly found? If the judiciary is to act as such arbiter, then it seems clear that it must do one of two things, either to pronounce the act unconstitutional—(as in *Smith v. Sherry*, 50 Wis. 210) and upon such

Same *v. Same*, 16 Ia. 271; *Fulton v. Davenport*, 17 Ia. 404; *Buell v. Ball*, 20 Ia. 282.

¹⁰ *Bradshaw v. Omaha*, 1 Neb. 16.

¹¹ *Turner v. Althaus*, 6 Neb. 54.

¹² *Smith v. Sherry*, 50 Wis. 210.

¹³ *Stiltz v. Indianapolis*, 55 Ind. 515; *Logansport v. Seybold*, 59 Ind.

225; *Giboney v. Cape Girardeau*, 58 Mo. 141; *Groff v. Frederick City*, 44 Md. 67; *Martin v. Dix*, 52 Miss. 53; *Turner v. Althaus*, 6 Neb. 54; *Kelley v. Pittsburgh*, 85 Pa. S. 170; *Appeal of Hewitt*, 88 Pa. S. 55; *Norris v. City of Waco*, 57 Tex. 635.

¹⁴ 6 Neb. 51, 74.

decision, as already shown, the tax district will be destroyed—or it must, by legislative action, amend and change the law, and classify the property within the city limits, so as to subject part thereof to taxation, and exempt the other part from taxation, and this must be done by piecemeal as each case shall arise. But in the adjudication of cases which must constantly arise under the rule contended for, it seems impossible to discover any test, or criterion, by which uniformity and certainty of decisions may be obtained. The opinions of men are so diversified and varied, that what to one mind may seem clearly right and proper, to another may clearly appear to be wrong and unjust. By one court lands may be adjudged subject to taxation, and by another the same lands, or lands similarly situated, may be adjudged exempt from taxation. Which would be right? Who can decide the question? It therefore seems difficult to escape the conclusion that the decision of each case, as it shall arise, must depend upon the caprice of the arbiter who determines it, for he cannot resolve the question upon any principle of legal science. Hence the exercise of judicial power in apportioning the taxes of a district affords no security against the abuse of the taxing power; but on the contrary, it may be fraught with more danger, and result in greater injustice, than a uniform system of taxation established by legislative enactment."

§ 156. Taking under the guise of the police power.— While the theoretical distinction between the police power and the power of eminent domain is clear and definite, it is not always easy to distinguish them in their practical application. That is sometimes attempted under the police power which can only be accomplished by an exercise of eminent domain. We shall not go at length into this question, but advert briefly to some of the cases in which the question has been made. Fire limits may be established and the manner of building regulated with a view to preventing the spread

of fires.¹ The erection or repairing of wooden buildings in cities may be prohibited, and such a regulation is not a taking of a partially destroyed building.² So a building which is in such condition as to endanger life and property may be declared a nuisance and destroyed without compensation.³ Likewise a building erected in violation of a valid fire ordinance.⁴ An act prohibiting the use of any building not "now" used for that purpose, for slaughtering, rendering and the like, is not unconstitutional as interfering with private property without compensation.⁵ The legislature may regulate the construction and use of wharves and piers and prescribe dock lines,⁶ but cannot declare a dock which has been rightly and properly built, a nuisance, and abate it without compensation, because it projects beyond a dock line afterwards established.⁷ An act prohibiting the taking of sand or gravel from a sea beach was held valid as a proper regulation of the use of private property for the preservation of Boston harbor, and a person violating the act was found guilty though he owned the fee of the land whence he took the sand.⁸ Any nuisance may be abated, such as a hog pen,⁹ or stagnant pool¹⁰ without compensation for the property destroyed or interfered with. Low, wet grounds in populous localities may be filled up at the expense of the owners for the purpose of preserving the public health.¹¹ But land

§ 156.

¹ *Dillon Munic. Corp.* § 405; *ex parte Fisher*, 72 Cal. 125; *Brady v. Northwestern Insurance Co.*, 11 Mich. 425; *Knoxville v. Bird*, 12 Lea, 121.

² *Brady v. Northwestern Insurance Co.*, 11 Mich. 425.

³ *Harvey v. Dewoody*, 18 Ark. 252; *Theilan v. Porter*, 14 Lea, 622; *Raymond v. Fish*, 51 Conn. 80.

⁴ *Hine v. New Haven*, 40 Conn. 478; *King v. Davenport*, 98 Ills. 305.

⁵ *Watertown v. Mayo*, 109 Mass. 315.

⁶ *State v. Sargent*, 45 Conn. 358; *Commonwealth v. Alger*, 7 Cush. 53; *Roosevelt v. Godard*, 52 Barb. 533.

⁷ *Chicago v. Laflin*, 49 Ills. 172; *Yates v. Milwaukee*, 10 Wall. 497; *Ryan v. Brown*, 18 Mich. 196.

⁸ *Commonwealth v. Tewksbury*, 11 Met. 55.

⁹ *St. Louis v. Stern*, 3 Mo. App. 48.

¹⁰ *Baker v. Boston*, 12 Pick. 184.

¹¹ *Farnsworth v. Boston*, 126 Mass.

upon which there is no nuisance belonging to one proprietor cannot be occupied with drains or other works for the purpose of abating a nuisance on the lands of others, unless compensation is made.¹² Intoxicating liquor kept or made in violation of law may be destroyed¹³ and its manufacture prohibited, though the result of such prohibition may be to render buildings, machinery and fixtures used for that purpose of little or no value.¹⁴ Bread made under weight in

1; Bancroft *v.* Cambridge, 126 Mass. 438; Welch *v.* Boston, 126 Mass. 442.

¹² Matter of Chessbrough, 78 N. Y. 232; S. C. 17 Hun, 561; Cavanaugh *v.* Boston, 139 Mass. 426.

¹³ Beer Co. *v.* Massachusetts, 97 U. S. 25; State *v.* Snow, 3 R. I. 64.

¹⁴ People *v.* Hawley, 3 Mich. 330, 342. In this case the court say: "In the exercise of its police power a State has full power to prohibit, under penalties, the exercise of any trade or employment which is found to be hazardous or injurious to its citizens and destructive of the best interests of society, without providing compensation to those upon whom the prohibition operates." Mugler *v.* Kansas, 123 U. S. 623. The latter is the decision sustaining the prohibitory amendment to the constitution of Kansas and the legislation passed to carry it into effect. The nature of the decision is so well known that no extended comment upon it is necessary. We quote the following extract from the opinion as particularly in point in this connection: "As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may

not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with

violation of law may be forfeited;¹⁵ cattle taken *damage feasant* may be impounded and sold after reasonable notice.¹⁶ Private property cannot be seized and occupied as a small-pox hospital under the police power.¹⁷ An act which restricts one in the use of his property in a particular manner in order that another may use his in that manner to greater advantage is void.¹⁸ The legislature cannot bargain away its police power, at least so far as the public health and the public morals are concerned.¹⁹ And an act prohibiting the

the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

"It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, above cited, the supervision of the public health and the public morals is a governmental power, 'continuing

in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' and that, 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' So in *Beer Co. v. Massachusetts*, 97 U. S. 32: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer,'" pp. 668-670. See also *Foster v. Kansas*, 112 U. S. 201, 206; *People v. McGann*, 34 Hun, 358.

¹⁵ *Guillotte v. New Orleans*, 12 La. An. 432.

¹⁶ *Dillard v. Webb*, 55 Ala. 468.

¹⁷ *Markham v. Brown*, 37 Ga. 277.

¹⁸ *Commonwealth v. Bacon*, 13 Bush, (Ky.) 210. The act prohibited any one within three hundred yards of a fair ground from furnishing feed and shelter for horses.

¹⁹ *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; and see *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Co. v. Rivers*, 115 U. S.

use of property for certain purposes or the carrying on of a business injurious to the public health or public morals, though in violation of a previous grant of the legislature, and though it may destroy and greatly impair the value of property, is neither a *taking* for public use under the power of eminent domain, nor a violation of a contract.²⁰ Where the charter of a water-power company is subject to amendment, alteration or repeal at the pleasure of the legislature, it may be compelled to construct a fishway in its dam without compensation,²¹ otherwise not.²² A railroad company will be compelled to erect such structures and submit to such regulations as are necessary for the safety of the public or security of property, and accordingly may be required to disuse steam upon city streets,²³ construct and maintain cattle-guards,²⁴ and fences,²⁵ or widen and repair bridges over its road.²⁶ Some cases hold that a railroad company cannot be

674; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683.

²⁰ *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ills. 634; affirmed, 97 U. S. 659; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; same case below, 4 Wood, 96; *Boyd v. Alabama*, 94 U. S. 645; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Stone v. Mississippi*, 101 U. S. 814. In *Lake View v. Rose Hill Cemetery Co.*, 70 Ills. 191, three of the seven judges dissenting, it was held that the Cemetery Company, having been authorized by charter to acquire five hundred acres of land in Lake View, to be used for cemetery purposes, could not be deprived of the privileges of using a portion of the land so acquired for cemetery purposes, without compensation. See also *New Orleans Water Works Co. v. St. Tammany Water Works Co.*, 4 Wood, 134.

²¹ *Commissioners of Inland Fish-*

eries v. Holyoke Water Power Co., 104 Mass. 446; *Holyoke Co. v. Lyman*, 15 Wall. 500; see also *S. P. Commonwealth v. Eastern R. R. Co.*, 103 Mass. 254.

²² *Commonwealth v. Pennsylvania Canal Co.*, 66 Pa. S. 41; *State v. Glen*, 7 Jones, L. 321; *Cornelius v. Glen*, *ibid.* 512; *People v. Platt*, 17 Johns. 195; *Woolever v. Stewart*, 36 Ohio St. 146; *contra*: *Parker v. People*, 111 Ills. 581.

²³ *North Chicago City Ry. Co. v. Lake View*, 105 Ills. 207; *Railroad Co. v. Richmond*, 96 U. S. 521.

²⁴ *Nelson v. Vermont & Canada R. R. Co.*, 26 Vt. 717; *Thorp v. Rutland & Burlington R. R. Co.*, 27 Vt. 140; *Missouri Pacific Ry Co. v. Humes*, 115 U. S. 512.

²⁵ *Emmons v. Minneapolis & St. Louis Ry. Co.*, 35 Minn. 503.

²⁶ *English v. New Haven & Northampton Co.*, 32 Conn. 240.

compelled to construct a highway across its track, even though the power to modify or repeal its charter is reserved.²⁷ Other cases hold that it may be done when the power to repeal, alter or amend the charter is reserved.²⁸ A recent case in Maine sustained, as a valid police regulation, a statute which made it the duty of a railroad company, when a new highway was laid out over its tracks, to construct and maintain the crossing.²⁹ But a corporation cannot be deprived of its essential rights without compensation. Thus, a bridge company cannot be compelled to construct a draw,³⁰ or a turnpike company to remove or open its gates.³¹

²⁷ *Miller v. New York & Erie R. R. Co.*, 21 Barb. 513; *Illinois Central R. R. Co. v. Bloomington*, 76 Ills. 447; *People v. Lake Shore & Mich. Southern Ry. Co.*, 52 Mich, 277.

²⁸ *Albany Northern Ry. Co. v. Brownell*, 24 N. Y. 345; *Boston & Albany R. R. Co. v. Greenbush*, 52 N. Y. 510; *Portland & Rochester R. R. Co. v. Deering*, 78 Me. 61. In the last case the railroad charter was subject to general laws passed or to be passed, one of which was that any railroad charter might be amended.

²⁹ The court say: "Corporations derive their existence from the State, and hence are subject to the State even more completely than individuals. Corporations created for public purposes and invested with large powers, as railroad corporations are, can properly be required to do any reasonable thing and to assume permanently any reasonable duty, which shall promise greater security from the dangers attendant upon the exercise of their powers. There must needs be a highway. The crossing at the railroad must be kept in repair.

To permit any divided authority or responsibility as to the crossing would be dangerous. The railroad company would loudly remonstrate if the municipality were given the power to manage the crossing. The company needs the entire control for its own protection as well as that of its passengers. By operating its road it occasions the danger. It is not unreasonable that the railroad company should provide against the danger so occasioned. Such a requirement does not seem to be an 'alteration, amendment or repeal' of the charter of the Boston and Maine Railroad Company. The company exercises all the powers and privileges it had before the enactment of the statute requiring this duty of maintaining crossings. The statute simply requires more care and greater security in such exercise. However the statute may affect the company or its charter, we think the company is subject to it." *Railroad Co. v. County Comrs.* 79 Me. 386, 395.

³⁰ *Washington Bridge Co. v. State*, 18 Conn. 53.

³¹ *Turnpike Co. v. Davidson Co.*,

As a result of these decisions and the principles upon which they depend, we think the following conclusions may be deduced: The use of property may be regulated as the public welfare demands. A public nuisance may be abated and private property interfered with or destroyed for that purpose. The conduct of any business detrimental to the public interests may be prohibited. Property made or kept in violation of law may be destroyed. Railroad corporations, and others invested with the power of eminent domain, because their business is of public utility, may be subjected to such regulations in regard to their charges and the conduct of their business as the legislature deem wise and proper for the general good.³² They may be compelled to adopt such appliances and execute such additions or changes in their works or property and take such precautions as are necessary to the public safety.³³ Beyond this, private property cannot

³² Tenn. Ch. 396; *Powell v. Sammons*, 31 Ala. 552.

³² *C. B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. C. & N. W. Ry. Co.*, 94 U. S. 164; *Munn v. People*, 69 Ills. 80; *S. C. 94 U. S. 113*.

³³ *State v. Noyes*, 47 Me. 189. Two railroads crossed a city street at grade. The legislature passed an act appointing a commission to advise some plan whereby the street should be carried over or under the railroads, and authorized the commissioners to condemn such property and construct such works as should be necessary and to apportion the expense between the railroads and the city. In *Woodruff v. Catlin*, 54 Conn. 277, the Supreme Court of Connecticut held the act valid, and say: "The act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or

diminish the assets of either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment. That the legisla-

be interfered with under the police power, but resort must be had to the power of eminent domain and compensation made.^{3 4}

ture of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue." p. 295. An act requiring intersecting railroads to construct passenger waiting-rooms at crossings was held valid in *State v. Wabash, St. Louis & Pacific Ry. Co.*, 83 Mo. 144.

³⁴ An act prohibiting the manufacture of cigars or tobacco in a certain class of tenement houses in cities of over five hundred thousand population, of which there

was only one in the State, was held invalid in *matter of Jacobs*, 98 N. Y. 98; S. C. 33 Hun, 374. Ordinances compelling abutting owners to clean the snow and ice from their sidewalks and to keep them in repair were held invalid in Illinois. *Chicago v. O'Brien*, 111 Ills. 532; *Chicago v. Crosby*, 111 Ills. 538. See also, as illustrating the text, *Philadelphia etc. R. R. Co. v. Philadelphia*, 47 Pa. S. 325; *Albany v. Watervliet etc. R. R. Co.*, 45 Hun. 442; *Clark v. Syracuse*, 13 Barb. 32; *Philadelphia v. Scott*, 81 Pa. S. 80.

CHAPTER VII.

MEANING OF THE WORDS "PUBLIC USE."

§ 157. **Taking for private use unauthorized.**—Only a few of the State constitutions in terms prohibit the taking of private property for private use.¹ All courts, however, agree in holding that this cannot be done.² Different courts find different reasons for this conclusion, some putting it on the ground of an implied prohibition in the eminent domain provision of the constitution,³ some on the ground that it

§ 157.

¹ See provisions in the constitutions of Alabama, Colorado, Georgia, Louisiana and Missouri, *ante*, §§ 15, 18, 22, 28, 35.

² *Bankhead v. Brown*, 25 Ia. 540; *Nesbitt v. Trumbo*, 39 Ills. 110; *Matter of Albany Street*, 11 Wend. 151; *Concord R. R. Co. v. Greeley*, 17 N. H. 47; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 59; *Beckman v. Railroad Co.*, 3 Paige. 73; *Witham v. Osburn*, 4 Oregon, 318; *Hepburn's Case*, 3 Bland (Md.) 95; *Hoye v. Swan's Lessee*, 5 Md. 237, 244; *Dunn v. Charleston, Harper (S. C.)* 189; *Osborn v. Hart*, 24 Wis. 89; *Tyler v. Beacher*, 44 Vt. 648; *Dickey v. Tennison*, 27 Mo. 373; *Clack v. White*, 2 Swan, 540; *Sadler v. Langham*, 34 Ala. 311; *Taylor v. Porter*, 4 Hill, 140; *Valley City Salt Co. v. Brown*, 7 W. Va. 191; *New Central-Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Varner v. Martin*, 21 W. Va. 534; *Bangor R. R. Co. v. McComb*, 60

Me. 290; *Harris v. Thompson*, 9 Barb. 350; *McCaudless' Appeal*, 70 Pa. S. 210; *Kenedy v. Erwin, Busbee L.* 387; *Embry v. Conner*, 3 N. Y. 511; S. C. 2 Sandf. 89; *Sauder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 726; *Robinson v. Swope*, 12 Bush, 21, 27; *Harding v. Funk*, 8 Kan. 315, 323; *Jenal v. Green Island Draining Co.*, 12 Neb. 163; *Waddell's Appeal*, 84 Pa. S. 90; *Brown v. Beatty*, 34 Miss. 227, 240; *Dayton Mining Co. v. Seawell*, 11 Nev. 394, 399; *Hand Gold Mining Co. v. Parker*, 59 Ga. 419, 421; *Lorenz v. Jacob*, 63 Cal. 73; *Bennett v. Boyle*, 40 Barb. 551; *Matter of John & Cherry Streets*, 19 Wend. 659; *Matter of Eureka Basin Warehouse & Manuf. Co.*, 96 N. Y. 42; *McQuillen v. Hatton*, 42 Ohio St. 202.

³ See last note, and especially the following cases: *Bankhead v. Brown*, 25 Ia. 540; *Concord R. R. Co. v. Greeley*, 17 N. H. 47, 54; *Matter of Albany Street*, 11 Wend. 151; *Bloodgood v. Mohawk & Hud*

would be contrary to the provision that no person shall be deprived of his property except by the law of the land;⁴ others, on the ground that it would be subversive of the fundamental principles of free government,⁵ or contrary to the spirit of the constitution.⁶ The conclusion is undoubtedly a correct one and is too well settled by authority to necessitate any inquiry into the true grounds upon which it rests. "It is conceded on all hands," says Judge Cooley, "that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit."⁷

son R. R. Co., 18 Wend. 9, 59; Robinson *v.* Swope, 12 Bush, 21, 27; Talbott *v.* Hudson, 16 Gray, 417; Sedgwick on Const. Law, p. 447, (2d ed.)

⁴ Nesbitt *v.* Trumbo, 39 Ills. 110; Taylor *v.* Porter, 4 Hill, 140; Embury *v.* Conner, 3 N. Y. 511.

⁵ Concord R. R. Co. *v.* Greeley, 17 N. H. 47, 56; Hepburn's Case, 13 Bland (Md.) 95; Bloodgood *v.* Mohawk & Hudson R. R. Co., 18 Wend. 9, 56.

⁶ Matter of Peter Townsend, 39 N. Y. 171, 182. In Concord *v.* Greeley, 17 N. H. 47, 55, the court say: "We have no doubt that a law providing merely that the property of A should be taken from him and given to B, either with or without consideration, would be repugnant to the constitution. Not, indeed, to the letter of any particular clause contained in it, but to its spirit and design, which, throughout the whole, discountenance the idea that the property of the citizen is held by any such uncertain tenure as the arbitrary discretion of the legislature

in a matter of mere private right unconnected with any considerations of public utility. Such a law would not be so much in repugnance to the constitution as it would be to the principles which hold human society together; which, while they recognize the power of the legislature to be supreme, do not admit it to be arbitrary."

⁷ Cooley Const. Lims. *530. In Coster *v.* Tide Water Co., 18 N. J. Eq. 54, 63, the Chancellor says: "There is no prohibition in the constitution of this State, or in any of the State constitutions, that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The constitution vests in the senate and general assembly the legislative or law-making power. They can make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another, is

§ 158. **The question of public use a judicial one.**—It is manifest that the legislature, in providing for the condemnation of private property, must determine in the first instance whether the use for which it is proposed to make the condemnation is a public one. But this determination is not final. All the courts, we believe, concur in holding that, whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary.¹ Some

not making a law, or rule of action; it is not legislation, it is simply robbery. This power was not necessary or useful to be given to the legislature for any of the purposes for which the government was constituted; and it was not given. It is the principle of all free governments, that no right of the citizen should be surrendered to the sovereign, that is not necessary for the purposes of government. This maxim pervades all republican governments as well as monarchies; for the tyranny of a majority, or of corrupt representatives, is just as oppressive, and far more odious, than that of a monarch. This is the aim of all our constitutional restrictions. The first declaration in the bill of rights, that forms the first article of our State constitution, affirms that one of the unalienable rights of every man is that of acquiring, possessing, and protecting property; and the last declaration therein says that such enumeration of rights shall not be construed to deny others retained by the people. This shows that the right of private property was made sacred by the constitution, to be invaded by no one, not even the legislative power, except where such control was expressly given

by that instrument. Again, the sixteenth declaration of the bill of rights, which declares that private property shall not be taken for public use without just compensation; and the ninth provision of the seventh section of the fourth article of the constitution, the article defining and restricting legislative power, which declares that individuals and private corporations shall not be authorized to take private property for public use without compensation first made to the owners; both show, by inevitable implication, that it was not intended to confer on the legislature the power of taking private property for private use at all."

§ 158.

¹ *Sadler v. Langham*, 34 Ala. 311; *Matter of Deansville Cemetery Association*, 66 N. Y. 569; *Young v. Harrison*, 6 Ga. 130; *Parkham v. Justices etc.*, 9 Ga. 341; *Loughbridge v. Harris*, 42 Ga. 501; *Anderson v. Turbeville*, 6 Coldw. 150; *Stockton & Visalia R. R. Co. v. Stockton*, 41 Cal. 147; *Consolidated Channel Co. v. Central Pacific R. R. Co.*, 51 Cal. 269; *Harris v. Thompson*, 9 Barb. 350; *Bankhead v. Brown*, 25 Ia. 540; *Tyler v. Beacher*, 44 Vt. 648; *Dickey v. Tennison*, 27 Mo. 373; *New Cen-*

dicta have been understood as announcing the doctrine that it was competent for the legislature not only to decide upon the *necessity* and *expediency* of an exercise of the power of eminent domain, but also to determine absolutely what uses are public within the meaning of the constitution. We think it more likely that these *dicta* have been misapprehended than that any judge ever intended to announce such a doctrine, and the *dicta* usually referred to do not necessitate any such construction.²

§ 159. **State of the authorities as to the meaning of the words, "public use."**—It is easily determined, as has been shown in the two preceding sections, that private property can be taken *only* for public use, and that what is a public use is a question for the courts. When, however, we come to seek for the principles upon which the question of public use is to be determined, or to define the words, "public use," in the light of judicial decisions, we find ourselves utterly at sea. "No question has ever been submitted to the courts," says one authority, "upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words, 'public use,' as found in the different State constitutions regulating the right of eminent domain."¹ A perusal of the cases cited in this chapter will verify this statement. Courts have generally avoided, and wisely so, the enunciation of general principles or the giving

tral Coal Co. *v.* George's Creek Coal & Iron Co., 37 Md. 537; Varner *v.* Martin, 21 W. Va. 534, 550; Talbott *v.* Hudson, 16 Gray, 417; Pittsburgh *v.* Scott, 1 Pa. S. 309, 314; Concord R. R. Co. *v.* Greeley, 17 N. H. 47; Coster *v.* Tide Water Co., 18 N. J. Eq. 54; County Court of St. Louis County *v.* Griswold, 58 Mo. 175, 194-196; Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 726; Dayton Mining Co. v.

Seawell, 11 Nev. 394, 399; *In re* St. Paul & Northern Pacific Ry. Co., 34 Minn. 227; Savannah *v.* Hancock, 91 Mo. 54; McQuillen *v.* Hatton, 42 Ohio St. 202.

² See Sadler *v.* Langham, 34 Ala. 311, 326.

§ 159.

¹ Dayton Mining Co. *v.* Seawell, 11 Nev. 394, 400; see also Cooley Const. Lim. p. *582.

of general definitions, which might prove stumbling blocks in subsequent cases or work mischief in their practical application. It is the duty of courts simply to apply the law to the case in hand. But every decision necessarily proceeds upon the basis of certain general principles, which, whether expressed or not, are capable of being discovered and applied to future cases. In a treatise of this sort, it is proper to seek out the general principles which underlie the decision of specific cases, as to what constitutes a public use, and so expound the law as to afford a guide in its application to new cases and conditions as they arise. Before proceeding to inquire as to the proper construction and meaning of the words *public use*, it will be well to divest the subject of certain outlying considerations which are sometimes supposed to affect the question, but in reality do not.

§ 160. The question of public use not affected by the agency employed.—As we shall see hereafter, it is competent for the legislature to delegate to individuals or corporations the right to take private property for public use.¹ In determining whether the use in such case is public or not, it is an immaterial consideration that the control of the property is vested in private persons who are actuated solely by motives of private gain.² Railroads, canals, turnpikes and ferries are familiar instances of such appropriation, and the principle is of universal application. “The inquiry must

§ 160.

¹ *Post*, § 242.

² *Brown v. Beatty*, 34 Miss. 227, 240; *Salt Co. v. Brown*, 7 W. Va. 191, 197; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 21, 83. Edwards, Senator, in the last case, says: “Does the fact that the power to construct the road is given to a *company* alter the nature of the grant? Surely not. It is entirely immaterial who constructs

the road, or who defrays the expense of the construction. The object for which it is constructed must determine the nature of the grant, whether for public or private use.” p. 21. Also *Concord R. R. Co. v. Greeley*, 17 N. H. 47, 60; *Matter of Townsend*, 39 N. Y. 171; *Bellona Company Case*, 3 Bland, Chy. 44²; *Cottrill v. Myrick*, 12 Me. 222.

necessarily be, what are the objects to be accomplished? not, who are the instruments for attaining them?"³

§ 161. Nor by the fact that the use or benefit is local or limited.—It is not necessary that the entire community, or any considerable portion of it, should directly participate in the benefits to be derived from the property taken.¹ "The public use required, need not be the use or benefit of the whole public or State, or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates."² A school-house site for a district of a dozen families is as undeniably for public use as the ground for a State-house.³ The amount of benefit to be derived

¹ *Willyard v. Hamilton*, 7 Ohio, pt. 2, 111.

§ 161.

¹ *Bloomfield etc. Natural Gas Light Co. v. Richardson*, 63 Barb. 437, 448; *Hartwell v. Armstrong*, 19 Barb. 166; *Aldridge v. T. C. & D. R. R. Co.*, 2 Stew. & Por. 199; *Gilmer v. Lime Point*, 18 Cal. 229; *Coster v. Tide Water Mill Co.*, 18 N. J. Eq. 54; *O'Reilly v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Riche v. Bar Harbor Water Co. (Me.)* 28 Alb. L. J. 498; *Talbott v. Hudson*, 16 Gray, 417, 425.

² *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 68. Similar views are expressed in *Ross v. Davis*, 97 Ind. 79, and *McQuillen v. Hatton*, 42 Ohio St. 202.

³ In a case where the question was whether the taking for a district school was for a public use, the court say: "Every public use is, to some extent, local, and benefits a particular section more than others. Railroads and canals, the most extensive of our public works,

do so in some degree. Burying grounds, aqueducts, mills and many highways are as purely local as this, and no person can derive benefit from them except by becoming a resident in their vicinity. In the same way this may be for the benefit of any citizen. But the use in the present case has a more enlarged and liberal view. It is a benefit and advantage to the whole country, that all the children should be educated, and thus, any means of educating the children in any district, benefit the whole. To accomplish this great object of educating the whole, it becomes necessary that a great number of schools should be supported to make them accessible to all; but the principle remains the same, as if all the children of the State could attend a single school; they are all but separate means to accomplish the same great and general benefit." *Williams v. School District*, 33 Vt. 271, 279; *Township Board v. Hackman*, 48 Mo. 243, 245.

from a particular improvement or system of improvements is a consideration which addresses itself to the legislature, and not to the courts.

§ 162. Nor by the necessity or lack of necessity for the condemnation.—Some courts have held that, in order to uphold an exercise of the power of eminent domain, a necessity must exist for its exercise, in order to accomplish the purpose sought, and that this question of necessity is in some way an element in determining whether the taking is for public use.¹ Thus it is argued that a hotel, or theatre is not a public use within the meaning of the constitution, because the public can be accommodated in those respects without resorting to the power of eminent domain.² Nearly all the cases, however, hold that the question of necessity is distinct from the question of public use, and that the former question is exclusively for the legislature.³ The necessity, expediency or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general public policy and belong to the legislative department of the government. They have nothing to do with the question of what constitutes a public use.

§ 163. The words “public use” a limitation.—Many courts seem to treat the question of *What is a public use?*

§ 162.

¹ Ryerson *v.* Brown, 35 Mich. 333; Jordan *v.* Woodward, 40 Me. 317, 323; Dayton Mining Co. *v.* Seawell, 11 Nev. 394; Salt Co. *v.* Brown, 7 W. Va. 191, 199; Varner *v.* Martin, 21 W. Va. 534, 556. In the last case the court say, the use “must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience;” also, that it “must be impossible, or very difficult at least, to secure the same public uses and purposes in any

other way than by authorizing the condemnation of private property.”

² Dayton Mining Co. *v.* Seawell, 11 Nev. 394.

³ People *v.* Smith, 21 N. Y. 595; Challiss *v.* A. T. & S. F. Ry. Co., 16 Kan. 117, 126; Buffalo & New York R. R Co. *v.* Brainard, 9 N. Y. 100, 109; Bloomfield etc. Natural Gas Light Co. *v.* Richardson, 63 Barb. 437; Water Works Co. *v.* Burkhardt, 41 Ind. 364, 370; Anderson *v.* Turbeville, 6 Coldw. 150, 160; Cooley Const. Lim. *538; *post*, § 238.

as though the question was *For what purposes may the power of eminent domain be properly exercised.* This is a serious error. The power of eminent domain, as we have before shown, is the power of a sovereign State to appropriate private property to particular uses for the purpose of promoting the general welfare.¹ This power was originally in the people, in their sovereign capacity, and was by them delegated to the legislature in the general grant of legislative power. In the absence of any restrictions, the legislature could take private property for any purpose calculated to promote the general good. By the provision in question, the people said to the legislature, in effect, You shall not exercise this power except for *public use*. To give these words any effect, they must be construed as limiting the power to which they relate, that is, as limiting the purposes for which private property may be appropriated. As the power is by its nature limited to such purposes as promote the general welfare, it is evident that the words *public use*, if they are to be construed as a limitation, cannot be equivalent to the general welfare or public good. They must receive a more restricted definition.

§ 164. Statement of doctrines. — The different views which have been taken of the words *public use* resolve themselves into two classes: one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that they are equivalent to public benefit, utility or advantage. Some of the many definitions of the words *public use* are here given. “The words ‘public use’ mean public utility, advantage or what is productive of public benefit.”¹ “If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient

§ 163.

¹ *Ante*, § 1.

§ 164.

¹ *Olmstead v. Camp*, 33 Conn. 532.

importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose.”² “By the public use is meant for the use of many, or where the public is interested.”³ “Whatever is beneficially employed for the community is of public use and a distinction cannot be tolerated.”⁴ Similar definitions, making the words equivalent to public benefit or advantage, are numerous.⁵ On the other hand, numerous cases hold that to constitute a public use the property must be taken into the direct control of the public or of public agencies, or the public must have the right to use in some way the property appropriated.⁶

² Chancellor Walworth in *Beekman v. Saratoga & Schenectady R. R. Co.*, 3 Paige, 45, 73.

³ *Seely v. Sebastian*, 4 Oregon, 25.

⁴ *Aldridge v. T. C. & D. R. R. Co.*, 2 *Stew. & Por.* 199.

⁵ *Pittsburgh v. Scott*, 1 Pa. S. 309, 314; *Hand Gold Mining Co. v. Parker*, 59 Ga. 419; *Tood v. Austin*, 34 Conn. 78; *Talbot v. Hudson*, 16 Gray, 417; *Bellona Company Case*, 3 *Bland, Chy.* 442.

⁶ *Varner v. Martin*, 21 W. Va. 534; *Memphis Freight Co. v. Memphis*, 4 *Coldw.* 419; *West River Bridge Co. v. Dix*, 6 *How.* 507, 546; *Jenal v. Green Island Draining Co.*, 12 *Neb.* 163; *Sholl v. German Coal Co.*, 118 *Ills.* 427; *Matter of Eureka Basin Warehouse & Manf. Co.*, 96 N. Y. 42. In *Varner v. Martin*, 21 W. Va. 534, 552, 556, the court divided cases of appropriation into two classes, as follows: *First*. Where “the property condemned is under the direct control and use of the government, or public officers of the government, or what is almost the same thing in the direct use and occupation of the public at

large, though under the control of private persons or corporations.”

Second. Where “it is in the direct use and occupation of private persons or of a corporation, and the general public has only an indirect and qualified use of the property condemned, or perhaps no use properly of any kind of the property condemned, but simply derives from its use by and for a private person or corporation, some indirect advantage, as by the promotion of the general prosperity of the community.” As to cases of the first class, the court concludes there is no question as to the public use. In regard to the second class, the court proceeds as follows: “I think we can show from the decisions, that a person or corporation claiming to belong to this second class, and to have legislative authority to condemn lands, must first show that he or they are possessed of each and all of these three qualifications: *First*, the general public must have a definite and fixed use of the property to be condemned, a use independent of the

§ 165. Proper construction of the words "public use."—It is, of course, impossible to reconcile these different views, and the question is, which one is correct. "The meaning of the words cannot be ascertained by reading the constitution. No attempt is there made to define them. Nor is there any clause in that instrument, which, by its bearing upon them, teaches us the precise meaning which they were intended to have. We must, therefore, look elsewhere for a true construction."¹ If we look to our dictionaries, we find the same confusion as in the decisions. Thus, "use" is defined as, *first*, "the act of employing anything or the state of being employed for any purpose; application, employment, service;" *second*; "the quality that makes a thing proper for a purpose; benefit, utility, advantage."² To constitute a public use according to the first of these definitions, it is necessary that the public should in some way use or be entitled to use or enjoy the property taken. According to the second definition, it would be a public use if the property taken was so employed as to enure in any way to the public benefit or advantage.

If we go back a century and place ourselves in the situation of those who framed the constitutions of the original

will of the private person or private corporation in whom the title of the property when condemned will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature; *second*, this *public use* must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience; *third*, it must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the

condemnation of private property. If any one of these essentials is wanting, the courts will declare the act of the legislature authorizing such condemnation of private property to be unconstitutional, because it would amount to taking private property for *private* and not for public uses." See also *Salt Co. v Brown*, 7 W. Va. 191, 199.

§ 165.

¹ *Concord R. R. Co. v. Greeley*, 17 N. H. 47, 60.

² See *Worcester*, *Webster* and other lexicographers, all of whom give and illustrate these different uses of the word.

States, we shall find that the principal purposes, if not the only purposes, for which private property was appropriated were for ways and mills. The mills were mostly saw-mills and grist-mills, and were accustomed, and in most cases obliged, to saw and grind for toll for whomsoever applied.³ They were for *public use*, in the stricter sense of the phrase. There was nothing in the practice of the States at the time the earlier constitutions were adopted to require that the words public use should have the meaning of public benefit or advantage.

The use of a thing is strictly and properly the employment or application of the thing in some manner.⁴ The *public* use of anything is the employment or application of the thing by the public. *Public use* means the same as *use by the public*, and this it seems to us is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: *First*, that it accords with the primary and more commonly understood meaning of the words; *second*, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; *third*, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.

If the constitution means that private property can be taken only for use *by* the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment, and to that

³ Post, § 178.

⁴ Such is the first meaning given by all lexicographers, and the one required by the etymology of the word. It is from the Latin *utor*, which means "to use, make use of, avail one's self of, employ, apply, enjoy, etc." Of course constitu-

tional law cannot be turned into a question of etymology, but, in questions of this sort, which necessarily turn upon nice distinctions, and where there is no definite clue to guide us, it is proper to look at the original and controlling definition of the words employed.

extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for public use and the act of appropriation is void. This interpretation will cover every case of appropriation that has been deemed lawful by any court, except a few in relation to mills, mines and drainage. If exceptional circumstances require exceptional legislation in those respects in any State, it is very easy to provide for it specially in the constitution, as has been done in several States.

On the other hand, if the constitution means that private property may be taken for any purpose of public benefit and utility, what limit is there to the power of the legislature? This view places the whole matter ultimately in the hands of the judiciary, as though the constitution read that private property may be taken for such purposes as the Supreme Court *deem of public benefit or advantage*. The public welfare is committed generally to the keeping of the legislature. It is a numerous body, coming directly from the people and supposed to be acquainted with their condition and needs. All questions of general public welfare and advantage fall appropriately within the province of the legislature. They have opportunities for judging correctly, ways and means of information which the courts do not and cannot have. It cannot be presumed that the people ever intended to commit such a question to the courts. Whether the public will have the use of property taken under a particular statute is a question which may be readily determined from an inspection of the statute, but whether a particular improvement will be of public utility is a question of opinion merely, about which men may differ, and which cannot be referred to any definite criterion. "The moment the mode of use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men pro-

pose to make of the property of another, that moment we are afloat without any certain principles to guide us.”⁵

It has sometimes been said that the construction of the words *public use* which we have preferred would afford less security to private property than the one we have rejected. Thus, one court says: “If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theatres. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad.”⁶ But certainly a hotel is also for the public benefit and advantage as well as a railroad, and is as much within one construction of the words *public use* as the other. But why may not the legislature provide for acquiring by condemnation a site for a hotel or theater to which the public shall have the right to resort, and which shall be subject to public regulation in its management and charges? Is not this a mere question of expediency and public policy? And is not our opinion upon this question the outgrowth of the state of society in which we live and the usages and practices to which we are accustomed? In ancient times vast sums of money were expended

⁵ Tracy, Senator, in *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 60. Also, in the same opinion, p. 65: “Can the constitutional expression, *public use*, be made synonymous with public improvement, or general convenience or advantage, without involving consequences inconsistent with the reasonable security of private property; much more with that security which the constitution guarantees?

If an incidental benefit, resulting to the public from the mode in which individuals in pursuit of their own interest use their property, will constitute a public use of it, within the intentions of the constitution, it will be found very difficult to set limits to the power of appropriating private property.”

⁶ *Dayton Mining Co. v. Seawell*, 11 Nev. 394, 411.

in the construction and maintenance of public theatres, which were regarded as among the most important of public institutions. A proposal to condemn a site for a theatre would not have sounded strange, so far as the purpose goes, in the ears of Pericles or Cicero.

There is no constitutional limitation to the effect that the power of eminent domain shall not be exercised unless it would be otherwise impossible or difficult to accomplish the purpose sought. There are *dicta* to this effect, but no decisions that we are aware of.

Some discretion must be left to the legislature. It is not to be presumed that they are wholly destitute of integrity or judgment. The people have left it for them to determine for what public uses private property may be condemned. If they abuse their trust, the responsibility is not upon the courts nor the remedy in them. For further verification of the views here expressed we must refer to the subsequent sections of this chapter and the cases therein cited.

§ 166. Highways: Questions of public use, as affected by their character, purpose or other circumstances. — Perhaps no better example of a public use can be given than that of the ordinary highway, where the easement or right of way vests in the public for the common and equal use of all.¹ Private property taken for a highway is taken for public use, though the way terminates on ground used for a church and cemetery and be laid out wholly to afford access to such ground;² or though it accommodates but a single family,³

§ 166.

¹ Footways and alleys are within the definition of highways. *Boston & Albany R. R. Co. v. Boston*, 140 Mass. 87; *Savannah v. Hancock*, 91 Mo. 54.

² *West Pikeland Road*, 63 Pa. S. 471; *Kissinger v. Hanselman*, 33 Ind. 80.

³ *Lewis v. Washington*, 5 Gratt.

265; *Roberts v. Williams*, 15 Ark. 43; *Paine v. Leicester*, 22 Vt. 44; *Drake v. Clay, Snead*, Ky. 139; (But see *Fletcher's Heirs v. Fugate*, 3 J. J. Marsh, Ky. 631); *Johnson v. Supervisors of Clayton Co.*, 61 Ia. 89; *Pagels v. Oaks*, 64 Ia. 198; *contra*: *Knowles' Petition*, 22 N. H. 361; *Underwood v. Bailey*, 59 N. H. 480.

or though it be a mere *cul de sac*;⁴ or though it be laid out in one town solely for the benefit of lands and persons belonging in another town or another State,⁵ or though its purpose be to afford access to a farm or lumber yard.⁶ So a highway may be laid out terminating at a State line,⁷ or town line,⁸ or river,⁹ and not connecting with any thoroughfare. It is immaterial what the object of travel on the road may be, whether pleasure or business. The proper authorities may lay out roads to accommodate all lawful travel. It has accordingly been held that highways may be laid out for the purpose of affording access to points which command a fine view or are resorted to for pleasure.¹⁰ So the public nature of the use is not affected by the fact that the expense is defrayed in whole or in part by private contribution,¹¹ but it has been held that a road which is not of public utility cannot be laid out merely because private parties are willing to defray the expense.¹² Land taken for a ditch to drain and improve a highway is taken for a public use.¹³ In the absence of special statutory or constitutional provisions it is for the proper public authorities to determine whether a particular highway is necessary and proper, and with this question the courts have nothing to do. A highway is a public use, but the need of it is a question of expediency.¹⁴

§ 167. Private roads.—Laws have existed, and, perhaps, do still exist in most of the States for the laying out of what

⁴ *Schatz v. Pfeil*, 56 Wis. 429; *People v. Van Alstyne*, 3 Keyes, 35; *Sheaff v. People*, 87 Ills. 189; *Masters v. McHolland*, 12 Kan. 17.

⁵ *Gilman v. Westfield*, 47 Vt. 20; *Crosby v. Hanover*, 36 N. H. 404.

⁶ *State v. Bishop*, 39 N. J. L. 226; *Masters v. McHolland*, 12 Kan. 17.

⁷ *Rice v. Rindge*, 53 N. H. 530.

⁸ *Goodwin v. Wetherfield*, 43 Conn. 437.

⁹ *Watson v. Town Council of South Kingstown*, 5 R. I. 562.

¹⁰ *Higginson v. Nahant*, 11 Allen, 530; *Petition of Mount Washington Road Co.*, 35 N. H. 134.

¹¹ *Dwiggins v. Denver*, 24 Ohio St. 629; *Parks v. Boston*, 8 Pick. 218; *Copeland v. Packard*, 16 Pick. 217; *Patchen v. Doolittle*, 3 Vt. 457; *Inhabitants of Vassalborough*, 19 Me. 338.

¹² *Blackman v. Halves*, 72 Ind. 515; *Dudley v. Cilley*, 5 N. H. 558.

¹³ *Smeaton v. Martin*, 57 Wis. 364.

¹⁴ *Post*, § 238.

are usually called *private roads*, but which are also called in some States, township, neighborhood or pent roads. These statutes have in some cases been held valid, and in others invalid. There is, however, but little, if any, real conflict of authority, as appears when the cases are examined and compared. The key to their reconciliation is to be found in the fact that the phrase *private roads* or *private ways* is used in different States and different statutes to designate roads of entirely different character. Where the road, though laid out on the application and paid for and kept in repair by a particular individual who is especially accommodated thereby, is, in fact, a public road and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose for which land may be condemned.¹ But when the road, after being laid out, becomes the property of the applicant, from which he may lawfully exclude the public, then the use is strictly private, and the law authorizing the condemnation of property therefor is void.² In many cases the constitutional question is not raised or considered.³

§ 167.

¹ *Shaver v. Starrett*, 4 Ohio St. 494; *Ferris v. Bramble*, 5 Ohio St. 109; *Denham v. County Coms. of Bristol*, 108 Mass. 202; *Davis v. Smith*, 130 Mass. 113; *Wolcott v. Whitcomb*, 40 Vt. 40; *Whitingham v. Bowen*, 22 Vt. 317; *Brock v. Barnett*, 57 Vt. 172; *Roberts v. Williams*, 15 Ark. 43; *Perrine v. Farr*, 22 N. J. L. 356; *Metcalf v. Birmingham*, 3 N. H. 459; *Proctor v. Andover*, 42 N. H. 348; *Clark v. Boston etc. R. R. Co.*, 24 N. H. 118; *Hickman's Case*, 4 Harr. (Del.) 580; *Sherman v. Buick*, 32 Cal. 241; *Butte Co. v. Boydston*, 64 Cal. 110; see *Brewer v. Bowman*, 9 Ga. 37.

² *Sadler v. Langham*, 34 Ala. 311; *Rice v. Alley*, 1 Sneed, 51; *Osborn*

v. Hart, 24 Wis. 89; *Wild v. Deig*, 43 Ind. 455; *Stewart v. Hartman*, 46 Ind. 331; *Clack v. White*, 2 Swan, 540; *Taylor v. Proctor*, 4 Hill, 140; *Nesbitt v. Trumbo*, 39 Ills. 110; *Crear v. Crossly*, 40 Ills. 175; *Bankhead v. Brown*, 25 Ia. 540; *Dickey v. Tennison*, 27 Mo. 373; *Burgwyn v. Lockhart*, *Winston Law*, 269; *Plimmons v. Frisby*, *ibid.*, 201; *Witham v. Osburn*, 4 Oregon, 318; *Mohawk & Hudson R. R. Co. v. Artcher*, 6 Paige, 83; *Varner v. Martin*, 21 W. Va. 534.

³ *North Berwick v. Commissioners of York*, 25 Me. 69; *McCauley v. Dunlap*, 4 B. Mon. 57; *Rout v. Mountjoy*, 3 B. Mon. 300; *Jones' Heirs v. Barclay*, 2 J. J. Marsh, 73; *Ryker v. McElroy*, 28 Ind. 179; *Reynolds v. Reynolds*, 15 Conn. 88;

Whether a private way is the exclusive property of the applicant or is open to public use must be determined from the statute. If the statute provides that it shall be for public use,⁴ or for the exclusive use of the applicant, that settles the question.⁵ If any part of the expense *may* be imposed upon the public, that circumstance would indicate that it was intended to be for the use of the public.⁶ Where the statute provides that the applicant shall pay the cost of the road and that it shall be for the use of himself, his heirs or assigns, it will be deemed to intend that the road shall be private property, and the act will be void.⁷ Where the act provides that the road shall be laid out on the application of the individual or individuals to be benefited, who are to pay the expense of its establishment and maintenance, and gives no other indication of intent, it is generally held to provide for a strictly private road, and to be void.⁸ The Supreme Court of Iowa assigns the following reasons for this conclusion:

"First. The statute denominates them 'private roads,' and is entitled, 'an act to provide for establishing private roads.' If the roads established thereunder were not intended

Singleton v. Commissioners, 2 Nott & McC. 526; *Lyon v. Hamor*, 73 Me. 56; *Owings v. Worthington*, 10 G. & J. 283; *Road Case*, 4 Yates, 514; *Littlejohn v. Cox*, 15 La. An. 67; *Perry v. Webb*, 21 La. An. 247; *Leach v. Day*, 27 Cal. 643; *Bradford v. Cole*, 8 Fla. 263.

⁴ *Loveland v. Town of Berlin*, 27 Vt. 713.

⁵ *Wild v. Deig*, 43 Ind. 455.

⁶ *Denham v. County Commissioners*, 108 Mass. 202. Here the statute authorized the laying out of "private ways for the use of one or more of the inhabitants," but the applicant was only to pay such part of the cost as the commission-

ers should deem reasonable, and the residue, *if any*, was to be paid by the town. In the particular case the applicant paid the whole cost, but it was held a public way.

⁷ *Nesbitt v. Trumbo*, 39 Ills. 110; *Taylor v. Porter*, 4 Hill, 140; *Osborn v. Hart*, 24 Wis. 89; *Varner v. Martin*, 21 W. Va. 534.

⁸ *Bankhead v. Brown*, 25 Ia. 540; *Witham v. Osburn*, 4 Oregon, 318; *Wild v. Deig*, 43 Ind. 455 (overruling *Kissinger v. Hansleman*, 33 Ind. 80); *Stewart v. Hartman*, 46 Ind. 331; *Dickey v. Tennison*, 27 Mo. 373; *Sadler v. Langham*, 34 Ala. 311.

to be *private*, and different from ordinary and public roads, there was no necessity for the act.

“*Second.* Such road may be established on the petition of the applicant alone; and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fences, etc., as the board may prescribe.

“*Third.* The public are not bound to work or keep such roads in repair, and this is a very satisfactory test as to whether a road is public or private.

“*Fourth.* We see no reason, when such a road is established, why the person at whose instance this was done, might not lock the gates opening into it, or fence it up, or otherwise debar the public to any rights thereto.”⁹

On the other hand, such roads have been held public on the ground that it was the duty of the court so to construe the act, if possible, as to make it valid,¹⁰ and this even in case of an act which provided that the roads should “be, to all intents and purposes, private roads for the use of the parties interested.”¹¹ Though the cost and repair of the road

⁹ Bankhead *v.* Brown, 25 Ia. 540, 547.

¹⁰ Roberts *v.* Williams, 15 Ark. 43.

¹¹ Sherman *v.* Buick, 32 Cal. 241, 251. In this case the court, referring to the legislature, say: “By distinguishing or classifying roads or highways by the words ‘public’ and ‘private,’ and providing different modes for their establishment and support, and declaring that the latter class ‘shall be, to all intents and purposes, private roads for the use of parties interested,’ they give color to the idea that, in their judgment, they have the power to create and are creating a road for private use, and to make and are making it the private property of certain persons to the exclusion of all

others. If we look solely at their language without regard to the true nature of the only power which they possessed in the premises, an impression that the property of the owner of the land is taken for private use is created, for there is an apparent, if not an express, appropriation of it to the use of certain parties to the exclusion of all others. But it is well understood that the language of the legislature is to be read in all cases by the light of the constitution, with the spirit of which it is always presumed to be consistent. In construing it, it is the duty of the courts to look to the true object and to trace out the true result, and not to be guided by those which the legislature has mistakenly assumed

are cast upon the applicant, yet, if the repairs are subject to the supervision and control of public officers, it will be deemed a public road.¹²

In Kentucky a statute has existed since 1820 providing for the establishment of private passways over the land of others, when necessary to enable a citizen "to attend courts, elections, a meeting-house, a mill, a warehouse, ferry, *to pass from one tract of land to another owned by him*, or railroad depot' most convenient to his residence."¹³ The validity of this statute passed unchallenged for many years,¹⁴ but was finally passed upon in *Robinson v. Swope*, 12 Bush, 21. It seems to have been conceded that all such passways were private property. The court, in view of the long acquiescence

or declared; and if they be found to be consistent with the constitution, or within the acknowledged power of the legislature, to uphold the act as to its legitimate results and to discard all else. Thus, if the legislature provides for the laying out and establishing of a certain class of roads or highways which from any cause, whether for the purposes of classification or otherwise, is denominated 'private,' or as being for the especial benefit of certain individuals upon whom the burden of cost and repair is cast, instead of the public at large, it by no means follows that such roads become the private property or estate of the individuals designated, even if the legislature has so provided in express terms; for where roads are laid out, whether mainly for the accommodation of particular neighborhoods or individuals or not, it must be understood as having been provided for the use of every one who may have occasion to travel it, and hence as being public. In other

words, the legislature has no power to lay out and establish 'private roads,' in the sense that they are to be the private property of particular individuals, or that they are what are denominated 'private ways' at common law; and hence, so far as they undertake to do so, their action is simply null and void; but the road so laid out and established becomes a way over which all may lawfully pass who have occasion, and therefore public; and the language employed by the legislature, so far as it relates to the legal character of the road—as public or private—must be understood as being used for the purpose of distinguishing it from all other roads, or, in general terms, for the purposes of classification."

¹² *Hickman's Case*, 4 Harr. (Del.) 580, and Statutes of Delaware.

¹³ Statutes of Ky. 1883, p. 770.

¹⁴ *Jones' Heirs v. Barclay*, 2 J. J. Marsh, 73; *McCauley v. Dunlap*, 4 B. Mon. 57; *Rout v. Mountjoy*, 3 B. Mon. 300; *Troutman v. Barnes*, 4 Met. (Ky.) 337.

in the enforcement of the statute and the manifest utility of such ways and of the statute being in force when the present constitution was adopted, sustain the act, except the clause in italics, which, being a recent introduction and not of public utility, was held void.¹⁵ The same view is implied in Georgia¹⁶ and perhaps also in Connecticut,¹⁷ though in neither State has the point been decided. In Pennsylvania statutes have existed for the establishment of private roads since 1735.¹⁸ They may be laid out from "dwellings and plantations to a highway or place of necessary public resort, or to any private way leading to a highway."¹⁹ The roads here provided for are spoken of as *quasi* public,²⁰ and have been sustained as a valid exercise of the power of eminent domain.²¹ It has been held under other statutes in that State that a right of way for mere private use cannot be condemned.²² It has never, we think, been *decided* in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified. It is undoubtedly within the power of the legislature to lay out public ways to connect private premises with a public way

¹⁵ "We have no hesitation in holding," says the court, "that the general assembly may, in the exercise of the right of eminent domain, authorize the establishment of private passways over the lands of others when it is necessary to enable any inhabitant of the State to attend courts, elections, or mills, or to reach an established public highway." p. 25. It is to be observed, however, that the point *decided* in this case was that such a way could not be laid out to pass from one tract of a man's land to another, and that, consequently, the remainder of the opinion is *dictum*.

¹⁶ *Brewer v. Bowman*, 9 Ga. 37. The law was held void because it did not provide for compensation.

¹⁷ *Reynolds v. Reynolds*, 15 Conn. 83. The court here expressly decline to consider the question because not properly raised.

¹⁸ *Waddell's Appeal*, 84 Pa. S. at p. 92.

¹⁹ *Purdon's Statutes*, p. 646. Act 13 June, 1836.

²⁰ *Waddell's Appeal*, 84 Pa. S. 90, 94.

²¹ *Pocopsen Road*, 16 Pa. S. 15; also, *Stuber's Road*, 28 Pa. S. 199; *Sandy Lick Creek Road*, 51 Pa. S. 94; *Keeling's Road*, 59 Pa. S. 358.

²² *McCaudless' Appeal*, 70 Pa. S.

or place of public resort.²³ It is a question for the legislature whether the public welfare will be promoted by such an appropriation.

It has been held that where one has a way of necessity over the land of another at common law, it is competent for the legislature to prescribe how this shall be established, and that such a law would not divest private property for private use, but only regulate the exercise of an existing private right.²⁴ The owner of land taken for a private road may waive the unconstitutionality of the act and recover the damages awarded. In some States the laying out of private ways is expressly sanctioned by the constitution.²⁵

§ 168. Toll roads, bridges and ferries. — Property taken for toll-roads, toll-bridges and ferries is taken for public use.¹ They are public highways which every member of the public is entitled to use, and do not differ in any essential particular from the common highway opened and maintained at the expense of the public.²

²¹⁰; Waddell's Appeal, 84 Pa. S. 90.

²³ Bankhead *v.* Brown, 25 Ia. 540, 554; Witham *v.* Osburn, 4 Oregon, 318; Wild *v.* Deig, 43 Ind. 455; and see Lewis *v.* Washington, 5 Gratt. 265.

²⁴ Snyder *v.* Warford, 11 Mo. 513; Lawrence, J., in Crear *v.* Crossly, 40 Ills. 175.

²⁵ Michigan constitution, art. 18, sec. 14; Scheh *v.* Detroit, 45 Mich. 626; Ayres *v.* Richards, 38 Mich. 214; South Carolina constitution, art. 1, sec. 23; State *v.* Stockhouse, 14 S. C. 417. Alabama, art. 1, sec. 5. Colorado, art. 2, sec. 14. Georgia, art. 1, secs. 17, 20. Missouri, art. 2, sec. 20. New York, art. 1, sec. 7; and see Illinois, art. 4, sec. 30. In such cases there must be a strict compliance with the conditions specified in the constitution.

§ 168.

¹ Arnold *v.* Covington & Cincinnati Bridge Co., 1 Duval 372; Young *v.* Buckingham, 5 Ohio, 485; Plecker *v.* Rhodes, 30 Gratt. 795. A horse ferry is a public use. Day *v.* Stetson, 8 Me. 30; Young *v.* McKenzie, 3 Ga. 31. No land taken for an approach to a public ferry. Drake *v.* Clay, Snead, 139.

² "A road constructed and supported by a turnpike corporation differs in no essential characteristic from a common highway, established and supported by a town, a borough, or a city. Their origin and objects are identical. Both emanate from the same supreme power, acting through the legislature, the courts, or other depositaries of authority designated by the laws. Both are called into existence, and support-

§ 169. Canals.—Canals to be used as highways by water are a public use.¹ But more water cannot be taken than is necessary for navigation, for the purpose of selling it to private individuals for power or other use.² Where the water of a stream was taken for a canal and the supply of a mill cut off, it was held that a raceway could not be made through private property from the canal to the mill in order to supply it with water, the mill-owner having agreed to accept the same in lieu of damages for interfering with the stream. This would be taking one man's property to make compensation to another.³ A canal to supply water for mining, manufacturing, irrigation and domestic use has been held to be a public purpose.⁴

§ 170. Railroads, their connections and appurtenances.—When railroads were first introduced, some question was made as to their being a public use, but it has long been settled that they are.¹ A railroad company may be authorized to condemn land for all appurtenances necessary to the con-

ed, to subserve, in exactly the same way, the public necessities and convenience, and both alike are intended to endure for an indefinite period, and so long as that convenience requires or that necessity exists. The funds for making and repairing them, indeed, are drawn from different sources and in different modes—the one, from travelers by a toll—the other, from the community by a tax; and the turnpike company is permitted to take, for the benefit of its stockholders, the contingent profits in compensation for the contingent losses of the enterprise; but still the public interest in the road and the burden upon the land are essentially the same in both.² *State v. Maine*, 27 Conn. 641, 646.

§ 169.

¹ *Willyard v. Hamilton*, 7 Ohio (pt. 2) 111; *Matter of Peter Townsend*, 39 N. Y. 171; *Chesapeake etc. Canal Co. v. Key*, 3 Cranch, C. C. 599.

² *Cooper v. Williams*, 5 Ohio, 391; *Buckingham v. Smith*, 10 Ohio, 288; *Varick v. Smith*, 5 Paige, 137.

³ *McArthur v. Kelley*, 5 Ohio, 139.

⁴ *Cummings v. Peters*, 56 Cal. 593.

§ 170.

¹ *Aldridge v. T. C. & D. R. R. Co.*, 2 Stew. & Por. 199; *Davis v. Same*, 4 *Ibid.*, 421; *Cairo & Fulton R. R. Co., v. Turner*, 31 Ark. 494; *San Francisco A. & S. R. R. Co. v Caldwell*, 31 Cal. 367; *O'Hara v. Lexington & Ohio R. R. Co.*, 1 Dana,

venient and proper operation of the road, such as depots;² freight houses,³ yard room,⁴ and the like. But property cannot be taken for things not necessary to the operation of the road or which do not require a particular location with reference to the right of way, such as teneinent houses for employees,⁵ and shops for manufacturing new rolling stock.⁶

(Ky.) 232; *Whiteman v. W. & S. R. R. Co.*, 2 Harr. (Del.) 514; The Bel-lona Company Case, 3 Bland, Chy. 442; *Swan v. Williams*, 2 Mich. 427; *Brown v. Beatty*, 34 Miss. 227; *Beekman v. Saratoga & Schenec-tady R. R. Co.*, 3 Paige, 45; *Blood-good v. Mohawk & Hudson R. R. Co.*, 14 Wend. 51; *Same v. Same*, 18 Wend. 9; *Buffalo & New York R. R. Co. v. Brainard*, 9 N. Y. 100; *Seacomib v. Milwaukee etc. R. R. Co.*, 49 How. Pr. 75; *Concord Railroad Co. v. Greeley*, 17 N. H. 47; *Louisville etc. R. R. Co. v. Chappell, Rice*, (18 S. C.) 383; *Buffalo, Bayou etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Tait v. Matthews*, 33 Tex. 112; *Bonaparte v. Camden & Am-boy R. R. Co.*, 1 Baldwin. U.S. 205; *Baltimore & Ohio R. R. Co. v. Van Ness*, 4 Cranch, 595; *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. 360; *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 40; *Lexington & Ohio R. R. Co. v. Applegate*, 8 Dana, 289.

² *Geizy v. C. W. & Z. R. R. Co.*, 4 Ohio St. 308; *Hannibal & St. Joe R. R. Co. v. Muder*, 49 Mo. 165.

³ In *Matter of New York etc. R. R. Co. v. Kip*, 46 N. Y. 546; *Matter of New York Central etc. R. R. Co.* 77 N. Y. 248; *New York Central etc. R. R. Co. v. Metropolitan Gas Light Co.*, 5 Hun, 201. Right to

take for warehouse questioned, *Cumberland Valley R. R. Co. v. McLanahan*, 59 Pa. S. 23.

⁴ *Eldridge v. Smith*, 34 Vt. 484; *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137.

⁵ *Eldridge v. Smith*, 34 Vt. 484; *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137; *State v. Commissioners of Mansfield*, 23 N. J. L. 510.

⁶ *Eldridge v. Smith*, 34 Vt. 484, 493; *Matter of New York etc. R. R. Co. v. Kip*, 46 N. Y. 546, 552; *West River Bridge Co. v. Dix*, 6 How. 507, 546. In the first case the court say: "Is an establishment for the manufacture of railroad cars a legitimate railroad purpose, so that the company would have a right to take land for it against the will of the owner? The defendants say, that as the company must necessarily have cars in order to carry on their business, therefore they must have the right to manufacture them and have works for that purpose." But this argument proves too much. Railroads must have iron, in great quantities, for their track and other purposes. Does this authorize them to take ore beds and lands for forges and foundries, and manufacture their own iron? They must have wood, sleepers, and timber for depots, and large quantities of lumber of various kinds. Does this authorize them to take timbered lands,

It has been held that property may be condemned for repair shops and that this would be a public use.⁷ These differ, undoubtedly, from shops for the manufacture of new cars or engines, since the former are indispensable to every railroad, while the latter are not. New rolling stock can be purchased of those who make a business of its manufacture. But facilities for the repair of such stock do not usually exist within any practicable distance, and unless the companies could have such facilities conveniently located, they might be hampered in their service and the public greatly incommoded. A railroad company may condemn land for a track to a public

and sites for mills, against the will of the owners? They must have glass, nails, paint, and many other things. Can they by compulsory measures provide themselves the means to manufacture them all? We think it very clear they cannot. If the company must manufacture their own cars or go without, then, doubtless, their manufacture would be regarded as a necessity of the railroad, but the manufacture of cars and engines is a distinct branch of mechanical industry, carried on wholly independent of any connection with railroads, and is a branch of business in which railroads do not usually engage at all; and in this case it seems to have been quickly demonstrated, that it was better to rely on supplying themselves with cars by purchase from those whose legitimate business it was to make them.

"Although railroad companies must have engines and cars, iron, lumber, wood, and many other things in large quantities, in order to build and operate their roads, it is supposed they can supply themselves as private persons do, by

purchase in the ordinary way, and they are not created or designed to be independent of all other branches of industry and business in the country, but to be additional aids to their successful development. The company must have shops for the repair of cars and engines, as they are so often needed, and as they cannot well be moved for repairs, nor can facilities be found for repairs in the country generally, but the company were already supplied with all necessary accommodations for repairs. We are of opinion that an establishment for the manufacture of cars is not a legitimate railroad necessity, so that the company could properly condemn land on which to erect one."

⁷ For "depot, engine house and repair shops," Hannibal & St. Joe R. R. Co. v. Muder, 49 Mo. 165; for "turn-outs, depots, engine houses, shops and turn-tables," C. B. & Q. R. R. Co. v. Wilson, 17 Ills. 123; for a "paint shop, and lumber and timber sheds," Low v. Galena & Chicago Union R. R. Co., 18 Ills. 324. In the Illinois cases the constitutional question of public use was

warehouse or elevator,⁸ or to connect with a wharf or pier,⁹ or for the purpose of diverting a stream in order to avoid a bridge, where the public safety will thereby be promoted.¹⁰ “Whatever is essential and indispensable to the construction, maintenance or running of the road, is allowed to be taken.”¹¹ Where, under a general railroad law, a road is built for private use, its operation may be enjoined at the suit of an individual,¹² or the franchise annulled at the suit of the people.¹³ A railroad in the gorge of the Niagara river, from the falls to the “whirlpool,” which could not be reached without passing over the State reservation or private property, along which no habitations could be built and on which no freight could be carried, and which could only be used for conveying sight-seers along the river during the summer months, was held not to be such a road as was contemplated by the general statutes of New York, and not a public use, for which the power of eminent domain could be exercised.¹⁴

§ 171. Lateral railroads.—Certain decisions in Pennsylvania have sometimes been understood as laying down the

not raised. The only question was whether the purposes specified were within the statute. Nor does it appear that the constitutional question was actually raised in the Missouri case. After referring to the cases from Illinois and Vermont the court say: “All these adjudications proceed upon the assumption that the appropriation of land, for the purpose stated in the plaintiff's petition, is an appropriation of private property to a public use.” p. 166. See also *Eldridge v. Smith*, 34 Vt. 484, and quotation in last note.

⁸ *Fisher v. C. & S. R. R. Co.*, 104 Ills. 323; *Chicago Dock & Canal Co. v. Garrity*, 115 Ills. 155. A city may grant permit to lay a track in

a street to a private elevator, *Clarke v. Blackmar*, 47 N. Y. 150.

⁹ *Rensselaer & S. R. R. Co. v. Davis*, 48 N. Y. 137.

¹⁰ *Reusch v. C. B. & Q. R. R. Co.*, 57 Ia. 687.

¹¹ *New York etc. R. R. Co. v. Gunnison*, 1 Hun, 496, 497.

¹² A road between the mines and mill of a company, *McCaudless' Appeal*, 70 Pa. S. 210; see also *Edgewood R. R. Co.'s. Appeal*, 79 Pa. S. 257.

¹³ A road to transport coal from the company's mine a distance of about five miles. *People v. Pittsburgh R. R. Co.*, 53 Cal. 694.

¹⁴ *In re Niagara Falls & Whirlpool Ry. Co.*, 15 U. E. R. 429; compare, *ante*, § 166 n. 10; *post*, § 175.

doctrine that private property could be taken for a lateral railroad connecting a mine or mill with a railroad, canal or navigable stream, though the lateral road was for the private use of the owner of the mine or mill.¹ The Supreme Court of that State seems to have so understood itself at an early date,² but afterwards discovered its mistake.³ An act of 1832 provided that the owners of any land, mills, quarries, coal mines, lime-kilns or other real estate might condemn lands for a railroad to any railroad, canal or navigable stream not exceeding a distance of three miles. Section seven of the act provided that any person could use the road for the transportation of freight on the payment of a certain specified compensation.⁴ This statute has remained in force until the present time. These lateral roads, therefore, are for public use, and the cases referred to form no exception to the general current of authority. Similar roads are sanctioned in Maryland, where, though constructed for the particular advantage of individuals, they are also open to the public as occasion requires.⁵ The legislature of Missouri, by special charter, authorized a company to construct a railroad from its coal lands to the Missouri River, but provided that it should be a public carrier of passengers and freight. It was rightly held to be for public use.⁶ A general statute of West Virginia authorizes the condemnation of a right of way under or over the surface from any timber, coal or mineral lands for the purpose of development or of conveying the product of such lands to market, provided the court, to which application is made, "is of the opinion that the purpose for which the property is to be taken is of public utility."⁷ In a case

§ 171.

¹ *Harvey v. Thomas*, 10 Watts, 63; *Harvey v. Lloyd*, 3 Pa. 331; *Shoenberger v. Mulholland*, 8 Pa. 134; *Hays v. Risher*, 32 Pa. 169; *Brown v. Corey*, 43 Pa. 495.

² *Harvey v. Thomas*, 10 Watts, 63.

³ *Hays v. Risher*, 32 Pa. S. 169

⁴ Purdon's Statutes, p. 492; see also *Boyd v. Negley*, 40 Pa. S. 377.

⁵ *New Central Coal Co. v. Georges Creek Coal and Iron Co.*, 37 Md. 537; *Brown v. Covey*, 43 Pa. S. 495.

⁶ *Dietrich v. Murdock*, 42 Mo. 279.

⁷ Rev. Stats. c. 171, §§ 50, 51.

arising under the statute the court held that the words *public utility*, in the statute, meant the same as *public use* in the constitution, and that, in the particular case, the purpose did not appear to be a public one, but do not pass generally upon the statute.⁸ A statute of Iowa permits the owner or lessee of lands having coal, stone or mineral thereon to condemn land for a “public way” to any highway or railroad, such owner or lessee to pay all damages and to construct and maintain the road. The act made no provision for the expenditure of public moneys thereon, and did not in any way define the rights of the public therein. The Supreme Court of that State held that the statute intended that the way should be for the use of the public, and so sustained the act. The court say: “We ought not to declare any act of the legislature void, if a construction can fairly be put upon it under which it can be sustained. In the title, as well as in the body of the act, the ways for the establishment of which it provides are described as public ways, and the legislature must be presumed to have intended that they should be public ways, in the ordinary sense in which that term is used; that is, that the public should have the right to use, occupy and enjoy them as ways or roads. It is not material that the rights and privileges of the public with reference to them are not specially defined in the act, for the rights and privileges of the people generally with reference to public highways are defined in the general statutes on the subject. Neither is it material that no special provision is made in the act for the improvement of such ways, or for putting them in condition for public use at public cost. The authority for making such improvements could probably be found in the general statutes which govern the subject, if there should be occasion for its exercise. And we think that it makes no difference that the mine-owner may be the only member of the public who may have occasion to use the way

⁸ Salt Co. v. Brown, 7 W. Va. 191.

after it has been established. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small."⁹ A similar statute of New Jersey has been sustained by the courts of that State, though it differs from the Iowa statute, in that it expressly requires the road to carry freight for any one who has occasion to use it.¹⁰ The laying out of an underground railroad under this statute, about two-thirds of a mile long from a coal mine to a railroad, was sustained.

In Illinois it has been held that a railroad company cannot condemn land for a spur about three-quarters of a mile to a brick-yard, and that such a road was neither authorized by the statute nor the constitution.¹¹ Also that a railroad from a coal mine to a railroad was not a public purpose for which land could be taken.¹²

There appears to be no reason why lateral roads should not be constructed, if they are required to serve the public, as occasion requires. The system of so-called private and lateral roads appears to have had its fullest development in Pennsylvania, and a summary of the legislation and decisions on that subject will be found in the case of Waddell's Appeal, 84 Pa. S. 90.

§ 172 Other means of transportation and communication: the telegraph, petroleum tubes, etc.—A telegraph or telephone line designed for the service of the public and subject to regulation by the legislature is a public use for which property may be taken.¹ The same is true of lines of tubing

⁹ Phillips *v.* Watson, 63 Ia. 28.

¹¹ Chicago & Eastern Ill. R. R.

¹⁰ DeCamp *v.* Hibernia Underground R. R. Co., 47 N. J. L. 43, affirmed by the Court of Errors, 47 N. J. L. 518.

¹² Sholl *v.* German Coal Co., 118 Ills. 427.

§ 172.

¹ Turnpike Co. *v.* American etc.

for the conveyance of petroleum, the same being for general use and subject to public regulation.² And so, generally, any means of conveying passengers or goods, or of transmitting intelligence, which is at the service of the public generally, would be a public use for which property might be condemned.³

§ 173. Urban improvements: sewers, water, gas, etc.—
The condemnation of property for public sewers,¹ for supplying a city or town with water,² or gas,³ is so manifestly for public use that it has been seldom questioned and never denied.

§ 174. Public buildings: schools, markets, hospitals, etc
—Property taken for public buildings of all kinds, such as court houses, jails, public schools,¹ markets,² almshouses,³ and the like, is taken for public use. This right has been questioned in some decisions, but never denied in any decided case.⁴ So a postoffice and custom house⁵ and other

News Co., 43 N. J. L. 381; Pierce *v.* Drew, 136 Mass. 75; New Orleans etc. R. R. Co. *v.* Southern & Atlantic Tel. Co., 53 Ala. 211.

² West Va. Trans. Co. *v.* Volcanic Coal & Oil Co., 5 W. Va. 382.

³ Concord R. R. Co. *v.* Greeley, 17 N. H. 47, 61.

§ 173.

¹ Hildreth *v.* Lowell, 11 Gray, 345.

² St. Helena Water Co. *v.* Forbes, 62 Cal. 182; Thorn *v.* Sweeney, 12 Nev. 251; Lombard *v.* Stearns, 4 Cush. 60; State *v.* Eau Claire, 40 Wis. 533; Cummings *v.* Peters, 56 Cal. 593; Kane *v.* Mayor etc. of Baltimore, 15 Md. 240; Reddall *v.* Bryan, 14 Md. 444; Wayland *v.* County Commissioners, 4 Gray, 500; Burden *v.* Stein, 27 Ala. 104, 116; Riche *v.* Bar Harbor Water Co., 75 Me. 91; Olmstead *v.* Proprietors of

the Morris Aqueduct Co., 46 N. J. L. 495, affirmed by Court of Errors, 47 N. J. L. 311; Stamford Water Co. *v.* Stanley, 39 Hun, 424; Matter of New Rochelle Water Co., 46 Hun, 525.

³ Bloomfield etc. Natural Gas Light Co. *v.* Richardson, 63 Barb. 437.

§ 174.

¹ Chamberlin *v.* Morgan, 68 Pa. S. 168; Williams *v.* School District, 33 Vt. 271; Long *v.* Fuller, 68 Pa. S. 170; Township Board *v.* Hackman, 48 Mo. 243.

² Matter of Application of Cooper, 28 Hun, 515.

³ Hayward *v.* Mayor etc. of New York, 8 Barb. 486.

⁴ Justice Woodbury in West River Bridge Co. *v.* Dix, 6 How. p. 546, says: "Who ever heard of laws

public works for the general government are a public use for which the State's power of eminent domain may be exercised.⁶

§ 175. Public parks and pleasure drives.—Pleasure and recreation are not only essential, but tend to the improvement of character. No better instance of a public use can be given than that of a public square or park in the midst of a dense population. Private property may be taken for the purpose of securing such means of recreation and health.¹ A park is a public use, though not located in a city or town, but only in the vicinity of it.² Land may be taken on each side of a highway to be kept open for court yards and ornament.³ Highways may be laid out for the purpose of affording access to a position which commands a fine view or for accommodating pleasure driving.⁴

§ 176. Cemeteries.—Public places of sepulture are undoubtedly a public use, and the power of eminent domain may be exercised for this purpose, when the cemetery is to be under the control of public authorities, or when the right

to condemn private property for public use, for a marine hospital or State prison? So a custom-house is a public use for the general government, and a court-house or jail for a State. But it would be difficult to find precedent or argument to justify taking private property, without consent to erect them on, though appropriate for the purpose. No necessity seems to exist, which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence." For comments on this language see 33 Vt. 278, 279.

⁵ Burt v. Merchants' Ins. Co., 106 Mass. 356.

⁶ See *post*, § 203.

§ 175.

¹ Brooklyn Park Co. v. Armstrong, 45 N. Y. 234; Matter of Commissioners for Central Park, 63 Barb. 282; Owners of Ground v. Mayor etc. of Albany, 15 Wend. 374; County Court v. Griswold, 58 Mo. 175.

² County Court v. Griswold, 58 Mo. 175.

³ Matter Bushwick Avenue, 48 Barb. 9.

⁴ Higginson v. Nahant, 11 Allen, 530; Mount Washington Road Co., 35 N. H. 134; see Woodstock v. Gallup, 28 Vt. 587; Bryan v. Bradford, 50 Conn. 246; *ante*, § 166.

of sepulture is public and general.¹ But cemetery associations cannot condemn land for burial purposes, to be vested in the association and lot-holders as their private property, and in which the public have no rights.² It is no objection that the privilege must be paid for, nor that the price varies according to location, nor that the price operates as a practical exclusion of a portion of the public.³

§ 177. Improvement of navigation.—As we have already seen, all navigable streams are public highways by water, and the public not only have a right to traverse them, but to improve them for that purpose, and private property may be condemned in order to effect such improvements.¹ Any occupation or interference with private property for the purpose of improving navigation, as by the construction of canals or dams is for public use.² A boom to facilitate the running, storing and handling of logs is an improvement of such highway and a public use.³ Land may be taken on the banks of navigable streams for public landing places, including yard room for storing and handling freight.⁴ A company was chartered by the legislature of Tennessee for the purpose of constructing sheds, railroads, engines and other equipments to be used in loading and unloading freight on or from steam-boats and other craft touching at Memphis. This was held

§ 176.

¹ *Edgecumbe v. Burlington*, 46 Vt. 218; *Balch v. County Coms. of Essex*, 103 Mass. 106; *Edwards v. Stonington Cemetery Association*, 20 Conn. 466. In all these cases the proceedings were for the enlargement of an existing cemetery. Also, *Evergreen Cemetery Association v. New Haven*, 43 Conn. 231, 241.

² *Matter of Deansville Cemetery Association*, 66 N. Y. 569; *Evergreen Cemetery Association v. Beecher*, 53 Conn. 551.

³ *Evergreen Cemetery Association v. Beecher*, 53 Conn. 551.

§ 177.

¹ *Matter of Petition of United States*, 96 N. Y. 227; *S. C. 67 How. Pr. 121.*

² *Hazen v. Essex Co.*, 12 Cush. 475; *Calking v. Baldwin*, 4 Wend. 667.

³ *Cotton v. Miss. & Rum River Boom Co.*, 22 Minn. 372; *Patterson v. Boom Co.*, 3 Dill. 465; *S. C. affirmed*, 98 U. S. 403.

⁴ *Pearson v. Johnson*, 54 Miss. 259; *Belcher Sugar Refining Co. v.*

not to be a public use which would authorize the condemnation of private property. The ground of this decision was that it was a public *convenience*, merely, and not a necessity, and that it was not subject to public regulation in its charges and services.⁵

§ 178. Water mills and water power.—Prior to the Revolution, and, consequently, long before the courts of this country were called upon to adjudicate upon the question of *public use*, it had been the practice to permit the erection of dams for water power and to provide for a statutory adjustment of the damages to property overflowed.¹ After the Revolution and the adoption of state constitutions containing the eminent domain provision in question, this practice continued, no question being made for some time as to the constitutionality of such proceedings.² When at last the question was raised as to the public use of these mills, the practice had been so long acquiesced in and encouraged and so much capital had become invested in such enterprises, that the courts were hardly in a condition to give the question a fair consideration. Courts are not, and perhaps ought not to be, free from the influence of the circumstances which surround a case and the consequences which may flow from a particular decision. Most of the mills which existed in these early years were grist

St. Louis Grain Elevator Co., 10 Mo. App. 401; Pittsburgh *v.* Scott,
¹ Pa. S. 309.

⁵ Memphis Freight Co. *v.* Memphis, 4 Cold. 419.

§ 178.

¹ Acts of 8 Anne, 1714, and 13 Anne, 1719, in Colony of Massachusetts Bay, Ancient Charters, pp. 388, 404; and see remarks of court in Boston & Roxbury Mill Corp. *v.* Newman, 12 Pick. 467-9, and Murdock *v.* Stickney, 8 Cush. 113, 117. In Great Falls Manf. Co. *v.* Fernald, 47 N. H. 444, 459, such acts

are said to have been in force in that State since 1718.

² Stowell *v.* Flagg, 11 Mass. 364, 1814; Cogswell *v.* Essex Mill Corp., 6 Pick. 94, 1827; Wolcott *v.* Woolen Manf. Co., 5 Pick. 293, 1824; Fiske *v.* Framingham Manf. Co., 12 Pick. 67, 1831; French *v.* Braintree Manf. Co., 23 Pick. 216, 1839; Crenshaw *v.* Slate River Co., 6 Rand. Va. 245, 1828; Bibb *v.* Mountjoy, 2 Bibb, 1, 1810; Afee *v.* Kennedy, 1 Litt. 92, 1822; Smith *v.* Connally's Heirs, 1 T. B. Mon. 58, 1824; Shackleford *v.* Coffee, 4 J. J. Marsh, 40, 1830.

and saw-mills, accustomed to grind and saw for the public, and dependent upon the custom of the public for their success and profit. In most States they were regulated by law and compelled to serve the public for a stipulated toll and in regular order.³

³ We have not access to all the old statutes of the different States enacted prior to the time when the constitutionality of the mill acts was called in question, but give below sufficient to sustain the text.

Alabama. All mills were declared to be for public use, and were required to be commenced within one and completed within three years after leave granted. Grist mills were required to grind according to turn and well and sufficiently all grain brought thereto and for a toll fixed by the county court where located. Acts of 1811 and 1812. The act of 1812 authorized the erection of grist-mills, saw-mills, cotton gins or other useful water works. Tomlin's Digest, Laws of Ala., pp. 623-626.

Connecticut. The first act authorizing flowage by dams appears to have been passed in 1864. Acts of 1864, p. 40. There had existed, however, since 1796 a statute regulating the tolls and duties of millers. Acts and Laws, 1796.

Delaware. As far back as 1752 an act was passed for regulating the tolls of millers, and from time to time during the remainder of the century acts were passed compelling millers to grind for the public, to keep their mills in repair, and otherwise regulating them. Laws of Del. 1829, pp. 402, 403. Laws of Del. 797, *passim*.

Georgia had a similar act passed

in 1786. Prince's Digest of Laws of Ga. p. 339.

Kentucky. In 1797 an act was passed for the erection of water grist-mills. Applicants were obliged to commence their mill in one year and complete it in three years and keep it in repair under a penalty. Millers were required to grind well and sufficiently the grain brought to their mills in due time as the same was brought. In 1810 the provisions of this act were extended to "any kind of water works." Littell & Swigert Digest of Laws of Ky., 1822, pp. 935-939.

Maryland. Acts of 1704 and 1816 regulate tolls for grinding. Dorsey's Statutes, vol. 1, pp. 3 and 640. No act for a statutory assessment of damages appears to have existed up to 1840.

Massachusetts. The first act for a statutory assessment of damages from flowage was passed in 1714. Ancient Charters, p. 404. The preamble refers to mills as "serviceable for the publick good and benefit of the town, or considerable neighborhood in or near to which they have been erected." Which indicates that saw-mills and grist-mills for public use were in mind. The act, however, provides for "any water-mill or mills." Other early acts regulate the tolls and duties of millers. Act of 1635, Ancient Charters, p. 157; also pp. 388, 469. The

§ 179. **The same: Leading cases.**—The question as to the constitutionality of these mill acts appears to have been made almost simultaneously in two different States, Massachusetts

act of 1796 was a revision of the statutes on this subject. *Perpetual Laws*, vol. 2, p. 344. The act applies to "any water mill." The preamble recites as follows: "Whereas the erection and support of mills to accommodate the inhabitants of the several parts of the State ought not to be discouraged by many doubts and disputes," etc. This shows that the legislature had in mind public mills. The act also regulates the tolls and prescribes the duties of millers. There were afterwards many additions and amendments to this act and also many special acts passed for the erection of particular mills or water power.

New Hampshire. In 1718 an act was passed authorizing the erection of water mills and providing a statutory remedy for flowage. The act regulates the toll of millers. The act is given in full, together with a summary of legislation on the subject, in 44 N. H. 448-450.

New Jersey. An act of 1696 prescribes the tolls of millers. *Leaming & Spicer's Grants etc. of N. J.* 547. Similar regulations were continued in force until the present century. *Nixon's Digest of Laws*, p. 547; *Rev. Stat. 1821*, p. 446. I find no laws for the erection of mills or the assessment of damages to lands.

North Carolina. An act of 1777 allows the erection of water grist-mills only, and provides for an assessment of damages caused by

flowage. All millers are required to grind "according to turn," and "well and sufficiently," for a prescribed toll. After the right has been acquired, the applicant must commence his works within a year and complete them within three years. This act continued in force at least until 1821. *Rev. Stat. 1821*, vol. 1, p. 345.

Pennsylvania. Mill acts do not appear to have existed in this State in early times. An act of 1803 permits the erection of dams in all but specified streams, but the persons erecting such dams are not to "infringe on or injure the rights or privileges of the owner or possessor of any private property on said stream." *Purdon's Statutes*, p. 592.

Rhode Island. An act of 1726 regulates the tolls of millers. *Rev. Stat. 1822*, p. 376. An act of 1734 provides for the erection of "water mills" and an assessment of damages from flowage. *Same*, p. 374.

South Carolina. In 1712 an act was passed offering a benefit to the one who should first erect and put in successful operation a wind or water saw-mill, or a wind or water grist-mill. *Statutes at Large*, vol. 2, p. 388. In 1744 an act was passed which prohibited the erection or maintenance of dams which flooded the lands of others and provided for their abatement. *Ibid.* vol. 3, p. 609. This act, at first passed for three years only, was revived and made perpetual in 1783. *Ibid.* vol.

and New Jersey.¹ In Boston & Roxbury Mill Corporation *v.* Newman, the plaintiff was authorized to construct a system of dams and works for the purpose of operating grist-mills, iron manufactories and other mills by means of tide water. The act was held valid principally on the ground that the establishment of such mills would be a great public benefit. The acts of the Colony and State in reference to mills were referred to as showing the light in which the legislature and the people had regarded such works. The court say: "We should be at a loss to imagine any undertaking of an individual or association of persons with a view to private emolument, in which the public had a more certain and direct interest and benefit." "Take the grist-mill established in this city, as an example. Is it of no benefit to have the corn ground near to the inhabitants, rather than at a distance? 'But you cannot compel the miller to grind your corn for the toll, as you may the proprietors of the turnpike to let you travel over the road for a toll.' If there be not an actual, there is a moral necessity imposed upon the owner of the mill, to accommodate the public to the extent of his power. Who ever heard of a refusal? And in regard to the manufacturing establishments, is it nothing to the public

4, p. 540. In 1785 an act was passed regulating tolls taken by millers. *Ibid.* vol. 4, p. 652.

Virginia. Various acts were passed from 1645 to 1666 regulating the charges and duties of millers. Henning's Stat. at Large, vol. 1, pp. 301, 348, 485; vol. 2, p. 242. In 1667 an act was passed allowing the owner on one side of a stream to condemn an acre of land on the opposite side for the purpose of erecting a mill "for the grinding of corne." *Ibid.* vol. 2, p. 260. In 1745 the first act was passed allowing an assessment of damages for

flowage. *Ibid.* vol. 5, p. 360. This act applied generally to *water mills*. In 1748 these various acts were revised and continued in force at least until after the adoption of the first constitution. *Ibid.* vol. 6, p. 55.

Vermont. An act of 1797 regulates the tolls and duties of millers. Rev. Laws, 1797, p. 407. No flowage laws existed until a recent date.

§ 179.

¹ *Boston & Roxbury Mill. Corp. v. Newman*, 12 Pick. 467, 476, 1832; *Sudder v. Trenton Rel. Falls Co.*, 1 N. J. Eq. 694, 1832.

that great numbers of citizens have the means of employment brought to their homes?"

In *Scudder v. Trenton Del. Falls Co.*² the decision was by the Chancellor only. He says: " May we not, in considering what shall be deemed a public use and benefit, look at the objects, the purposes, and the results of the undertaking? The water power about to be created, will be sufficient for the erection of seventy mills, and factories, and other works dependent on such power. It will be located at the seat of government, at the head of tide water, and in a flourishing and populous district of country. It will be no experiment in a country like ours; and, judging from the results in other places, we may make a sufficiently accurate calculation as to the result here. Take the town of Paterson as an example. The water power there is in the hands of individuals—a company like this. They are under no obligation to lease or sell any mills or privileges to the public; and yet see the result of a few years' operation. Paterson is now the manufacturing emporium of the State, with a population of eight thousand souls. It has increased the value of property in all that district of country; opened a market for the produce of the soil, and given a stimulus to industry of every kind. May we not hope that a similar benefit may be experienced here? * * * The ever-varying condition of society is constantly presenting new objects of public importance and utility; and what shall be considered a public use or benefit, may depend somewhat on the situation and wants of the community for the time being. The great principle remains: There must be a public use or benefit; that is indisputable. But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to general rule. Looking at this case in all its bearings, and believing as I do that great benefit will result to the com-

² 1 N. J. Eq. 694, 728.

munity from the contemplated improvement, I am not satisfied to declare the act of incorporation, or that part of it which is now in question, void and unconstitutional." The act was accordingly sustained.

In the same year a case was decided in Tennessee which intimates that to take land for a saw-mill or paper-mill or any kind of mill except a public grist-mill would not be a taking for a public use.³ The *decision* in the case was that, under an act which related solely to grist-mills, an application for a grist-mill, saw-mill and paper-mill could not be granted. These early cases were not very carefully considered, but they were sufficient to establish the law of the States where they were made, and to exert an important influence upon the law of sister States.

§ 180. The same: Law in the different States at the present time.—The taking of land for water-power for running any kind of mills or machinery is held to be for public use upon principle in Connecticut,¹ Indiana,² Massachusetts,³ New

¹ Harding *v.* Goodlet, 3 Yerg. Tenn. 41, 1832.

§ 180.

² Olmstead *v.* Camp, 33 Conn. 532, 551; Todd *v.* Austin, 34 Conn. 78, 90; Occum Co. *v.* Sprague Manf. Co., 35 Conn. 496. In Olmstead *v.* Camp the court say: "It would be difficult to conceive a greater public benefit than garnering up the waste waters of innumerable streams and rivers and ponds and lakes, and compelling them with a gigantic energy to turn machinery and drive mills, and thereby build up cities and villages, and extend the business, the wealth, the population and the prosperity of the State." In Todd *v.* Austin this proposition is laid down: "The legislature may lawfully grant

rights of easement to individuals or corporations to enable them to erect and operate structures, if the result of their operation is the production of an article or thing intended to be furnished or sold to the public for a beneficial use, and to supply their reasonable wants."

³ Hankins *v.* Lawrence, 8 Blackf. 266; Kepley *v.* Taylor, 1 Blackf. 492.

³ Boston & Roxbury Mill. Corp. *v.* Newman, 12 Pick. 467; Hazen *v.* Essex Co., 12 Cush. 475; Murdock *v.* Stickney, 8 Cush. 113. In the latter case the court doubt whether the mill acts could be sustained if the question was a new one, but say it is too late to question them after being in full operation for a century and a half. In

Hampshire,⁴ and New Jersey,⁵ and also by the Supreme Court of the United States in a case which went up from New Hampshire.⁶ The constitutionality of acts for this purpose has been seriously questioned, but nevertheless upheld either on the ground of authority or long and general acquiescence and usage in Iowa,⁷ Kansas,⁸ Maine,⁹ Minne-

this case also the court take the position that the mill acts are not an exercise of the power of eminent domain at all, but the argument is too obscure to be condensed. An interesting commentary upon the mill acts, in which the position taken in *8 Cushing.* is elaborated, will be found in *Lowell v. Boston*, 111 Mass. 454.

⁴ *Great Falls Manf. Co. v. Fernald*, 47 N. H. 444; *Amoskeag Manf. Co. v. Head*, 56 N. H. 386; *Ash v. Cummings*, 50 N. H. 591; *Amoskeag Manf. Co. v. Worcester*, 60 N. H. 522.

⁵ *Scudder v. Trenton Del. Falls Co.*, 1 N. J. Eq. 694.

⁶ *Head v. Amoskeag Manf. Co.*, 113 U. S. 9.

⁷ *Burnham v. Thompson*, 35 Ia. 421; *Gammell v. Potter*, 6 Ia. 548.

⁸ *Venard v. Cross*, 8 Kan. 248; *Harding v. Funk*, 8 Kan. 315, 323. In the former case it is argued that, when the constitution was adopted, mill acts had been in operation in other States, and if the people had intended to stop the practice they would have said so in express terms. One judge dissents on principle, but acquiesces in the decision for the reason above stated. It is doubtful whether these cases sustain anything more than public grist-mills. In *Harding v. Funk* the court say: "The fact however

is that the mills provided for under our statute, are neither absolutely private mills nor absolutely public mills, but they partake of the character of both. They might perhaps properly be called *quasi* public mills. It is not necessary for us to say what would be our decision upon this question if the same was a new question in this country. But it is not a new question. It has been long and well settled by legislative, executive, and judicial construction, practice, and usage; and we are not now at liberty to depart from such construction, practice, and usage." See also *Rev. Stats. 1860*, chaps. 65 and 66.

⁹ *Jordan v. Woodward*, 40 Me. 317, 323. "The mill act, as it has existed in this State, pushes the power of eminent domain to the verge of constitutional inhibition." "Strictly speaking, private property can only be said to have been taken for public use when it has been so appropriated that the public have certain well-defined rights to that use secured, as the right to use the public highway, the turnpike, the public ferry, the railroad, and the like. But when it is so appropriated that the public have no rights to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use."

sota,¹⁰ Nebraska,¹¹ and Wisconsin.¹² On the other hand such acts have been held to be unconstitutional as authorizing the taking of private property for private use, except in case of public grist-mills, in the States of Alabama,¹³ Georgia,¹⁴ Michigan,¹⁵ New York,¹⁶ Vermont,¹⁷ and West Virginia.¹⁸

¹⁰ *Miller v. Troost*, 14 Minn. 365, 369. "Had not similar laws, in States having constitutional restraints similar to ours, been uniformly sustained by the courts, we should hesitate long before upholding this one. The decisions, however, are so numerous, and by courts of so great authority, that we are constrained to hold the law to be constitutional."

¹¹ *Traver v. Merrick County*, 14 Neb. 327.

¹² *Newcomb v. Smith*, 1 Chandler, 71, 1849. In this case two of the five judges dissent in an elaborate opinion. In *Thien v. Voegtlander*, 3 Wis. 461, the decision in *Newcomb v. Smith* is impliedly questioned, while in *Pratt v. Brown*, 3 Wis. 603, the minority opinion is commended, but the court do not deem it necessary to reconsider the question, because the act in question had in the meantime been repealed. Other acts were sustained in *Babb v. Mackey*, 10 Wis. 371; *Fisher v. Horicon Iron & Manf. Co.*, 10 Wis. 351, though in the latter case the court distinctly say that they would hold the mill act unconstitutional, but for the large investments which had been made upon the faith in the decision in *Newcomb v. Smith*. In *Attorney General v. Eau Claire*, 37 Wis. 400

436, the court say: "This court, as now organized, has, in submission to the rule *stare decisis*, reluctantly, against its own views, followed *Newcomb v. Smith*, 1 Chand. 71, in upholding the mill-dam act." See also *Bowers v. Bears*, 12 Wis. 213, 221, and *McCord v. Sylvester*, 32 Wis. 451.

¹³ *Sadler v. Langham*, 34 Ala. 311; *Bottoms v. Brewer*, 54 Ala. 288. In the former case it is said that long acquiescence in such acts is no reason for sustaining them.

¹⁴ *Loughbridge v. Harris*, 42 Ga. 501. Here it is denied that even grist-mills are a public use.

¹⁵ *Ryerson v. Brown*, 35 Mich. 333; overruling Hartwell's Petition, 2 *Nisi Prius Rep.* 97, 1871. In this case (*Ryerson v. Brown*), Judge Cooley, in an elaborate opinion, reviews the authorities and discusses the principles applicable to the question under consideration.

¹⁶ *Dictum, Hay v. Cohoes Co.*, 3 Barb. 42.

¹⁷ *Tyler v. Beacher*, 44 Vt. 648. This also is an instructive and well-considered case.

¹⁸ *Varner v. Martin*, 21 W. Va. 534. This case contains an elaborate opinion which discusses the question, but the decision is not directly in point.

§ 181. **The same:** Review of the decisions.—Saw-mills and grist-mills, carding and fulling-mills, which are regulated by law and obliged to serve the public, are undoubtedly a public use.¹ But, as respects all other kinds of mills, although they may be a public benefit, they are not a public use within the meaning of the constitution. No one of the public has any right in these mills. No one of the public can require any service at their hands. They are as absolutely private property and for private use as a steam-mill or a business block.² In the original States it is almost certain that, at the time of the adoption of the first constitutions,—that is, from 1777 to 1800—the power of eminent domain had never been exercised for the establishment of any mills except such as were public, either by law or practice. These acts were prompted by the great and urgent necessity which existed in the early history of the country for mills for grinding grain and sawing logs. It was undoubtedly the understanding of the legislature and people that the mill acts had reference to mills of this character. The fact, therefore, that no reference is made to mills or mill acts in the early constitutions cannot be construed into a recognition of all kinds of water mills as a public use.

It must be confessed, however, that many courts which have been called upon to pass upon the validity of these acts for the first time have labored under peculiar difficulties. The question has not generally arisen in any State until a large amount of capital had become invested upon the assumption of their validity. To have declared them unconstitutional, it was supposed, would have been to jeopardize these investments, and bring loss and ruin to many citizens. The legislatures and people of the newer States were justified in accepting the construction given by the courts of the older States to a constitutional provision which the newer

§ 181.

Sadler *v.* Langham, 34 Ala. 311.

¹ Harding *v.* Goodlett, 3 Yerg. ² In Cole *v.* La Grange, 113 U. 41; Varner *v.* Martin, 21 W. Va. 534; S. 1.

States had adopted from the older ones. These decisions were the best attainable information. The first case holding the acts in question unconstitutional was not decided until 1859, and until then no legislature had reason to suspect their invalidity.³ When the question first arose in Massachusetts in 1832,⁴ the court of that State had very plausible grounds for sustaining the act in question, on the ground of a contemporaneous construction by the legislature and of long acquiescence on the part of the people and legal profession.⁵ The New Jersey court, which passed upon the question at the same time,⁶ had similar grounds to go upon, and, besides, was free from any embarrassment occasioned by the constitution, since the constitution of that State contained no provision as to taking private property for public use until 1844. When the question next arose in Indiana, in 1846,⁷ the court was sustained in its views, not only by contemporaneous construction and long acquiescence, but also by the authority of the decisions in Massachusetts and New Jersey. The next case, which arose in Wisconsin in 1849,⁸ presented still stronger inducements to sustain the act. The act there in question was taken largely from the statutes of Massachusetts. The constitutional provision in question had been transplanted from the older States, where it had not only received a practical construction by the legislatures in favor of the mill acts, but had also been construed by the courts in favor of such acts. Moreover, the act in question was in force when the constitution was adopted. Every State which has since been called upon to adjudicate upon this question has labored under similar embarrassments.

³ *Sadler v. Langham*, 34 Ala. 311.

⁴ *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. 467, 1832.

⁵ *Cooley*, Const. Lim. pp. 67-72; *Sedgwick Con. Law*. pp. 412, 413.

⁶ *Scudder v. Trenton Del. Falls Co.*, 1 N. J. Eq. 694, 1832.

⁷ *Hankings v. Lawrence*, 8 Blackf.

266. In the previous case of *Keppler v. Taylor*, 1 Blackf. 492, the question was not made, though the acts are expressly sanctioned by the court.

⁸ *Newcomb v. Smith*, 1 Chand. 71, 1849.

But, while these considerations may explain, they do not justify, the decisions which have been made. The doctrine of contemporary construction or long acquiescence will not justify upholding a statute which is plainly repugnant to the constitution.⁹ Especially is this true where no material embarrassment will result from an adverse decision. Stress has been laid in many cases upon the fact that a large amount of capital had become invested under the mill acts which would be endangered or swept away if these acts were declared invalid. But this we think is a mistake. Those whose property had been condemned for mills had received the damages awarded and would be estopped from questioning the validity of the proceedings by which it was acquired.¹⁰ This principle would have relieved and still relieves the question of most of its embarrassment. The prosperity of the State would not have been affected by such a decision, for it is not probable that in this age of steam and enterprise there would have been one less mill in consequence.

§ 182. Massachusetts doctrine that the mill acts do not fall under the eminent domain power.—A doctrine has grown up in Massachusetts that the mill acts are not an exercise of the power of eminent domain at all, but are referable to the same power, and to be classed with the same acts, that regulate the duties of adjoining proprietors to each other in regard to division fences and party walls, and the enjoyment and partition of joint estates.¹ This doctrine has also lately found its way into the Supreme Court of the United States, through a judge from Massachusetts.² The doc-

⁹ Story on Const. § 407; Cooley, Const., Lim. 70, 71.

¹⁰ Post, § 606.

§ 182.

¹ Fiske v. Framingham Manf. Co., 12 Pick. 68, 70-72; Williams v. Nelson, 23 Pick. 141, 143; French v. Braintree Manf. Co., 23 Pick. 216, 218-221; Cary v. Daniels, 8 Met.

466, 476, 477; Murdock v. Stickney, 8 Cush 113, 116; Bates v. Weymouth Iron Co., 8 Cush. 548, 552, 553; Gould v. Boston Dock Co., 13 Gray, 442, 450; Storm v. Manchaug Co., 13 Allen, 10; Lowell v. Boston, 111 Mass. 454.

² Head v. Amoskeag Manf. Co., 113 U. S. 9, opinion by Gray, J. In

trine is very fully elaborated in *Lowell v. Boston*,³ from which we quote as follows:

"The mill acts, so called, are often referred to as authorizing the exercise of the right of eminent domain by private parties for their exclusive private benefit. And the language of the court, used *arguendo*, has been sometimes such as to imply that the growth and prosperity of manufacturing and other industrial enterprises were of such importance to the public welfare, as to justify the exercise of the right of eminent domain in their behalf, as a public use. *Boston & Roxbury Mill Co. v. Newman*, 12 Pick. 467; *Hazen v. Essex Co.*, 12 Cush. 475, 478; *Talbot v. Hudson*, 16 Gray, 417, 426.

"That mills for the sawing of lumber for purposes of building, grinding grain for food, and the manufacture of material for clothing, may be of such necessity to a community, especially in the early settlement of a country, as to make their establishment a provision for a public service, we do not question. It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may properly be exercised; as in the case of the Bos-

Pumpelly v. Green Bay Co., 13 Wall. 166, the United States Court holds that flooding property by means of a dam is a taking. In *Head v. Amoskeag Manf. Co.*, *ante*, the same court holds that property may be flooded by a dam in order to create a water power to operate the mill of a private manufacturing corporation. In *Cole v. La Grange*, in the same volume, page 1, it holds that neither the power of eminent domain nor of taxation can be exercised for the purpose of aiding a private manufacturing company. We do not see how these three decisions can stand together. If a flooding is a *taking*, then land can

only be flooded for a public use. If land may be flooded to afford water power for a mill, then it follows that a mill is a public use. But if a mill is a public use for which the power of eminent domain may be exercised, why is it not a public use for which the power of taxation may be exercised? The only reconciliation that can be made of these cases is to limit the opinion in *Head v. Amoskeag Manf. Co.* to the particular point decided, viz: that the mill acts of New Hampshire were due process of law in that State at the time the Fourteenth Amendment was adopted.

³ 111 Mass. 454, 464.

ton & Roxbury Mill Corporation, and the Salem Mill-dam Corporation. What may be the limits of legislative power in that direction, and whether there are any limits except in the sound discretion of the Legislature, it is needless now to inquire. We are satisfied that the mill acts are not founded upon that power, and do not authorize its exercise.

"The advantages to be derived from a running stream by the several riparian proprietors, are of natural right. Each one may make use of its waters, as they flow through his lands, in a reasonable manner, for such purposes as they are adapted to serve. In order that each may have his opportunity in turn, each is entitled to have the water allowed to flow to and from his land as it has been accustomed to flow, with only such modification as results from such reasonable use. Hence, all proprietors upon a stream, from its source to its mouth, have, in a certain sense, a common interest in it, and a common right to the enjoyment of all its capacities. Among those capacities no one is more important than that of the force of the current to supply power for the operation of mills. To make that force practicably serviceable requires a considerable head and fall at the point where it is to be applied; often more than can be gained within the limits of one proprietor. The use of the stream in this mode has always been regarded as a reasonable use, notwithstanding the effect of the dam, by which the head is created, to retard the water in its flow to the proprietor below, and to set it back and thus diminish or destroy the force of the current above. One who thus appropriates the force of the current is in the enjoyment of a common right, in which he is protected, although he may thereby prevent a like use subsequently by the proprietor above. *Hatch v. Dwight*, 17 Mass. 289, 296; *Cary v. Daniels*, 8 Met. 466; *Gould v. Boston Duck Co.*, 13 Gray, 442. But this protection extends no farther than to justify the appropriation of a part of that quality of the stream which, until so appropriated, is common to all. It does not justify any, even the least, injury to land outside the channel.

Without some law to control, the mill-owner would be exposed, not merely to the liability to make just compensation for injuries thus occasioned, but to harassing suits for damages and to abatement of his dam as causing a nuisance. This liability and the inevitable controversies growing out of conflicting rights in the stream itself, tending to defeat all advantageous use of its power, led to the adoption of laws regulating and protecting the beneficial use of streams for mill purposes. The St. of 1795, c. 74, is introduced by the recital: ‘Whereas the erection and support of mills, to accommodate the inhabitants of the several parts of the State, ought not to be discouraged by many doubts and disputes, and some special provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors.’ But there is no public service secured through the mill acts, except so far as it may result incidentally, and as the inducements of private interest may lead mill-owners to devote their mills to purposes favorable to the public accommodation. The same rights and protection are secured to all who may be possessed of sites for mills, whatever the purpose for which their mills may be designed, and however useless for all purposes of public accommodation or advantage. There is no discrimination in this respect, and no provision to secure any public service that may be supposed to have been contemplated. Further than this, each proprietor is allowed to avail himself of the rights secured by the mill acts, in his own mode and for his own purposes, at his own discretion, without the intervention of any public officer or other tribunal or board, to whom such a governmental function as the exercise of the right of eminent domain is ordinarily entrusted, when not under the special direction of the Legislature itself.

“A consideration, still more conclusive to this point, is, that in fact no private property, or right in the nature of property, is taken by force of the mill acts, either for public or private use. They authorize the maintenance of a dam to

raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement. *Hunt v. Whitney*, 4 Met. 603; *Talbot v. Hudson*, 16 Gray, 417, 422, 426. But it is not so. It confers no right in the land upon the mill-owner, and takes none from the land-owner. *Murdock v. Stickney*, 8 Cush. 113; *Storm v. Manchaug Co.*, 13 Allen, 10. In *Murdock v. Stickney*, Chief Justice Shaw remarks, in reference to the mill acts: ‘The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public.’ In *Bates v. Weymouth Iron Co.*, 8 Cush. 548, 553, he says: ‘It is a provision by law, for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it.’ Similar declarations are made in *Fiske v. Framingham Manuf. Co.*, 12 Pick. 68; *Williams v. Nelson*, 23 Pick. 141. ‘This regulation of the rights of riparian proprietors, both in respect to the stream and to their adjacent lands, liable to be affected by its use, involves no other governmental power than that ‘to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances,’ as the general court ‘shall adjudge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same.’ Const. of Mass. c. 1, § 1, art. iv.

“ All individual rights of property are held subject to this power, which alone can adjust their manifold relations and conflicting tendencies. The absolute right of the individual must yield to and be modified by corresponding rights in other individuals in the community. The resulting general good of all, or the public welfare, is the foundation upon which the power rests, and in behalf of which it is exercised;

whether by restricting the use of private property in a manner prejudicial to the public; Commonwealth *v.* Alger, 7 Cush. 53; or by imposing burdens upon it for the protection or convenience in part of the public; Goddard, Petitioner, 16 Pick. 504; Baker *v.* Boston, 12 Pick. 184, 193; Salem *v.* Eastern Railroad Co., 98 Mass. 431; or by modifying rights of individuals, in respect of their mutual relations, in order to secure their more advantageous enjoyment by each." The court then alludes to various other statutes, such as those relating to property held by joint tenants and tenants in common, to the drainage of meadows, and the like, and then concludes as follows: "We find in these statutes no exercise of the right of eminent domain, or of the governmental power of taxation."

§ 183. The mill acts fall under the eminent domain power.—There can be no question, it seems to us, but that the flooding of land by a mill-dam is a taking. It interferes with the right to have the water of the stream flow off in its accustomed manner, and excludes the owner from the use and enjoyment of so much of the land as is covered by water, and may greatly deteriorate that which is not flooded. This has been expressly held to be a taking by the Supreme Court of the United States,¹ and by almost every court in the Union.² It is the appropriation of private property to a particular use, and this can only be done under the eminent domain power. It follows, therefore, that it can only be done for a public use, and upon just compensation being made. Consequently, the only possible basis upon which the mill acts can stand is that mills are a public use within the meaning of the constitution. This can only be true of that class of mills which are obliged to serve the public, and, unless the acts are limited to such mills, they cannot be sus-

§ 183.

¹ Pumfelly *v.* Green Bay Co., 13 Wall. 166. ² *Ante* § 67.

tained. The Massachusetts court escapes this conclusion by maintaining that the flooding of lands by a mill-dam is not a *taking*. “A consideration, still more conclusive to this point, is, that *in fact no private property, or right in the nature of property, is taken by force of the mill acts, either for public or private use*. They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement. But it is not so. *It confers no right in the land upon the mill owner and takes none from the land owner.*”³ The Massachusetts doctrine rests upon this position, and we think we have shown that the position is untenable. The prohibition of the constitution applies to the legislative power in all its branches, and prevents private property from being appropriated to a particular use, unless that use is by or for the public.

We have treated this question thus at length, not because we think that the mill acts in themselves are an evil, but because we believe that they cannot be justified upon principle without virtually expunging the words *public use* from the constitution. The principle of these decisions may be used to justify the invasion of private rights for any purpose which the legislature or the courts for the time being may happen to consider of public utility. The courts should enforce the constitution as it is, and leave the people, if they deem mill acts essential to the prosperity of the State, to provide for them by an amendment to the constitution.

§ 184. Development of mines.—The tendency of those decisions which sustain the mill acts, is illustrated by some cases now to be noticed. The legislature of Nevada passed an act in which it was declared that “the production and reduction of ores are of vital necessity to the people of this

³ *Lowell v. Boston*, 111 Mass. at p. 466.

State; are pursuits in which all are interested and from which all derive a benefit; so the mining, milling, smelting or other reduction of ores are hereby declared to be for the public use and the right of eminent domain may be exercised therefor." In *Daton Mining Co. v. Sewell*,¹ the question was whether the company could condemn a strip of land, "in order to transport the wood, lumber, timbers and other materials to enable it to conduct and carry on its business of mining." The strip of land after being condemned, would be the private property of the mining company. The court, after reviewing the mill cases at length, say: "In the light of these authorities, nearly all of which were decided prior to the adoption of our State constitution, I think it would be an unwarranted assumption on our part to declare that the framers of the constitution did not intend to give to the term 'public use' the meaning of public utility, benefit and advantage, as construed in the decisions we have quoted. The reasons in favor of sustaining the act under consideration are certainly as strong as any that have been given in support of the mill-dam or flowage acts, as well as some of the other objects heretofore mentioned. Mining is the greatest of the industrial pursuits of this State. All other interests are subservient to it. Our mountains are almost barren of timber, and our valley lands could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the State. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. The mines are fixed by the laws of nature, and are often found in places almost inaccessible. For the purpose of successfully conducting and carrying on the business of "mining,

§ 184.

¹ 11 Nev. 394, 408, 1876.

milling, smelting or other reduction of ores," it is necessary to erect hoisting works, to build mills, to construct smelting furnaces, to secure ample grounds for dumping waste rock and earth; and a road to and from the mines is always indispensable. The sites necessary for these purposes are oftentimes confined to certain fixed localities. Now, it so happens, or, at least, is liable to happen, that individuals, by securing title to the barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such locations. In my opinion, the mineral wealth of this State ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has denied to this State many of the advantages which other States possess; but by way of compensation to her citizens, has placed at their doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the State is entirely due to the mining developments already made, and the entire people of the State are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals." The act was of course sustained, and, conceding the mill acts to be valid, the conclusions of the court are sound. The decision was approved in a subsequent case in which it was held that land might be condemned for a shaft.² So it has been held in Georgia that land could be condemned for a ditch to conduct water for hydraulic mining.³ And yet it was held in Georgia, only

² *Overman Silver Mining Co. v. Corcoran*, 15 Nev. 147, 1880.

³ *Hand Gold Mining Co. v. Parker*, 59 Ga. 419, 423, 1877. The court say: "The right of eminent do-

main may be exercised by the general assembly in this State, when it is for the public good, either through the officers of the State, or through the medium of corporate

six years before, that even grist-mills under public regulation were not a public use.⁴ No reference, however was made to this or any other case.

On the other hand the validity of such laws has been denied in California,⁵ and Pennsylvania,⁶ and virtually so in West Virginia.⁷ This is undoubtedly the correct view. In the California case it was sought to condemn land for a bed-rock flume to carry dirt and gravel from mining claims and for a place of deposit for the tailings and refuse from the mines. The court say: "The proposed flume is to be constructed solely for the purpose of advantageously and profitably washing and mining plaintiff's mining ground. It is not even pretended that any person other than the plaintiff will derive any benefit whatever from the structure when completed. No public use can possibly be subserved by it. It is a private enterprise to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of the constitution which permits the taking of private property for public use after just compensation made." This language is of general application.⁸

§ 185. Drains, ditches, levees, etc., for improving wet and overflowed land.—Statutes for the improvement and reclamation of low, wet and overflowed lands by means of drains and levees have been common in the United States

bodies, or by means of individual enterprise." Adding to the wealth of the State by the production of gold was held to be a sufficient public good.

⁴ *Loughbridge v. Harris*, 42 Ga. 501, 1871.

⁵ *Consolidated Channell Co. v. Central Pacific R. R. Co.*, 51 Cal. 269, 1876; see also *Gillan v. Hutchinson*, 16 Cal. 153.

⁶ *Waddell's Appeal*, 84 Pa. S. 90; *Edgwood R. R. Co.*, 79 Pa. S. 257.

⁷ *Valley City Salt Co. v. Brown*, 7 W. Va. 191.

⁸ A law exists in Iowa allowing the condemnation of property for the purpose of draining mines. But, as to whether it is valid in that respect, it has not been decided. See *Ahern v. Dubuque Lead & Level Mining Co.*, 48 Ia. 140.

for at least a century. These statutes have been made to apply to a great variety of circumstances and differ greatly in their phraseology, purpose and details. There has been much litigation growing out of these statutes, in which their validity has not been questioned, and in which, therefore, their validity has been tacitly assumed. There have also been quite a number of cases in which these statutes have been assailed as unconstitutional. They have generally been upheld, but their validity has been put upon different grounds by different courts, some holding that they are referable to the power of eminent domain and subject to the constitutional limitations on that power;¹ others holding that they are an exercise of the police power, or of the still more general power to make all such laws as the legislature shall deem for the good of the State, and hence are not subject to the limitations as to public use and just compensation.²

§ 186. Decisions referring such improvements to the police power, or power to legislate for the general welfare.— The leading case on this subject is that of *Coster v. Tide Water Co.*¹ The court say: “But there is another branch of legislative power that may be appealed to, as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regulations for the better and more economical man-

§ 185.

¹*People v. Supervisors of Saginaw Co.*, 26 Mich. 22; *Jenal v. Green Island Draining Co.*, 12 Neb. 163; *Draining along Pequest River*, 41 N. J. L. 175; *Same*, 39 N. J. L. 433; *People v. Nearing*, 27 N. Y. 306; *Burk v. Ayers*, 19 Hun, 17; *Matter of Ryers*, 72 N. Y. 1; *Hartwell v. Armstrong*, 19 Barb. 166; *Seely v. Sebastian*, 4 Or. 25; *Sessions v. Krunkilton*, 20 Ohio St. 349.

²*O'Reiley v. Kankakee Valley*

Draining Co., 32 Ind. 169; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *State v. Blake*, 36 N. J. L. 442; *Pool v. Trexler*, 76 N. C. 297; *Winslow v. Winslow*, 95 N. C. 24; *Donnelly v. Decker*, 58 Wis. 461; *Shelley v. St. Charles Co.*, 17 Fed. Rep. 909; *Lowell v. Boston*, 111 Mass. 454, 468; *Wurts v. Hoagland*, 114 U. S. 606; and see *Hagar v. Supervisors of Yolo Co.*, 47 Cal. 222.

§ 186.

¹18 N. J. Eq. 54, 68, 1866.

agement of the property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls; making and maintaining partition fences and ditches; constructing ditches and sewers for the drainage of uplands or marshes, which can more advantageously be drained by a common sewer or ditch. This is a well-known legislative power, recognized and treated by all jurisconsults and writers upon law through the civilized world; a branch of legislative power exercised by this State before and since the Revolution, and before and since the adoption of the present constitution, and repeatedly recognized by our courts. The legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land. When the constitution vested the legislative power in the Senate and general assembly, it conferred the power to make these public regulations as a well understood part of the legislative power.” This case is relied upon in all subsequent cases which refer the drainage and levee acts to the police power, or power to legislate for the general welfare.² The position is stated by Wells, J., in *Lowell v. Boston*,³ as follows, referring to the acts for the improvement of meadows: “The action taken therein relates to that in which all have a common interest, or in reference to which all are affected by a common necessity. That common necessity is met, and that common interest secured, by subjecting the individual rights to such modifications as the commissioners may judge to be most practicable to secure the best advantage of all. The natural conflict of rights which would arise if each were left to insist on his own, regardless of consequences to others, is avoided by the intervention of this common agent, by whom they are ad-

²See *O'Reiley v. Kankakee Draining Co.*, 32 Ind. 169; *Trexler*, 76 N. C. 297: *Donnelly v. Pool v. Decker*, 58 Wis. 461.

³111 Mass. 454.

justed with due regard for the interests of all as well as of each." P. 469. The acts in question are likened by Wells, J., to the mill acts, acts in relation to the repair of houses and mills owned by tenants in common, acts for the partition of joint estates, for the regulation of wharves, etc.⁴ The question is elaborately considered in the recent case of *Donnelly v. Decker*,⁵ but no new or different arguments or principles are therein referred to. The general proposition is that, when several estates are affected detrimentally by some common cause which cannot be removed except by some common improvement, then the legislature may direct such improvement to be made at the common expense, under its general power to legislate for the public welfare. If the cases referred to are examined, it will be seen that this general conclusion is inferred from the assumed validity of laws relating to adjoining proprietors and joint estates. But none of these laws attempt to appropriate a man's property to a particular use against his will, and therefore do not support the conclusion which is sought to be derived from them.⁶

⁴ 111 Mass. p. 468.

⁵ 58 Wis. 461, 1883.

⁶ When the authorities are carefully examined, it appears that the view that the drainage acts are referable to the police power, or general welfare power, has very little support. In *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, the decision is by the Chancellor only, but though this view is casually approved by the Court of Errors and Appeals in *State v. Blake*, 36 N. J. L. 442, it is clearly disapproved in *Matter of Drainage along Pequest River*, 41 N. J. L. 175, where such acts are sustained on the ground of their having been in existence when the constitution was adopted and having been acquiesced in ever since.

What is said in *Lowell v. Boston*, 111 Mass. 454, is *dictum* only. *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169, is based wholly upon *Coster v. Tide Water Co.*, *ante*, and subsequent cases in the same State, by implication at least, sanction the view that such works fall under the power of eminent domain. *Ross v. Davis*, 97 Ind. 79; *Neff v. Reed*, 98 Ind. 341; *Lipes v. Hand*, 104 Ind. 503; *Heick v. Voight*, 110 Ind. 279. *Pool v. Trexler*, 76 N. C. 297, is an extreme case and entitled to little respect as an authority outside of North Carolina, as is evident from the following, which contains all that is said by way of argument on the point. "These two powers, 'eminent do-

§ 187. These improvements referable to the eminent domain power.—All the statutes in question provide for constructing drains or levees across the lands of those who are unwilling to have them. Private property is thus devoted to a particular use, permanent in its nature, against the will of its owner. The rights of exclusion, of user and of disposition are interfered with or entirely destroyed. The question is, whether this can be done without an exercise of the power of eminent domain. It is not a question of advantage or disadvantage to the owner, but of constitutional right. The police power, so far as it relates to property, is a power to regulate its use, and is negative or inhibitory in its character. A man cannot be compelled, under the police power, to devote his property to any particular use, however advantageous to himself or beneficial to the public; but he may be compelled to refrain from any use which is detrimental to the public. This is the beginning and the end of the police power over private property. No instance can be cited, outside of the mill and drainage acts, (which are in controversy), in which the owner of private property has been compelled to devote it, or submit to its devotion, to a particular use, by virtue of the police power, or of any other power except that of eminent domain.¹

main,' and 'police regulations,' are distinct, and yet they are frequently confounded. By the one, the property of A is given to B. By the other, the property of A is left in him, but is made subservient to the general welfare. 'Cart-ways,' Bat. Rev. Ch. 104, § 38, furnishes an analogy. Under the power to make 'police regulations,' the land of A is made subservient to the land of B for the purposes of a road. After some contestation the question of the power of the General Assembly was yielded. So in our case

the power of the General Assembly to make the land of A subservient to the land of B for the purpose of drainage must alone be yielded upon the authorities and upon the reason of the thing." This case is followed in Winslow *v.* Winslow, 95 N. C. 24. The case of Donnelly *v.* Decker, 58 Wis. 461, and the late case of Wurts *v.* Hoagland, 114 U. S. 606, complete the list.

§ 187.

¹ Cooley, Const. Lim. chap. 16; Dillon, Munic. Corp. § 93 *et seq.*; Sedgwick Const. Law, pp. 435-441.

Again, if the acts in question are not under the power of eminent domain, then there is no obligation to make compensation for the property appropriated for ditches or levees,² and one proprietor might be compelled to contribute both land and money for an improvement which is no benefit to him. A tract of land which requires drainage may be so situated that it can only be drained by a ditch through another tract which does not require it and would not be benefited by it.³ In such case certainly the drain could only be made under the power of eminent domain. And, in any case, the land occupied by drains or ditches is devoted to a particular use, and this, as we have shown in discussing the mill acts, cannot be done under any branch of the legislative power, except the use be public and compensation be made.⁴ In other words, it can only be done by invoking the eminent domain power.

§ 188. **The question of public use.**—The promotion of the public health is undoubtedly a public use within the meaning of the constitution, and private property may be taken for the construction of drains, levees or other works in order to accomplish this object.¹ In New York it is held that drains can only be constructed for this purpose.² As

² Sedgwick Con. Law, 499–502; *State v. Blake*, 36 N. J. L. 442, 447; *Mugler v. Kansas*, 123 U. S. 623. In nearly all the cases it is assumed that compensation must be made, but in *Donnelly v. Decker*, 58 Wis. 461, the contrary doctrine is distinctly held.

³ *People v. Nearing*, 27 N. Y. 306.

⁴ *Ante*, § 183.

§ 188.

¹ “That the promotion and preservation of the public health is a public purpose, cannot be doubted. The legislation of the State in creating boards of health in cities, villages and towns, and vesting in

them great, if not extreme and arbitrary powers, show this. There is scarcely any one object which has been the subject of more enactments than this, or as to which more power is given to officials over the citizen and his property, and by more summary proceedings.” *Matter of Ryers*, 72 N. Y. 1; also *New Orleans Drainage Co.*, 11 La. An. 338; *Dingley v. Boston*, 100 Mass. 544; *Bancroft v. Cambridge*, 126 Mass. 438.

² *Matter of Ryers*, 72 N. Y. 1. So by statute in Michigan, 1 Howell's Stat. 1882, p. 474.

wet lands are undoubtedly unhealthful, it is evident that the public health may be made the real or ostensible ground of nearly all the drainage laws which have ever been passed. It is never an objection to an exercise of the power of eminent domain that it is instigated by private persons whose private interests will thereby be promoted. So a drain which will in fact promote the public health is none the less a public use because it is sought by particular individuals whose estates will be thereby improved. Most drainage laws, however, are not conditioned upon the public health. Some of these laws permit any one or more persons to construct a drain across the land of others without any consideration of the public health or public welfare.³ Such statutes clearly permit the taking of private property for private use, and are void.⁴ On the other hand a drain through a large tract of wet or swampy land belonging to numerous proprietors, into which all can drain whose lands incline towards it, would seem to be a public use, although the only object accomplished is the drainage and improvement of private property.

³ An act of Connecticut passed in 1853, R. S. 1854, p. 786, permitted *any owner of land* to drain across the land of others. This was construed, but no question made as to its validity, in French *v.* White, 24 Conn. 170.

⁴ Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333; Cypress Pond Draining Co. *v.* Hooper, 2 Met. (Ky.) 350. A statute of Nebraska permitted any three or more persons, being owners of lands wet or liable to be overflowed, to form a corporation for constructing drains or levees for the reclamation of their lands. This act was held void in Jenal *v.* Green Island Draining Co., 12 Neb. 163, 167. The court say: "There are no conditions upon which their right to

locate a ditch depend, except that they are the owners of wet or overflowed land. A ditch may be located and opened across the land of individual owners merely to subserve private interests." A similar law conferring like authority upon any five or more was upheld in Anderson *v.* The Kerns Draining Co., 14 Ind. 199. See also Norfleet *v.* Cromwell, 70 N. C. 634; Pool *v.* Trexler, 76 N. C. 297. In the latter case it is said that such drains may be made to drain the property of one man or a single acre of ground. In Oregon an act which enabled *any person* whose land required draining to open a ditch over the land of others was upheld as being for a public use. Seely *v.* Sebastian, 4 Or. 25.

As has been already observed, a public use does not necessarily mean for the use of the entire community, but for the use of all within a given locality.⁵ Thus a drain for the use of all within a certain district is as much for public use as a school-house for the use of a particular school district. The school-house is for the use of those who have children of school age residing within the school district. The drain is for those who have land needing drainage within the drainage district. The public outside of the school district have no right in the school-house whatever, though all share indirectly in the benefits which result from the schooling there provided. So of the drainage district. The improvement of the land in a particular locality is a benefit to the whole State. The instances of a supply of water or gas for a city or village afford similar analogies. The difference between such a ditch which is kept open and public for the use of a particular district and land taken for a mill or mill-dam is obvious. Unless the mill is for public use, as heretofore explained, the mill and dam become the private property of the person or corporation making the condemnation, as absolutely and exclusively as if it had been acquired by private purchase. Therefore, it seems to us, that a law which provides for the drainage of a given district by means of drains which are for the common use of all the lands within the district, is valid as effectuating a public use within the meaning of the constitution. But a law which enables one or more proprietors to construct a drain across the lands of others for the benefit of their particular estates, is void as authorizing a

⁵ "The number of the private owners benefited do not make them the public; the principle is the same if the number is three hundred, as if it is only three." *Coster v. Tide Water Co.*, 18 N. J. Eq. p. 66. *Ante*, § 161. "The public use or benefit need not extend to the whole public, or any large portion

of it, within the jurisdiction of the legislature. It may be limited to the inhabitants of a small locality, but the benefit must be in common, not to particular persons or estates." *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169, 183.

taking for a private purpose. A law such as we have indicated would be valid, might be special, designating the particular district to be drained, or general, providing for the organization of drainage districts of a *quasi* public character.

As we have before intimated, the legislation on this subject presents almost every conceivable variety of method. And the decisions present almost as much variety of reasoning and conclusion on the subject as the laws present in form. In the succeeding sections we have given a review of the decisions of each State, with such reference to the laws passed upon as will make them intelligible. The diversified and multifarious views expressed in these decisions and the antagonistic conclusions reached are some evidence, at least, that the courts have not found the true philosophy of the drainage question or the true criterion by which to test particular laws. Whether we have suggested them here, we leave the reader to judge.

§ 189. California.—An act incorporated a certain defined district as the Washington Drainage District of Yolo County, created a board of trustees and other officers, and provided for a tax on the district for works to be constructed under the supervision of the board. The object of the act was to secure the drainage of the district and prevent its overflow by the Sacramento River.¹ This act was held valid. The court say: “We think the power of the legislature to compel local improvements, which, in its judgment, *will promote the health of the people*, and advance the public good, is unquestionable.”² An act of 1880³ providing for a division of the whole State into drainage districts, and for an elaborate system of improvements, was declared void on other grounds than those under discussion.⁴

§ 190. Indiana.—In this State drainage acts are upheld,

§ 189.

Yolo Co., 47 Cal. 222.

¹ Acts 1867–8, p. 466.

² Stats. 1880, p. 123.

² P. 233. *Hagar v. Supervisors of*

⁴ *People v. Parks*, 58 Cal. 624.

both under the eminent domain and police powers.¹ But it must appear in each case that the proposed work will be of public utility. “The drainage of a man’s farm, simply to render it more valuable to the owner, would not be a work of public utility, in the constitutional sense of the term; and a corporation, organized and acting for such a purpose, would no more be acting in a public undertaking, than would a company organized and acting for the clearing up of men’s farms and putting them in a better state of cultivation than the proprietors were willing to do, though the public and adjoining proprietors might be, in a substantial degree, benefited by the operation.”² Under the statute now in force it must appear that the proposed drain will improve the public health, benefit a public highway in the county or street of a town or city, or be of public utility. The constitutionality of this statute is no longer regarded as an open question.³

§ 191. *Iowa*.—Drainage for the “public health, convenience or welfare” is held constitutional.¹

§ 192. *Nebraska*.—An act empowering any three or more persons, being owners of wet or overflowed land, to form a corporation for the construction of drains or levees over the land of others, was held void.¹

§ 193. *New Jersey*.—An act for the reclamation of tide-water marshes was passed in 1788, and with various amendments has remained in force to the present time. So also an

§ 190.

¹ *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *O’Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169.

² 14 Ind. p. 202. Approved in *Tillman v. Kircher*, 64 Ind. 104.

³ *Ross v. Davis*, 97 Ind. 79; *Wishmier v. State*, 97 Ind. 160; *Neff v. Reed*, 98 Ind. 341; *Anderson v.*

Baker, 98 Ind. 587; *Lipes v. Hand*, 104 Ind. 503; *Heick v. Voight*, 110 Ind. 279.

§ 191.

¹ *Hatch v. Pottawattamie Co.*, 43 Ia. 442; *Patterson v. Baumer*, 43 Ia. 477.

§ 192.

¹ *Jenal v. Green Island Draining Co.*, 12 Neb. 163.

act for the drainage of swamp or meadow lands.¹ In *Coster v. Tide Water Co.*,² acts of this character were referred to the police power. In the Court of Errors it was held that the construction of dikes, etc., to prevent the overflow of large districts of country, was a public use for which property might be taken. But the drainage of meadows was referred to the police power.³ A special act for the drainage of lands on the upper Passaic was held valid in *State v. Blake*,⁴ and again in the same case in a later volume,⁵ where it was referred to the police power. In 1871 an act was passed for the drainage of wet lands where the owners of a major part of the land to be affected so desired.⁶ In *Matter of Application for Drainage*,⁷ this act was held valid and referred to the eminent domain power. Also in *Matter of Commissioners etc. on Pequest River*.⁸ On an appeal of the latter case to the Court of Errors and Appeals,⁹ the decision of the Supreme Court was affirmed, but the view that the act could be sustained as an exercise of the eminent domain power was questioned, and its validity rested upon the antiquity of such statutes and long acquiescence in them.¹⁰ But, while drainage acts are thus upheld in this State, the power cannot be exercised for the profit of a private corporation not interested in the lands to be affected.¹¹

The act of 1871 above referred to came before the Supreme Court of the United States, on appeal from the court of last resort of New Jersey, and it was held that the act did not deprive an owner of his property without due process of law,

§ 193.

¹ Vol. 1 R. S. 1877, p. 641.

² 18 N. J. Eq. 54.

³ P. 531, *Tide Water Co. v. Coster*,
18 N. J. Eq. 518, 1866.

⁴ 35 N. J. L. 208, 1871.

⁵ 36 N. J. L. 442, 447, 1872.

⁶ Pub. Laws 1871, p. 25.

⁷ 35 N. J. L. 497, 1872.

⁸ 39 N. J. L. 433, 1877.

⁹ 41 N. J. L. 175, 1879.

¹⁰ See the same case again in 42
N. J. L. 553, 1880.

¹¹ *State v. Driggs*, 45 N. J. L. 91.

See also *Coster v. Tide Water Co.*,
18 N. J. Eq. 54, 518.

within the meaning of the Fourteenth Amendment to the Constitution of the United States.^{1 2}

§ 194. *New York.*—Drainage works can only be executed for the public health, the promotion of which is a public use.¹ In the earlier cases wherein drainage laws were sustained, it appeared that the public health would be promoted, although that was not made a condition to the exercise of the powers granted.²

§ 195. *North Carolina.*—Drainage for the benefit of private estates is sustained, first as a public use under the eminent domain power, in *Norfleet v. Cromwell*,¹ and afterwards under the police power, in *Pool v. Trexler*,² and *Winslow v. Winslow*.³

§ 196. *Ohio.*—An act which authorized the construction of drains on the application of one or more persons, without

¹² *Wurts v. Hoagland*. 114 U. S. 606. After reviewing the New Jersey cases, the court say: "This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health), as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the

whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this court upheld the validity of general mill acts in *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9." See *ante*, § 182 n. 2.

§ 194.

¹ *Matter of Ryers*, 72 N. Y. 1, 1878; *Burk v. Ayers*, 19 Hun, 17.

² *Hartwell v. Armstrong*, 19 Barb. 166, 1854; *People v. Nearing*, 27 N. Y. 306, 1863; *Matter of Draining Certain Swamp Lands*, 5 Hun, 116; *Woodruff v. Fisher*, 17 Barb. 224.

§ 195.

¹ 70 N. C. 634.

² 76 N. C. 297.

³ 95 N. C. 24. See also *Williamson v. Canal Company*, 78 N. C. 156.

any consideration of the public welfare, was held void; but it was held that drains, levees, etc., might be constructed when necessary for the "public health, convenience or welfare."¹ Thereupon, in 1859,² an act was passed authorizing County Commissioners, on petition of one or more owners, to establish ditches, drains, etc., when the same are "demanded by or will be conducive to the public health, convenience or welfare." This act was held valid in *Thompson v. Treasurer of Wood County*;³ also, a similar act⁴ passed in 1862.⁵

The Revised Statutes of 1886, § 4511, provide that the trustees of a township may establish a ditch whenever, in their opinion, the same will be conducive to the public health, convenience or welfare. It was held that under this statute a ditch could not be established, the only effect of which would be to render the lands of two proprietors more productive.⁶ "The prosperity of each individual conduces, in a certain sense, to the public welfare, but this fact is not a sufficient reason for taking other private property to increase the prosperity of individual men. The draining of marshes and ponds may be for the promotion of the public health and so become a public object; but the draining of farms to render them more productive, is not such an object." P. 204. The "public health, convenience or welfare" to be promoted have reference to the locality of the ditch. The finding that a ditch, five miles long and extending into two counties, "will be conducive to the public health, convenience and welfare of the *neighborhood*, is a finding that the community generally in the vicinity are benefited, and not merely the lands of the petitioner and others. It is a finding that it is for the public welfare as distinguished from a mere private

§ 196.

¹ *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333, 1858.

² Laws of 1859, p. 58.

³ 11 Ohio St. 678.

⁴ Laws of 1862, p. 93.

⁵ *Sessions v. Crunkelton*, 20 Ohio St. 349.

⁶ *McQuillen v. Hatton*, 42 Ohio St. 202.

advantage."⁷ But an act which authorized the construction of levees whenever, in the opinion of the probate judge, they would be conducive to the health, convenience or welfare of *any number of citizens of his county, or were necessary for the protection of the land of such citizens*, was held invalid, as permitting the taking of private property for private use.⁸

§ 197. *Oregon*.—An act under which *any person* might secure the construction of a ditch over the land of others was held valid, as promoting a public use, in *Seely v. Sebastian*.¹

§ 198. *Wisconsin*.—In this State drainage laws are sustained under the police power.¹

§ 199. *Other States*.—The foregoing embrace all of the decisions which have come to our notice in which drainage laws have been assailed as not being a legitimate exercise of the eminent domain power. Some miscellaneous cases in which they are attacked on other grounds are given in the note.¹ In Illinois drainage laws are provided for by a special provision in the constitution.²

§ 200. *Levees, dikes, etc.*.—Dikes and levees to prevent the overflow of extensive districts of country by streams or tide-waters are undoubtedly a public use.¹ They are a direct and immediate benefit to all the land affected by them. Both the powers of taxation and of eminent domain may

⁷ *Chesbrough v. Commissioners*, 37 Ohio St. 508, 516.

Draining Co. v. Hooper, 2 Met. (Ky.) 350; *Shelley v. St. Charles Co.*, 17 Fed. R. 909.

⁸ *Smith v. Atlantic & Great Western R. R. Co.*, 25 Ohio St. 91, 1874.

² Const. 1870, art. iv. § 31; *Blake v. People*, 109 Ills. 504.

¹ 4 Or. 25.

§ 200.

§ 198.

¹ *Donnelly v. Decker*, 58 Wis. 461.

§ 199.

¹ *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *New Orleans Drainage Co.*, 11 La. An. 338; *Cypress Pond*

¹ *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 523; *Matter of Drainage along Pequest River*, 41 N. J. L. 175, 178; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Norfleet v. Cromwell*, 70 N. C. 634, 639.

be exercised for this purpose.² If the public health will be promoted by such improvements, the case is clear.³ If the public ways or other public means of travel, transportation or communication will be improved or secured from interruption and damage, the case is equally clear.⁴ The only doubt arises, when the only object and effect of such works is the improvement of private property. It seems clear that the mere improvement of private property is not a public purpose, however extensive the tract, however great the improvement, or however numerous the proprietors. If this were not so, the legislature might impose taxes or exercise the power of eminent domain to put particular farms under a higher state of cultivation. But it seems to us there is another view by which the works in question can be sustained.

² In *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, and 518, the act passed upon created a corporation for the reclamation and protection of the tide-water marshes about Newark Bay by means of dikes, drains and other works. Of this act the Court of Errors and Appeal say: "That the legislative authority is competent to effect the end provided for in this act, I can entertain no doubt. The purpose contemplated, is to reclaim and bring into use a tract of land covering about one-fourth of the county of Hudson and several thousand acres in the county of Union. This large district is now comparatively useless. In its present condition, it impairs very materially the benefits which naturally belong to the adjacency of the territory of the State to its navigable waters. It is difficult, from the great expense of such works, to build roads across it, and consequently it has heretofore interposed

a barrier to anything like easy access, except by means of railroads, from one town to another situated upon its borders. To remove these evils and to make this vast region fit for habitation and use seems to me plainly within the legitimate province of legislation; and, to effect such ends, I see no reason to doubt that both the prerogatives of taxation and eminent domain may be resorted to. From the earliest times, the history of the legislation of this State exhibits many examples of the exercise of both these powers for purposes not dissimilar, and by these means, without question, many improvements have been effected. The principle is similar to that which validates the transfer, by legislative authority, of private property to private corporations for the construction of railroads and canals, or the construction of sewers and streets, and the imposition of the expense upon the

Every natural stream is public, in the sense of being for the common use and benefit of the proprietors of all the lands drained by it or subject to its influence, and any improvement of it by dikes or otherwise for the benefit of such lands is a public purpose, as being for the common use and benefit of all such lands as are affected by the improvements. Therefore, the construction of a levee which shall confine the waters of a stream to its channel and prevent the overflow of the adjacent country is a public use for which property may be taken or taxes levied. And similar considerations apply to tide waters. The shores of the sea are public for all purposes, and may be improved, not only for the purposes of navigation, but also to prevent erosion or submersion of the adjacent land. According to this view, dikes and levees to prevent the overflow of streams or tide-waters are a public use *per se*, and it rests absolutely with the legislature to determine when the power of eminent domain shall be exercised for that purpose, and what the extent of benefit must be to justify a resort to that power.⁵ The courts may always protect the individual from the perversion of laws authorizing

lands benefited," p. 520. See also Cooley on Taxation, p. 427.

³ See *Post*, § 201; *ante*, § 188.

⁴ *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *Tide Water Co., v. Coster*, 18 N. J. Eq. 518.

⁵ We do not understand how the taking for a certain definite purpose can be a public use or not, according to the result of an investigation of the circumstances of each proposed exercise of the power for that purpose. A purpose for which property may be taken must be held to be a public use or not, according to the nature and character of the purpose itself. As to whether the power of eminent domain shall be exercised for a purpose in its nature public, and

the time, manner and extent of its exercise, in the absence of special constitutional provisions, are exclusively legislature questions. A contrary view is expressed in a drainage case in 35 N. J. L., p. 505. In *Smith v. Atlantic & Great Western R. R. Co.*, 25 Ohio St. 91, an act which authorized the erection of a levee whenever, in the opinion of the probate judge, it will be conducive to the health, convenience or welfare of any number of citizens of his county, or is necessary for the protection of the land of such citizens or any of them from overflow, was held invalid as authorizing the taking of property for private use. It seems to us this law might be upheld, on the

the appropriation of private property for public use. Levee acts have almost uniformly been upheld by the courts, though they have more frequently been called in question under the power of taxation than under that of eminent domain.⁶ In Louisiana, lands on the banks of the Mississippi are subjected to a levee servitude, by virtue of which the same may be occupied for that purpose without compensation.⁷

§ 201. The public health.—Nothing is more vital to the welfare of the State than the public health, and works calculated to promote the public health, by removing the causes of disease or affording to populous communities a supply of pure air, pure water or means of necessary recreation, are a public use.¹ We have already had occasion to refer to this subject in connection with public parks² and drainage.³ Drains may be constructed or dams destroyed⁴ in order to relieve low grounds of their excessive moisture and render them more salubrious. Low grounds in the neighborhood of populous districts may be filled to abate a nuisance, and the power of eminent domain exercised for this purpose.⁵

§ 202. Irrigation.—The construction of canals, conduits and other works to convey or store water for irrigation in localities where the rainfall is insufficient or too uncertain for

ground that the erection of a levee to confine the waters of a stream within their natural channel is a public use. An act which is in fact for the promotion of a public use may be upheld, though the legislature has declared a use which is not public.

⁶ *Upheld under power of eminent domain:* Tide Water Co. v. Coster, 18 N. J. Eq. 518. *Upheld under taxing power:* Egyptian Levee Co. v. Hardin, 27 Mo. 495; Williams v. Cammack, 27 Miss. 209; Alcorn v. Hamer, 38 Miss. 652; Daily v. Swope, 47 Miss. 367; Boro v. Phil-

lips, 4 Dill. 216; McGhee v. Mathis, 21 Ark. 40; Cooley on Taxation, p. 427; Gould on Waters, § 247.

⁷ See *ante*, § 150.

§ 201.

¹ Matter of Ryers, 72 N. Y. 1.

² *Ante*, § 175.

³ *Ante*, § 188.

⁴ Woodruff v. Fisher, 17 Barb. 224; Talbot v. Hudson, 16 Gray, 417; Miller v. Craig, 11 N. J. Eq. 175.

⁵ Dingley v. Boston, 100 Mass. 544; Bancroft v. Cambridge, 126 Mass. 438.

agricultural purposes, and which are for the use of all those capable of being supplied by them upon terms which may be regulated by law, would seem to be a public use within the meaning of the constitution.¹ Egypt was wholly dependent upon such works for its bountiful crops, and the principle is not unlike that which applies to public drains for the reclamation of low lands.

§ 203. **Taking for the United States.**—Property taken for the use of the general government is taken for a public purpose, for which the State may exercise its power of eminent domain. Thus it has been held that the United States may, through the machinery of the States, take private property for a postoffice,¹ for a fort,² for works to supply the national capital with water,³ or for the purpose of prosecuting the coast survey.⁴ This power has been denied in Michigan.⁵ It seems to us, however, that property taken for the use of the national government, being for the use of all the people of all the States, is certainly for the use of the people of that State where it is located, who would be likely to be especially interested in the improvement to be made.

§ 202.

¹ A canal to conduct water for mining, *irrigation*, manufacturing, household and domestic use was held to be for public use. *Cummings v. Peters*, 56 Cal. 593. The right is expressly upheld in *Lux v. Haggin*, 69 Cal. 255.

§ 203.

¹ *Burt v. Merchants' Insurance Co.*, 106 Mass. 356.

² *In re League Island*, 1 Brews. Pa. 524; *Gilmer v. Lime Point*, 18 Cal. 229.

³ *Reddell v. Ryan*, 14 Md. 444.

⁴ *Orr v. Quimby*, 54 N. H. 590.

⁵ *Trombley v. Humphrey*, 23

Mich. 471, 476. The court say: "In the first place there can be no necessity for the exercise of this right by the States for this purpose, for the authority of the nation is ample for the supply of its own needs in this regard under all circumstances. In the second place, the eminent domain in any sovereignty exists only for its own purposes; and to furnish machinery to the general government under, and by means of which, it is to appropriate lands for national objects, is not among the ends contemplated in the creation of the State government."

§ 204. Taking all of a tract when only a part is required.

—Statutes for widening or opening streets sometimes provide that, where part of a lot is required, the whole may be taken and the part not required sold for the benefit of the improvement. Such statutes are not void, but they cannot be enforced against the will of the owner, as the part not needed for the street would be taken for private use.¹ But the owner may consent to the taking, and thereby a valid title will be acquired by the city.² The taking of the compensation awarded amounts to such consent, and the owner cannot afterwards reclaim the property.³ If the law simply provides that the owner may require the city to take the whole, it is not objectionable, since it is inoperative without the owner's consent.⁴

§ 205. Miscellaneous cases: Settling private controversies.—The legislature of Kentucky passed an act creating a corporation with power to fence a tract of some fifteen hundred acres of land which was subject to annual floods carrying off the fences. The cost was to be made a tax upon the several owners, according to acreage. The law was held invalid as not being for a public purpose.¹ A New York corporation was formed under the general law for the purpose of acquiring certain swamp, marsh and other lands in the County of Kings, which were particularly described in the certificate of incorporation, and to excavate, construct and maintain one or more basins, docks, wharves and piers, and to erect thereon suitable warehouses, mills, furnaces, foundries,

§ 204.

¹ Matter of Albany Street, 11 Wend. 149; Embury *v.* Conner, 3 N. Y. 511; S. C. 2 Sandf. 98; Matter of John and Cherry Streets, 19 Wend. 659; Bennett *v.* Boyle, 40 Barb. 551; Dunn *v.* City Council of Charleston, Harper (11 S. C.) 189; Gregg *v.* Baltimore, 56 Md. 256.

² *Ibid.*

³ Sherman *v.* Kane, 46 N. Y. Supr. Ct. 310; Embury *v.* Conner, 3 N. Y. 511, overruling same case in 2 Sandf. 89.

⁴ Mayor etc. of Baltimore *v.* Cluett, 23 Md. 449, 464; Boulat *v.* Municipality No. 1, 5 La. An. 363.

§ 205.

¹ Scuffletown Fence Co. *v.* McAllister, 12 Bush (Ky.) 312.

factories, shops and such other buildings as might be necessary and proper for docking, loading and unloading vessels, for the storage of goods and for carrying on generally the business of a dock, warehousing and manufacturing company, and in any and every other proper and suitable way promoting and increasing the facilities for commerce, manufactures and business generally. A special act, afterwards passed, authorized the company to condemn any of the lands specified which it could not acquire by agreement, and provided that the basin of the company should at all times be open to public use for all vessels that might apply therefor, but left by far the greater part of the works under the absolute control of the company. The Court of Appeals held that the object was not a public use. "We cannot regard such a project as a public purpose or use which justifies the delegation to this company of the right of eminent domain. The enterprise is, in substance, a private one, and the pretense that it is for a public purpose is merely colorable and illusory. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public."² To take the property of one and transfer it to another in order to settle a private controversy concerning title to the property, is not a taking for public use, however numerous the controversies or however extensive the property in question.³ In 1869 an act

² Matter Application of E. B. W. & M. Co., 96 N. Y. 42, 48. *ering v. Rutty*, 1 S. & R. 511. These are cases growing out of laws for

³ *Van Horne's Lessee v. Dorrancce*, 2 Dall. 304; *Lessee of Pick-* settling disputes between Connecticut and Pennsylvania claimants to

was passed in Pennsylvania to provide for the extinction of irredeemable ground rents upon payment, by the owners of the land out of which they issued, of damages or compensation to be ascertained as provided in the act. This was held invalid as authorizing the taking of private property for private use.⁴

§ 206. Combination of public and private use in the same act or proceeding.—If a private use is combined with a public use in such a way that the two cannot be separated, the whole act is void. Thus, an act which authorized the erection of a dam across a navigable river by a city, *either* for the purpose of water works for the city, *or* for the purpose of leasing the water for private use, was held void.¹ So, in a State where the only kind of mills regarded as a public use are public grist-mills, a statute which authorized the condemnation of property for the erection of a *mill or other machinery* was held void.² In this case the court say: “We have, then, the case of a statute, which, in the employment of a generic phrase, without expressing the different species included in that genus, attempts, by words not separable, to confer a general authority, a part of the patent object of which are within, and others without, the pale of constitutional power. In such case, we have no discretion but to pronounce the entire clause unconstitutional.” So an application under an act to condemn property for purposes, part of which are within, and part not within, the act, will be bad *in toto*.³

property in the latter State. See also *Hoye v. Swan's Lessee*, 5 Md. 237.

* *Palairet's Appeal*, 67 Pa. S. 479.

§ 206.

¹ *Attorney General v. Eau Claire*, 37 Wis. 400. After this decision the act was amended so as to make the water-works compulsory and per-

mit the leasing of only surplus water, and was then sustained. *State v. Eau Claire*, 40 Wis. 533.

² *Sadler v. Langham*, 34 Ala. 311, 333.

³ Thus, under an act for the erection of *grist-mills*, an order of the court condemning land for a *grist-mill, saw-mill and paper-mill* is void. *Harding v. Goodlet*, 3 Verg. 41.

CHAPTER VIII.

MEANING OF THE WORDS "DAMAGED," "INJURED," AND "INJURIOUSLY AFFECTED."

I. *In Statutes.*

§ 207. **Statutes giving damages for change of grade: Indiana.**—These statutes vary so much that we shall notice the decisions of each State separately.

A statute of Indiana provides that, "when the city authorities have once established the grade of any street or alley in the city, such grade shall not be changed until the damages occasioned by such change shall have been assessed and tendered to the parties injured or affected by such change, and such damages shall be collected by the city from the party or parties taking such change of grade in the manner provided for the collections of street improvements."¹ If the city fails to have the damages assessed and paid as required by the statute, a common law action will lie.² An established grade within the statuté is a grade established in pursuance of some ordinance or order of the common council, involving some general plan of improvement or grading of a street or some specific portion thereof.³ Accordingly, where the city engineer and committee on streets agreed with the plaintiff on a grade to which he adapted his building, and afterwards the council fixed a lower grade, this was held not to be a change within the statute.⁴ A change of grade of the sidewalk or part of the street is within the statute.⁵ Where the town of Wabash established the grade

§ 207.

¹R. S. 1881, § 3073.

²La Fayette v. Wortman, 107 Ind.

404.

³Mattingly v. Plymouth, 100 Ind.

545.

⁴Same.

⁵Kokomo v. Mahan, 100 Ind. 242.

of a street with reference to which the plaintiff built, and afterwards the town became a city, and then changed the grade so established, it was held the city was not liable, because it had not established the prior grade.⁶

§ 208. The same: Iowa.—A statute provided that, where a grade had been established and improvements made with respect thereto, and the grade was changed so as to injure or diminish the value of such property, the city making the change should pay to the owner or owners of said property the amount of such damage.¹ Under this statute the damage to both land and buildings may be recovered.² If, however, the property is worth more after the change than before, it has not been damaged, although expense will have to be incurred to adjust it to the new grade.³ Where a new pavement was put down, and the surface at the curb was a few inches lower than the old pavement; but the curb and center of the street remained the same, it was held not to be a change of grade within the statute.⁴ An established grade is one adopted by ordinance or resolution of the council. The fact that a city has worked or improved a street at a particular grade does not make it an established grade within the statute.⁵ The action accrues when the change is actually made, and when any part of the work is done in front of the property.⁶ The remedy given by the statute is exclusive.⁷ The act does not apply to changes which were ordered *before* the law took effect, but which were not executed until afterwards.⁸

⁶ *Wabash v. Alber*, 88 Ind. 428.

§ 208.

¹ *Code*, § 469.

² *Dalzell v. Davenport*, 12 Ia. 437; *Hempstead v. Des Moines*, 52 Ia. 303.

³ *Hempstead v. Des Moines*, 52 Ia. 303.

⁴ *Coates v. Dubuque*, 68 Ia. 550.

⁵ *Kepple v. Keokuk*, 61 Ia. 653.

⁶ *Hempstead v. Des Moines*, 63 Ia. 36. Where an established grade was lowered six feet, and the city first lowered the roadway and the plaintiff recovered damages for that, and afterwards the sidewalks were lowered and the plaintiff brought another suit, it was held that the former suit was a bar.

⁷ *Cole v. Muscatine*, 14 Ia. 296.

⁸ *Cotes v. Davenport*, 9 Ia. 227.

§ 209. **The same: Massachusetts.**—The statute provides that, “where an owner of land adjoining a highway sustains damage in his property by reason of any raising or lowering or other act done for the purpose of repairing such way, he shall have compensation therefor.”¹ Under this statute the abutting owner is entitled to recover for any damages to his property by reason of the proper execution of any such improvement.² Where a street is laid out, the compensation awarded includes such damages as may be occasioned by the construction of the street as proposed in the order of layout;³ but, where a street was laid out in 1861, and a grade established, but the street was not built at such grade, and the city by repairs and otherwise recognized the existing grade, and in 1877 the street was made to conform to the grade so originally established, it was held to be a change of grade within the statute.⁴ If no grade is established when the street is laid out, the establishing of a grade afterwards and bringing the street to such grade is a change within the statute.⁵ The statute has been held to apply to a case where, by removing dirt from in front of premises for the purpose of repairing elsewhere, access thereto was interfered with.⁶ If property abuts on two streets both of which are improved, the damages by the improvement of each street must be kept distinct.⁷ The statute only applies to property abutting on the street where the change is made.⁸ The action accrues when the work is done, and not when the change is ordered.⁹

§ 209.

¹ Statutes, C. 44, §§ 19, 20.

² Flagg v. Worcester, 13 Gray, 601.

³ Ryan v. Boston, 118 Mass. 248; Geraghty v. Boston, 120 Mass. 416; Murphy v. Boston, *Ibid.* 419; Brady v. Fall River, 121 Mass. 262.

⁴ Cambridge v. County Commissioners, 125 Mass. 529.

⁵ Snow v. Provincetown, 109 Mass.

123; Lane v. Boston, 125 Mass. 519.

⁶ Burr v. Leicester, 121 Mass. 241.

⁷ Bemis v. Springfield, 123 Mass 110.

⁸ Wilbur v. Taunton, 123 Mass 522.

⁹ Brown v. Lowell, 8 Met. 172.

§ 210. The same: Minnesota.—The charter of St. Paul provides that, if a grade once established is changed, “all damages, costs and charges arising therefrom shall be paid by the city to the owner of any lot or parcel of land or tenement which may be affected or injured in consequence of the alteration of such grade.” The act prescribed no remedy and a common law action was held proper. It was also held in the same case that the right of action accrued when the change was finally ordered by the proper tribunal, and that an owner need not delay his action until the change was actually made, and that a recovery could be had for all the damages which would be occasioned by the change.¹ A viaduct over a railroad which took all the travel along the street was held to be a change of grade within the statute.²

§ 211. The same: Missouri.—The charter of the city of St. Louis contains the following provision: “The city shall be liable for damages sustained by any owner of real estate upon which permanent buildings shall have been erected by any change of grade of any street upon which such real estate shall front.” Under this provision the city was held liable for damages by a causeway in the middle of the street, thirty-two feet wide, though a space nine feet wide between the causeway and the sidewalk was left on each side of the street at the old grade.¹ So the city was held liable where the grade of a street was ordered to be raised, but was

§ 210.

¹ *McCarthy v. St. Paul*, 22 Minn. 527. It seems to us the decision is wrong as to the time when the cause of action arises in such a case. A change of grade on paper does not injure any one. After a change has been ordered it might be reconsidered before execution. In the meantime an owner might have obtained judgment. See *post*, § 667.

² *Wilkin v. St. Paul*, 33 Minn. 181.

§ 211.

¹ *Stickford v. St. Louis*, 7 Mo. App. 217; affd. 75 Mo. 309. The city contended that the charter only embraced a change of grade over the whole width of the street. On this point the court say: “Such an interpretation would substitute the shadow for the substance. It would allow the city to evade responsibility for every change of grade by leaving a few feet, or even a few inches, untouched along the

not in fact raised to the full height ordered.² The charter of the city of St. Joseph provided for damages to abutting owners, in case of a change of grade which had been previously fixed or established. It was held that a grade might be fixed or established by improving a street at its natural grade without any ordinance in terms fixing the grade.³

§ 212. The same: New Jersey.—Under a statute giving damages for a change of grade, it was held that, where a street is widened and then the grade of the street subsequently changed, the damages occasioned by reducing the new part to the grade of the old must be presumed to have been included in the award for the original taking.¹ Where the statute allows damages only to improved property, an award for property not improved will be void.²

§ 213. The same: New York.—Acts giving damages for a change of grade in the streets of New York City have existed since 1852.¹ There appears to have been very little litigation under these acts which has found its way into the reports. It is held that the remedy provided by the statute is exclusive and that an ordinary suit will not lie.² Also that the right to damages accrues when the work is done, and not when the change is ordered.³

§ 214. The same: Pennsylvania.—An act of 1854 in relation to Philadelphia provided “that, in any alternative

lateral boundaries of the street.

* * * The change of grade contemplated by the charter provision is manifestly any such alteration as will raise or lower the principal current of travel or transportation.”

To same effect, *Dyer v. St. Louis*, 11 Mo. App. 590. See also *Mitchell v. St. Louis*, 14 Mo. App. 600.

²*Schumacher v. St. Louis*, 3 Mo. App. 297.

³*Gibson v. Zimmerman*, 27 Mo. App. 90.

§ 212.

¹*Van Riper v. Essex Road Board*, 38 N. J. L. 23.

²*State v. Sayer*, 41 N. J. L. 158.

§ 213.

¹ Laws of 1852, c. 52, pp. 46-47; Laws of 1867, vol. 2, c. 697, pp. 1748-1750; Laws of 1872, vol. 2, c. 729, p. 1726.

²*Heiser v. New York*, 104 N. Y. 68, affirming 29 Hun, 446.

³*People v. Toll*, 97 N. Y. 203.

that may be made of the regulation of any portion of the city, in conformity with the provisions of this section, whereby damages may ensue to private property, compensation shall be made for such damages, to be ascertained and paid by law as in case of damages for opening streets." This act only applies to the change of an established grade.¹ The right to damages is held to accrue when the new grade has been duly established and confirmed according to law. The owner is not required to wait until the work is completed.²

§ 215. The same: Rhode Island.—A statute gave compensation to abutting owners for damages "by any change in the grade of a highway." Where a grade was recognized by the city as the grade of the street, and was afterwards changed, it was held that the abutting owner was entitled to damages, though the first grade had never been formally established by the board of aldermen.¹ One having a leasehold interest as tenant from year to year is such an owner.² Any claim for such damages was required to be presented to the board of aldermen within forty days after the change was completed; it was held that after the forty days the aldermen had no jurisdiction to allow it.³

§ 216. The same: Tennessee.—A statute provided that, when the owner of a lot desired to build, he might apply to the city authorities and have the grade of the street fixed, and if, after the building was constructed, the grade was changed, he should have compensation for any damages. The grade of a street was established in 1866, and plaintiff raised

§ 214.

¹ *In re Ridge Ave.*, 99 Pa. S. 469; *Philadelphia v. Wright*, 100 Pa. S. 285; Matter of Change of Grade of Germantown Ave., 15 Phila. 413; *In re Levering St.*, 14 Phila. 349; *In re Germantown Ave.*, 14 Phila. 351.

² Matter of Change of Grade of 5th and 6th streets, 12 Phila. 587;

Campbell v. Philadelphia, 108 Pa. S. 300.

§ 215.

¹ *Aldrich v. Providence*, 12 R. I. 241.

² *Gilligan v. Providence*, 11 R. I. 258.

³ *Anness v. Providence*, 13 R. I. 17.

his building to correspond. Two years later the grade was changed. It was held that plaintiff could recover under the statute.¹ It is held that the statute should be liberally construed, and that a grade may be established without an ordinance. If the city council directs its engineer to fix grades, and he does so, such grades are established within the statute.²

§ 217. The same: Wisconsin.—The charter of Milwaukee required the city to establish the grade of all streets, and contained this provision: “When the established grade shall be thereafter altered, all damages, costs and charges arising therefrom shall be paid by the city to the owner of any lot or parcel of land or tenement which may be affected in consequence of the alteration of such grade.” Under this statute it was held that it was no defence to an action for damages by the changing of an established grade, that the city had not established the grade of all its streets;¹ that the doing of the work by the plaintiff in front of his premises pursuant to an order of the council was no bar to his recovery;² that the signing of a petition for a change of grade different from the one ordered was no bar;³ nor the signing of a petition to complete the work already begun.⁴ The building of a causeway forty feet wide in the middle of

§ 216.

¹ *Mayor of Nashville v. Nichol*, 3 Bax. 338. The court say: “We think, however, it is the duty of the court to give a liberal construction to statutes in favor of the right of a citizen to be reimbursed for damages done to his property by city authorities, occasioned by works for the advantage of the general public. The citizen whose property is thus injured, ought not to be required to bear the entire burden, the benefits of which he shares perhaps very slightly, in common with

other inhabitants of the city, the improvements frequently being of no personal advantage to him, whatever.”

² *Chattanooga v. Geiler*, 13 Lea, 611.

§ 217.

¹ *Goodrich v. Milwaukee*, 24 Wis. 422.

² *Pearce v. Milwaukee*, 18 Wis. 428.

³ *Luscombe v. Milwaukee*, 36 Wis. 511.

⁴ *Herzer v. Milwaukee*, 39 Wis. 108.

a street was held to be a change within the statute, though twenty feet was left on each side at the old grade.⁵ The measure of damages is the depreciation in the value of the property caused by the change, and in arriving at this it is proper to consider the cost of adjusting the property to the new grade, the cost of making the change in the street which is a charge upon the lot, the damage to trees if any, and also any benefit which will accrue to the property by the change.⁶ The right of action accrues when the work is done, and not when the order is passed, and suit must be brought by the owner at the former time.⁷

§ 218. **The same: Other States.**—Similar statutes exist, or have existed, in other States, but no adjudications thereon have come to our notice.¹

§ 219. **Statutes giving damages for railroads in streets.**—A statute required compensation to be made for injury to property abutting upon any street upon which a railroad was proposed to be laid. This was held to apply as to any tracks laid after its passage, and that a recovery was not limited merely to damages from change of grade.¹ It was held not to apply to a horse railway,² nor to a railroad crossing a street.³ Where permission to lay a railroad in a street was granted upon condition of paying all damages to private property, it was held that only *actionable* damages were intended.⁴ But

⁵ *Dove v. Milwaukee*, 42 Wis. 108.

§ 219.

⁶ *French v. Milwaukee*, 49 Wis. 584; *Church v. Same*, 34 Wis. 66; *Stadler v. Same*, 34 Wis. 98; *Church v. Same*, 31 Wis. 512; *Stowell v. Same*, 31 Wis. 523; *Tyson v. Same*, 50 Wis. 78.

¹ *Drady v. D. M. & Ft. D. R. R Co.*, 57 Ia. 393; *Merchants' Union Barb Wire Co. v. Chicago, B. & Q. R. R. Co.*, 70 Ia. 105.

⁷ *Tyson v. Milwaukee*, 50 Wis. 78; *contra: McCarthy v. St. Paul*, 22 Minn. 527.

² *Sears v. Marshalltown Street Ry. Co.*, 65 Ia. 742.

§ 218.

³ *Morgan v. Des Moines & St. Louis Ry. Co.*, 64 Ia. 589. But see *New Castle & Franklin R. R. Co. v. McChesney*, 85 Pa. S. 522.

¹ See *Sawyer v. Keene*, 47 N. H. 173; *Healey v. New Haven*, 49 Conn. 394.

⁴ *Sargeant v. Ohio & Mississippi R. R. Co.*, 1 Handy, Ohio, 52.

where the condition was that the railroad company should pay all damages that might accrue to the property owners on the street by reason of the construction of the road, it was held that a recovery could be had, not only for the depreciation in value of the property, but also for interruption and damage to business during the progress of the work.⁵ The measure of damages in such cases is discussed in a subsequent chapter.⁶

§ 220. Statutes giving damages in other cases.—The charter of a railroad company required it “to pay all damages that may arise to any person or persons.” This was held to embrace damages of every description, incidental and consequential, as well as direct, and to apply to those no part of whose land was taken as well as to those over whose land the road was laid.¹ Injury to a building by excavating on the adjoining lot, whereby the foundations were weakened,² also by raising the grade of the street in front, whereby access was impeded and water turned on the property,³ were held to be within the statute.

A statute of Massachusetts provided as follows: “Every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out and making and maintaining their road, or by taking any land or materials as provided in the preceding section.”⁴ The following cases of damage have been held to be within the statute: The draining of plaintiff’s well by a deep cut,⁵ injury to plaintiff’s building

⁵ *St. Louis etc. R. R. Co. v. Capps*, 67 Ills. 607; *S. C.* 72 Ills. 188; *Same v. Haller*, 82 Ills. 208.

⁶ *Post*, § 493. The following cases arose under such statutes, but relate chiefly to the question of damages: *Grand Rapids & Indiana R. R. Co. v. Heisel*, 47 Mich. 393; *Pittsburg, Va. etc. R. R. Co. v. Rose*, 74 Pa. S. 362; *Grafton v. Baltimore & Ohio R. R. Co.*, 21 Fed. R. 309.

§ 220.

¹ *Bradley v. New York & New Haven R. R. Co.*, 21 Conn. 294.

² Same.

³ Same; and *Nicholson v. New York & New Haven R. R. Co.*, 22 Conn. 74; *Burritt v. New Haven*, 42 Conn. 174.

⁴ R. S. 1836, c. 39, § 56; R. S. 1882, c. 112, § 95.

⁵ *Parker v. Boston & Maine R. R.*

by blasting,⁶ and injury by raising the grade of the street in front of plaintiff's property.⁷ An important case arose out of the following facts: Plaintiff owned premises in Lowell abutting on Western avenue. A railroad company crossed the avenue near the plaintiff's premises, and between them and the center of the city. The track was several feet above the grade of the street, and on either side suitable approaches were made. The result of this was to cause numerous detentions to plaintiff, to impair the convenience of the road, and to depreciate the value of plaintiff's property. No part of the plaintiff's property was taken. The court held that the plaintiff was not entitled to damages.⁸ It is difficult to reconcile this case with an earlier one in the same court. A corporation was authorized to erect dams on a stream, by a statute which provided that any person "sustaining any damage to his land" by reason thereof might obtain compensation. The plaintiff had a soap and candle mill on the stream. The dam cut off his water communication with Boston, whereby transportation was rendered more expensive. It was held that he could recover.⁹ In the former case there was an interference with a highway by land, in the latter an interference with a highway by water. In both cases the interference caused a depreciation of the plaintiff's property. In neither case was any part of the plaintiff's property taken.

Under a statute which provided for the payment of "all damages that shall be sustained by any persons in their property * * * by the construction of any aqueducts, etc., for the purpose of the act," it was held an injury by transporting materials over land was embraced by the act and the

Co., 3 CUSH. 107. To the same effect is Trowbridge *v.* Brookline, 144 Mass. 139, where a well was drained by a cut for a sewer, and the statute as to damages was similar.

⁶ Dodge *v.* Commissioners of Essex, 31 Met. 380.

⁷ Gardiner *v.* Boston & Worcester R. R. Co., 9 CUSH. 1.

⁸ Proprietor of Locks and Canals *v.* Nashua & Lowell R. R. Co., 10 CUSH. 385.

⁹ Boston & Roxbury Mill Corporation *v.* Gardner, 2 Pick. 33.

remedy provided by the act was exclusive.¹⁰ An act which provides that the mayor and aldermen of a city shall have power to ascertain any damage done to property by a certain improvement, and to provide for payment of the same, imposes an imperative duty and vests a right of action in the owner of property so injured, whether the city makes such provision or not.¹¹ In Pennsylvania it has been held that an act requiring compensation for any injury or damage to private property by particular works includes all damages, consequential and remote.¹² Under an act which provides for an assessment of damages sustained by reason of any excavation or embankment made in the construction of a railroad, proceedings cannot be had to assess damages for an additional track in a street.¹³ Under an act giving compensation "to all parties interested for all damages by them sustained by reason of the exercise of such powers," it was held that damage to goods could be recovered.¹⁴

II. *In Constitutions.*

§ 221. Constitutional provisions.—When the people of

¹⁰ *Tower v. Boston*, 10 *Cush.* 235.

¹¹ *Gregg v. Mayor etc. of Baltimore*, 56 *Md.* 256.

¹² *Buckwalter v. Black Rock Bridge Co.*, 38 *Pa. S.* 281; *Watson v. Pittsburgh & Connellsville R. R. Co.*, 37 *Pa. S.* 469; *Mifflin v. Railroad Co.*, 16 *Pa. S.* 182; see also *Coster v. Albany*, 52 *Barb.* 276. In the following case it was held that *legal* injury only is intended; *Shrunk v. Schuylkill Navigation Co.*, 14 *S. & R.* 71. Where a canal was transferred by the State to a private company, who agreed to pay "any and all claims for damages or other demands against the commonwealth," the company was held bound to pay only such claims as the commonwealth would have

been held liable for, and hence was held not liable for consequential damages. *Delaware Division Canal Co. v. McKeen*, 52 *Pa. S.* 117. Where a company was authorized to improve a stream and required to file a bond "sufficient to indemnify all persons holding property on said stream for any loss by reason of said improvement," this was held not to enlarge the company's liability so as to make it responsible for consequential damages. *Woodward v. Webb*, 65 *Pa. S.* 254.

¹³ *Cumberland Valley R. R. Co. v. Rhoadarmer*, 107 *Pa. S.* 214.

¹⁴ *Knock v. Metropolitan Railway Co.*, 4 *L. R. C. P.* 131; 38 *L. J. C. P.* 78.

Illinois revised their constitution in 1870, they introduced an important change into the provision respecting the power of eminent domain. The provision reads as follows: "Private property shall not be taken *or damaged* for public use without just compensation."¹ Every other State which has revised its constitution since 1870, except North Carolina, which never had any provision on the subject, has followed the example set by Illinois by adding the word *damaged*, or its equivalent, to the provision in question.² Prior to 1870, as appears from the preceding sections, statutes had been passed in many of the States giving compensation for property damaged or injured in particular cases or for particular public uses. These statutes related mostly to the change of street grades. In England, since 1845, compensation has been allowed by act of Parliament for property "injuriously affected" by the construction of public works.³ The proper meaning of the words *damaged* or *injured* in these late constitutions is now to be considered.

§ 222. The terms "damaged," "injured" and "injuriously affected" are synonymous.—The legal profession are familiar with a distinction between *damage* and *injury*. *Damnum absque injuria* has been the answer to many a law-

§ 221.

¹ Art. II, § 13.

² "Taken *or damaged*." Illinois, art. ii, § 13, 1870; West Virginia, art. iii, § 9, 1872; Missouri, art. i, § 20, 1875; Nebraska, art. 1, § 21, 1875; Colorado, art. ii, § 14, 1876; California, art. i, § 14, 1879. "Taken, appropriated *or damaged*." Arkansas, art. ii, § 22, 1874. "Taken, *damaged* or *destroyed*." Texas, art. i, § 17, 1876. In the new constitution of Pennsylvania, adopted in 1873, a provision was inserted as follows: "Municipal and other corporations and individuals invested with the

privilege of taking private property for public use shall make just compensation for the property *taken, injured or destroyed* by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction." Art. i, § 8. The new constitution of Alabama adopted in 1875 contains the same provision. Art. xiii, § 7. In both States the general provision as to *taking* remains.

³ Land Clauses Consolidation Act, § 68.

suit, which, being interpreted, means that there may be damage or loss without any violation of legal right. In common usage, however, these words are practically synonymous. Webster defines *damage* as "any hurt, *injury* or harm to one's estate;" and *injury* he defines as "any wrong or *damage* done to a man's person, rights, reputation or goods." The people of Pennsylvania, when they said that private property should not be *injured* for public use without compensation, undoubtedly understood and intended the same thing as the people of Illinois, who said that it should not be *damaged* for public use without compensation. The evil to be remedied was the same in both States. In England the word *damaged*, in a statute providing compensation for land damaged, was held equivalent to the words *injuriously affected* and given the same construction.¹ Likewise the words *all damages*, in a similar statute.² So also the word *injured*.³ The word *injured*, in a New Jersey statute, was construed by the courts of that State to mean the same as the words *injuriously affected*, in the English statutes.⁴

§ 223. Damages from change of grade.—All damages resulting to abutting property, by reason of lowering or raising the street in front of it, is within the constitutional provisions in question, and compensation must be made therefore.¹ It is immaterial whether the whole surface of the street is raised or lowered or only a part of it, as where a

§ 222.

¹ Hall *v.* Mayor of Bristol, L. R. 2 C. P. 322; see also Ripley *v.* Great Northern Ry. Co., L. R. 10 Ch. App. 435.

² East & West India Docks etc. Co. *v.* Gattke, 3 McN. & G. 155; New River Co. *v.* Johnson, 2 E. & E. 435; S. C. 105 E. C. L. R. 434.

³ Rickett's Case, 2 Eng. & Irish App. 198.

⁴ Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 558.

§ 223.

¹ Reardon *v.* San Francisco, 66 Cal. 492; Pekin *v.* Brereton, 67 Ills. 477; Bloomington *v.* Brokaw, 77 Ills. 194; Pekin *v.* Winkel, 77 Ills. 56; Elgin *v.* Eaton, 83 Ills. 535; S. C. 2 Ills. App. 90; Atlanta *v.* Green, 67 Ga. 386; Moore *v.* Atlanta, 70 Ga. 611; Castleberry *v.* Atlanta, 74 Ga. 164; Johnson *v.* Parkersburg, 16 W. Va. 402; Hutchinson *v.* Parkersburg, 25 W. Va. 226; McElroy *v.* Kansas City, 21 Fed. L.

causeway is built in the middle,² or an embankment on one side.³ So a recovery may be had where the grade of a street is raised for the purpose of forming a levee,⁴ or where an approach to a bridge is built therein which affects the abutting property by impeding access and by the dust, noise and jarring caused by traffic on the same.⁵ Where a street is opened and graded in one proceeding, compensation should be assessed both for the taking and the grading.⁶ But, where a change is made from the natural grade after a street is opened, compensation must be made for the change.⁷ One who buys property on a street after a grade has been established should improve with reference to the established grade and not with reference to the natural grade. And where, in such a case, the purchaser improved with reference to the natural grade, and the city afterwards cut down the street three feet to the established grade, it was held that no recovery could be had.⁸ Nor does the constitution apply to a change of grade made prior to its adoption.⁹ If a change

257; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. R. 415; *Blanchard v. City of Kansas*, 5 McCrary, 217; *New Brighton v. United Presbyterian Church*, 96 Pa. S. 331; *Pusey v. Allegheny*, 98 Pa. S. 522; *New Brighton v. Peirsol*, 107 Pa. S. 280; *In re Levering Street*, 14 Phil. 349; *In re Germantown Ave. etc.*, 14 Phil. 351; *Werth v. Springfield*, 78 Mo. 107; *Householder v. City of Kansas City*, 83 Mo. 488; *Queen v. Vestry of St. Luke's etc.*, L. R. 6 Q. B. 572; S. C. 7 L. R. Q. B. 148; *Queen v. The Wallasey Local Board of Health*, L. R. 4 Q. B. 351; *Queen v. Eastern Counties Ry. Co.*, 2 A. & E. n. s. 347; S. C. 42 E. C. L. R. 706; *Chicago v. Taylor (U. S.)* Chicago Leg. News, Apr. 7, 1888.

² *Chouteau v. St. Louis*, 8 Mo.

App. 48; see also the following cases under statutes, but involving the same principle: *Stickford v. St. Louis*, 7 Mo. App. 217; affirmed in 75 Mo. 309; *Dore v. Milwaukee*, 42 Wis. 108.

³ *Shawneetown v. Mason*, 82 Ills. 337.

⁴ *Beckett v. Midland Ry. Co.*, 1 L. R. C. P. 241; S. C. 3 L. R. C. P. 82.

⁵ *Stack v. East St. Louis*, 85 Ills. 377.

⁶ *Pusey v. Allegheny*, 98 Pa. S. 522.

⁷ *New Brighton v. United Presbyterian Church*, 96 Pa. S. 331; *Hendrick's Appeal*, 103 Pa. S. 358.

⁸ *Denver v. Vernia*, 8 Col. 399.

⁹ *Folkenson v. Easton Borough*, 116 Pa. S. 523.

of grade is made without the authority of the city, it will not be liable for damages resulting therefrom.¹⁰

§ 224. The same: Decisions in Alabama and Pennsylvania.

—These States have a limited extension of the right to damages, requiring corporations and individuals invested with the power of eminent domain to make compensation for property *taken, injured or destroyed* by the *construction or enlargement of their works, highways or improvements.*¹ In Pennsylvania the question as to what constitutes a *construction* or *enlargement* of a street or highway does not appear to have been discussed. Suits for damages arising from a change of grade, whether from a natural grade or an established grade have uniformly been upheld,² and a liberal construction of the statute has been favored.³ The purport of the decisions is that *any* change of grade is within the provision in question. A different view has been taken in Alabama. One Townsend sued the city of Montgomery to recover for damages to his property by reason of the street in front of it being cut down some twenty feet. The plaintiff recovered a verdict and on appeal to the Supreme Court the provision in question was elaborately considered. The court say: "The next inquiry is, what is, in the meaning of the constitution, a construction or enlargement of a highway? The purposes intended are, as ascertained from all the provisions of the section, to limit and qualify the right of eminent domain, making such limitation and qualification equally operative as to all corporations and individuals invested with the privilege. The section contemplates, that the General Assembly shall provide appropriate proceedings for the pre-ascertainment of the damages, protects the right of appeal

¹⁰ *Werth v. Springfield*, 22 Mo. App. 12. *Hendrick's Appeal*, 103 Pa. S. 358; *New Brighton v. Peirsol*, 107 Pa. S. 280.

§ 224.

¹ *Ante*, §§ 15, 44.

² *New Brighton v. United Presbyterian Church*, 96 Pa. S. 331;

³ *New Brighton v. United Presbyterian Church*, 96 Pa. S. 331.

from the preliminary assessment, and of having the damages assessed by a jury, and requires that the compensation shall be paid before such taking, injury, or destruction,—provisions only applicable and appropriate in case of a resort to the right of eminent domain. In all other cases, the liability of the municipal corporation remains dependent on common law rules, or statutory provisions. *Edmunson v. Pittsburg*, 23 Amer. & Eng. R. R. Cas. 423. Having reference to the subject with which the convention was dealing, there are three interpretations open—to restrict the construction of a highway to its primary meaning, excluding subsequent alterations; or to extend it and include *all* alterations without reference to the primary construction; or only to a class of changes which may be regarded as separate and distinct uses of the right of eminent domain, as distinguished from the first taking or injury. We think that the last meets most fully the purposes of the constitution.

“In laying out a town or city into lots, streets are absolutely necessary as a means of access, without which approach and enjoyment are denied to the lot-owner. They are equally necessary to its growth and development, to its trade, and the various uses and purposes, for which towns and cities are laid out and built. Land-owners, in laying out their lands preparatory to a sale of lots, withhold from sale certain parts at convenient intervals, and set them apart as streets and highways, to be kept open for the public through all coming time, as inducements to the purchase of lots; and the seller derives his compensation from the enhanced value and market price thereby imparted to the lots proper. Although there are no words of grant as to this appendant privilege, the sale of the lots, with the proclaimed attinent streets, is a complete dedication to the use of the lot-holder and the public as highways; as much so as if a deed were executed conveying the easement, or as if they had been condemned to public use under the power of eminent domain. The dedication is not restricted to the use of the street in its natural state; but is

a surrender of its use to the public, as a thoroughfare—safe and convenient way for travel and transportation, extending the entire width, including the sidewalks. As a rule, change of surface is essential to the proper enjoyment of this privilege, and dedication carries with it this right of change. Though the land-owner retains the ultimate fee, his right of property is subservient to the use and enjoyment of the easement by the public; and to the reasonable exercise of the authority of the municipal government to prepare and adapt it, and to make necessary improvements to continue its adaptation, to the public convenience and safety. Authority to make all needed excavations or embankments or alterations, to render the street safe and convenient, is implied in the dedication, which follows the co-terminous soil, into whose-soever hands it may pass. The anticipated size of the town or city, its probable commercial importance, and the proximity of the pass-way to public or business centers, are factors, which should enter into the computation; for all these must be presumed to have been had in view, when the dedication was made.

“It is not the intent and operation of the constitution to infringe the existing rule as to the liability of the city for grading, altering, or improving the streets, farther than is essential to the protection of private property, and the equal distribution of the public burdens. Where land has been dedicated to the public for use as a street, the rule as to the liability of the municipality for subsequent alterations is the same, under the constitution, as if the land had been condemned under the right of eminent domain. In case of condemnation, the constitution does not operate to so restrain the power of municipal corporations over the streets, as to subject them, on each successive alteration and improvement, to liability for damages, when the same could legally, and should have been assessed on the first taking or injury of the property. A double liability is not intended, and unless all ascertainable damages are, or presumed to be assessed at

once, the corporation might be made liable to a double recovery for the same injury. This rule exempts from liability for damages, arising from ordinary and reasonable changes and improvements, which may be due to the natural formation of the surface, or to the increasing wants of the public, —which injuries were capable of being foreseen and ascertained, could and ought to have been naturally anticipated, and are presumed to have been considered and included in the original assessment of compensation. Such changes or improvements are the natural and probable consequences of the uses and purposes for which the land was originally taken, and compensation then awarded; or in case of dedication, for which the owner received consideration in the resultant advantages. *Denver v. Bayer*, 2 Amer. & Eng. Cor. Cas. 465; *L. & Y. Ry. Co. v. Evans*, 16 Beav. 322; *Lawrence v. Gt. No. Ry. Co.*, 16 Q. B. 643.

“But the right of the municipal authorities to change the grade of a street, or alter it in other respects, is not unlimited, nor to be exercised capriciously. It is bounded by the nature of the use, for which the property was dedicated or condemned, and the necessities of a safe and convenient way, having reference to the wants of the community. To limit *construction of its highways*, as employed in the constitution, strictly to its *primary* signification, would exclude cases which come within its spirit, and defeat the particular intent, that compensation shall be made for every injury to private property for public use, in the forms specified; cases which came within the mischief and the constitutional remedy. The dividing line lies between what is necessary to safe and convenient use on the one hand, and what is in excess thereof and not essential thereto, or mere ornamentation on the other. Under this rule, the constitution requires compensation to be made for the extraordinary changes, which may not be due to the natural formation of the surface, nor to the mode of original construction, as then deemed sufficient to a safe and convenient way. A material change,

operating injury to adjoining premises, occasioned by a contingency, which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be increased thereby, or the general appearance of the street improved, is a new description of injury, in the enlarged sense of the constitution, which casts on the property-owner an additional burden, entitling him to compensation. Injuries by the construction of a highway, as provided for in the constitution, include those injuries produced by alterations, which could not have been naturally and reasonably anticipated, and damages for which could not have been legally awarded in the preliminary assessment, if the land is condemned, or if dedicated, which the owner would not be estopped to claim. This construction effectuates the cardinal purposes of the constitution—the protection of private property, and the equal distribution of the public burdens—avoids double compensation; and is applicable alike to all corporations, municipal and other, and individuals invested with the privilege of taking private property for public use. We are aware that we have left a wide margin for diversified opinion; but we cannot lay down a more definite general rule applicable to all cases, where each case is dependent on its special facts and circumstances; as definite, however, as the rule which defines the prospective injuries, for which compensation may be recovered on condemnation of the land for public use. It applies when the municipal corporation is not the owner of the fee. If such owner, other rules may govern.

“It follows, that whether the lowering of the sidewalk to the level of the street is a construction of the highway is a mixed question of law and fact. The court erred in not submitting the ascertainment of the facts to the jury, and in instructing them, that the plaintiff is entitled to recover if his property was injured, without regard to the circumstances or the character of the alteration.”⁴

⁴ City Council of Montgomery v. Townsend, 80 Ala. 489, 433.

§ 225. Damages by railroads in streets.—Where a railroad is laid down in a public street or alley, the abutting property is *damaged* within the meaning of the constitution, to the extent of the depreciation caused by the construction and operation of the road.¹ It is immaterial whether the fee of the street is in the public or in the adjoining owner.² So a recovery may be had for damages caused by laying an additional track in a street,³ or by moving a track nearer the plaintiff's property.⁴

§ 226. Damages by other uses of streets.—Damages resulting to abutting property by any improvement or use of streets for public purposes are undoubtedly within the constitution. The construction of viaducts and tunnels in streets, though often of great public utility, is frequently attended with great damage to property in the immediate

§ 225.

¹ *Columbus & Western Ry. Co. v. Withrow*, 82 Ala. 190; *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429; *Chicago & Western I. R. R. Co. v. Ayers*, 106 Ills. 511; *Pittsburg, Ft. Wayne & Chicago R. R. Co. v. Reide*, 101 Ills. 157; *Chicago, M. & St. Paul Ry. Co. v. Hall*, 90 Ills. 42; *S. C. 8 Ill. App. 621; Mix v. La Fayette etc. R. R. Co.*, 67 Ills. 319; *Stetson v. Chicago & Evanston R. R. Co.*, 75 Ills. 74; *Patterson v. Chicago, D. & V. R. R. Co.*, 75 Ills. 588; *Chicago & Pacific R. R. Co. v. Francis*, 70 Ills. 238; *Stone v. Fairbury, etc. R. R. Co.*, 68 Ills. 394; *Chicago & Western Indiana R. R. Co. v. Berg*, 10 Ill. App. 607; *Same v. George*, *Id.* 646; *Same v. Phillips*, *Id.* 648; *Chicago & Eastern Ill. R. R. Co. v. Loeb*, 8 Ill. App. 627; *Gottschalk v. C. B. & Q. R. R. Co.*, 14 Neb. 550; *Mollandin v. Union Pacific R. R. Co.*, 4 McCrary, 290; 14 Fed. R. 394; *Denver v. Bayer*, 7

Col. 113; *S. C. 2 Pacific R. 6; Queen v. Eastern Counties Ry. Co.*, 2 A. & E. n. s. 347; 42 E. C. L. R. 706; *Duncan v. Penn. R. R. Co.*, 94 Pa. S. 435; *S. C. 13 Phil. 68; Pennsylvania R. R. Co. & Appeal*, 115 Pa. S. 514; *Beckett v. Midland Ry. Co.*, 1 L. R. C. P. 241; affirmed, 3 L. R. C. P. 82; *Frankle v. Jackson*, 30 Fed. R. 398; *Williams v. Galveston etc. R. R. Co.*, 1 Tex. App. Civil Cas. 131; *Galveston etc. Ry. Co. v. Graves*, *Ibid.* 301; *Belt Line St. Ry. Co. v. Crabtree*, 2 Tex. App. Civil Cas. p. 579; *Galveston etc. R. R. Co. v. Eddins*, 60 Tex. 656; *Same v. Bock*, 63 Tex. 245; *Same v. Fuller*, 63 Tex. 467; *Texas etc. R. R. Co. v. Goldberg*, 68 Tex. 685.

² *Denver v. Bayer*, 7 Col. 113; *Gottschalk v. C. B. & Q. R. R. Co.*, 14 Neb. 550.

³ *P. Ft. W. & C. R. R. Co. v. Reich*, 101 Ills. 157.

⁴ *Patent v. Phil. & Reading R. R. Co.*, 14 Weakley Notes, (Pa.) 545.

vicinity.¹ For all such damage a recovery may be had.² Where a city erected a tank and steam engine in front of plaintiff's property, for the purpose of supplying water to its citizens, which caused smoke and cinders to be thrown upon his property and depreciated its value, it was held that he could recover.³ In Missouri the erection of telephone poles in a street is held not to come within the constitutional provision as to damage.⁴ But we think this is clearly an error.⁵

§ 227. Impeding access to premises by interfering with public ways not in front of same.—We have already seen that if, by any authorized use or improvement of the street in front of property, access thereto is impeded or it is otherwise depreciated in value, the property is *damaged* and a recovery may be had. But it frequently happens that a public improvement on a street or public way affects the value of property which does not abut upon the improvement, and the question is whether in such case the property is *damaged or injuriously affected*. This question has received careful consideration both in England and the United States.

In the case of *McCarthy v. Metropolitan Board of Works*,¹ the plaintiff, McCarthy, resided and carried on business as a dealer in lime, brick, sand, ballast and other building materials on premises near a dock, known as Whitefriars' Dock, which was a public dock on the Thames. The dock was separated from plaintiff's premises by a public street twenty feet wide and the distance from this street to

§ 226.

¹ *Chicago v. Rumsey*, 87 Ills. 348; see *Souch v. East London Ry. Co.*, 42 L. J. 477.

² *Ante*, § 225: *Chicago v. Taylor*, U. S. Chicago Legal News, April 7, 1844.

³ *Morrison v. Hinkson*, 87 Ills. 117.

* *Julia Building Association v. Bell Telephone Co.*, 88 Mo. 258.

⁵ See *ante*, § 131.

§ 227.

¹ L. R. 7 C. P. 508; affd. in Exch. Chamber, L. R. 8 C. P. 191 (5 Moak's Rep. 256); affd. in House of Lords, L. R. 7 Eng. & Irish App. 243 (10 Moak's Rep. 1).

the river along the dock was 352 feet. The dock was largely used by the plaintiff in the way of his business, but he had no right or easement in the dock other than as one of the public, nor was there appurtenant or otherwise belonging to his premises any other right or privilege in or to the dock. By reason of its proximity to the plaintiff's premises, and the access thereby afforded to and from the Thames, the premises were rendered more valuable to sell or occupy with reference to the uses to which any owner might put them. In the execution of the works authorized by the Thames embankment acts, a solid embankment was carried along the foreshore of the Thames, thus permanently stopping up and destroying Whitefriars' Dock. By reason thereof access along the dock from the plaintiff's premises to and from the Thames was prevented, and his premises were permanently damaged and diminished in value. The plaintiff recovered judgment in the Court of Common Pleas, which held that his premises were injuriously affected, and this decision was affirmed by the Exchequer Chamber and House of Lords. Many elaborate opinions were delivered in which the grounds of the decision were fully considered and all prior decisions touching the questions in issue were reviewed. We shall refer to the principles of this case further on. The McCarthy case was fully approved by the House of Lords in Caledonia Ry. Co. v. Walker's Trustees,² which involved a similar state of facts. There are many other English cases which go upon the same ground.³

² 7 Appeal Cas. 259.

³ Chamberlain v. The West End of London etc. Ry. Co., 2 Best & Smith, 605; 110 E. C. L. R. 604; aff. same, 617; Glover v. North Staffordshire Ry. Co., 20 L. J. n. s. Q. B. 376; Wood v. Stourbridge Ry. Co., 16 Q. B. n. s. 222; 111 E. C. L. R. 221; Cameron v. Charing Cross Ry. 16 C. B. n. s. 430; 111 E. C. L. R.

430; 33 L. J. C. P. 313; Senior v. Metropolitan Ry. Co., 2 H. & C. (Ech.) 258; Wadham v. Northeastern Ry. Co., 14 L. R. Q. B. 747. But, where the obstruction is temporary only, being occasioned by the construction of the works, the premises are not *injuriously affected* within the meaning of the Lands Clauses Act, and compensation must

In *Rigney v. Chicago*,⁴ it appeared that Rigney owned an improved lot on Kinzie street, which street was intersected at right angles by Halsted street, at a point 220 feet west of Rigney's property. The city built a viaduct on Halsted street over Kinzie street, so as entirely to prevent access to Halsted street from Kinzie except by stairs. The evidence showed that Halsted street was an important thoroughfare, upon which horse car lines were operated, affording communication with all parts of the city. No change whatever was made in Kinzie street in front of Rigney's property or elsewhere, but, as a result of the construction of the viaduct, and cutting off access to Halsted street along Kinzie street, Rigney's property was depreciated one-fourth or more. The Supreme Court of Illinois held that Rigney's property was *damaged* within the meaning of the constitution.⁵ These cases settle the doctrine that an obstruction or interference with a public street or way need not necessarily be in front of or contiguous to the property claimed to be affected thereby, in order to authorize a recovery. It is sufficient if it is such an obstruction or interference as produces a diminution in the *value* of the property, as distinguished from mere personal inconvenience to the owner.⁶

A recent case in Missouri is apparently in conflict with these views. The plaintiff's premises were situated upon High street, which was crossed by a railroad two blocks or more away. The crossing was of such a character as completely to obstruct the street at that point. Two streets intersected High street, at right angles, between the plaintiff's premises and the crossing. The jury found that the

be sought under a different provision. *Rickett v. Metropol. Ry. Co.* 5 Best & Smith, 149, 117 E. C. L. R. 149; affd. L. R. 2 House of Lords, 175. See the case of the Caledonian Railway Co. *v. Ogilry*, 2 Macy. Sc. App. 229; *Regina v. Met. Board of Works*, 4 L. R. Q. B. 358.

⁴ *Rigney v. Chicago*, 102 Ills. 64.

⁵ A somewhat similar case is found in *East St. Louis v. Lockhead*, 7 Ill. App. 83; also *East St. Louis v. O'Flynn*, 19 Ill. App. 64.

⁶ *Caledonian Ry. Co. v. Walker's Trustees*, 7 Appeal Cas. 259.

plaintiff's premises were damaged or depreciated to the amount of two thousand dollars, and he recovered judgment for that sum. The Supreme Court reversed the case, holding that the plaintiff's damages were the same in kind as those suffered by the public generally, and that for such damages no recovery could be had, even under the word *damaged* in the new constitution.⁷ If the plaintiff's premises were depreciated in value by reason of the obstruction complained of, then, it seems to us, both the premise and conclusion of the court are wrong. When property is so situated with respect to a public way that its permanent obstruction depreciates its market value, then the owner of the property suffers a *special* and *peculiar* damage by reason of such obstruction, different from that of the public generally.⁸ It is tacitly conceded by the Missouri court, and is unquestionably the law, that, if the plaintiff's damages were special and peculiar, then he had a right of action under the constitutional provision in question. The right to damages cannot be reduced to a question of distance, but depends upon the fact of the market value of the premises being actually depreciated by reason of the obstruction or improvement. The point was fully considered in the McCarthy case, and in reference to it Justice Bramwell says: "If it is to be asked where the line is to be drawn,

⁷ *Rude v. St. Louis*, 93 Mo. 408; 6 S. W. R. 257.

⁸ Where property is so situated with respect to any kind of a public nuisance that it is permanently depreciated in value if the nuisance is regarded as permanent, or the value of its use is lessened if it is regarded as temporary, then the owner of the property suffers a special and peculiar damage, different from that of the public generally, for which a private action will lie. *Stetson v. Faxon*, 19 Pick. 147;

Francis v. Schoellkoff, 53 N. Y. 152; *Givens v. Van Studdiford*, 4 Mo. App. 498; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Blane v. Khimpke*, 29 Cal. 156; *Frink v. Lawrence*, 20 Conn. 117; *Brown v. Watrous*, 47 Me. 161; *Ottawa Gas Light Co. v. Graham*, 28 Ills. 73; *Illinois Central R. R. Co. v. Grabill*, 50 Ills. 242; *Attorney General v. Lonsdale*, 7 L. R. Eq. Cas. 390. See also opinions in the McCarthy case, *ante*.

I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place ten miles away, if there was no other within twenty of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected for present or other purposes, or the man, whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were one thousand claims of 1,000*l.* each. If they are well founded, 1,000,000*l.* of property is destroyed, and why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?"⁹

§ 228. Competing ferries, bridges, etc.—It has been held, by the Supreme Court of West Virginia, that where a statute prohibited another ferry within half a mile of one already established, the statute would include a toll-bridge as well as a ferry, and that the diminution in value of the ferry by reason of the establishment of a toll-bridge within the prohibited distance was a *damage* and not a *taking* within

⁹ McCarthy *v.* Metropolitan Board of Works, L. R. 8 C. P. 191, 210. In the House of Lords Lord Penzance gives expression to similar views as follows:

"It was asked, in argument, where are the claims to compensation to stop, if the rule is so applied? The answer, I think is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attached to the premises in question by reason of their proximity to, or relative position with, the highways obstructed, and that this special value has been permanently destroyed or abridged by the

obstruction. If this limit be thought to be a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking, for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position relatively to the highway which they occupy." Metropolitan Board of Works *v.* McCarthy, L. R. 7 Eng. & I. App. 243, 214.

the constitution.¹ So the English courts have held a similar injury to be an *injurious affecting*.²

§ 229. Interference with water rights.—In *Duke of Buccleuch v. Metropolitan Board of Works*,¹ the plaintiff's property consisted of a leasehold interest in a mansion house and grounds abutting on the Thames River. He not only had free access to the river, but the grounds were secluded and quiet by reason of the river frontage and thereby rendered more valuable to sell or occupy. The defendant constructed an embankment along the river frontage which was to serve as a public highway. The result of this was to cut off access to the river and to destroy the quiet and seclusion of the premises. It was held that the plaintiff was entitled to recover the full amount of the depreciation of his premises.² So an interference with access to a dock on a stream by a bridge is within the constitutional provision as to damage.³ But damage which results to a lower proprietor by changes in the flow of a stream in consequence of the removal of shoals is not actionable.⁴ The right to recover for diverting the waters of a stream to the damage of a lower proprietor was referred to this provision of the constitution in *Reading v. Althouse*,⁵ though we think such a diversion is clearly a *taking*, as shown in a previous chapter.⁶

§ 228.

¹ *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396. According to the views of the author, such an interference with an *exclusive* right is a *taking*. See *ante*, §§ 137, 138.

² See also *Hopkins v. The Great Western Railway Co.*, L. R. 2 Q. B. D. 224; *Queen v. Cambria Railway Co.*, L. R. 6 Q. B. 422.

§ 229.

¹ 5 L. R. Ex. 221; affd. 5 L. R. Eng. & Irish App. 418.

² Compare *Regina v. Metropolitan Board of Works*, L. R. 4 Q. B. 358; 38 L. J. Q. B. 201.

³ *Chicago etc. R. R. Co. v. Stein*, 75 Ills. 41; *Chicago & Alton R. R. Co. v. Maher*, 91 Ills. 312. It has been held in Pennsylvania that an interference with the feeders of an artificial stream which had flowed for over a century was to be regarded as an *injury* rather than a *taking* under their present constitution. *City of Reading v. Althouse*, 93 Pa. S. 400.

⁴ *Rhodes v. Airedale Drainage Comrs.*, L. R. 1 C. P. Div. 402; s. c. Same p. 380.

⁵ 93 Pa. S. 400.

⁶ *Ante*, § 62.

§ 230. Dust, smoke, noise, vibration, etc.—A recovery may be had for damage caused by dust and dirt drifting upon one's premises from a bridge or embankment,¹ or by smoke and cinders from a locomotive or other engine.² Damage arising from the fact that premises can be overlooked from a railroad embankment, or by persons traveling over the same in coaches, have been held not to be within the English act;³ also damages caused by vibrations made by passing trains.⁴

§ 231. Miscellaneous cases.—Obstructing the access of light to premises is a damage for which a recovery may be had.¹ It has been held in Illinois that lots adjacent to a railroad, no parts of which were taken, were *damaged* to the extent of "the depreciation in market value of the same by reason of the construction and maintenance of the road."² Plaintiffs had a rifle range, and, for the purpose of maintaining it, had an interest in three fields in a straight line. On one field was the range. The plaintiffs had a verbal arrangement with the owner of the next field, revocable on notice, by which they paid him forty-nine pounds a year liquidated damages. The third field was leased to the plaintiffs. A road was constructed through the middle field, which rendered the range useless for the purpose for which plaintiffs held it. It was held that the interest of plaintiffs in the first and third fields was injuriously affected.³ Where

§ 230.

¹ *Turner v. Sheffield & Rotherham R. R. Co.*, 10 M. & W. 425; *East and West India Docks and Birmingham Junction Ry. Co. v. Gattke*, 20 L. J. n. s. Ch. 217; *Stack v. City of East St. Louis*, 85 Ills. 377.

² *Stone v. Fairbury, Pontiac & North Western Ry. Co.*, 68 Ills. 394; *City of Morrison v. Hinkson*, 87 Ills. 587.

³ *In re Penny*, 7 Ellis & B. 660; 90 E. C. L. R. 658; 26 L. J. Q. B. n. s. 225.

⁴ *Brand v. Hammersmith City Ry. Co.*, L. R. 1 Q. B. 130; S. C. (Exch. Cham.) L. R. 2 Q. B. 223; S. C. (House of Lords) L. R. 4 Eng. & Irish App. 171.

§ 231.

¹ *Eagle v. Charing Cross Ry. Co.*, 2 L. R. C. P. 688; *Turner v. Sheffield & Rotherham R. R. Co.*, 10 M. & W. 425.

² *Eberhart v. Chicago, M. & St. P. Ry. Co.*, 70 Ills. 347.

³ *Holt v. The Gas Light & Coke Co.*, 7 L. R. Q. B. 728.

a railroad company owned property abutting on the south side of a street, and constructed and operated an elevated road thereon, it was held that the plaintiff, who owned property across the street, could not recover for damages thereto by reason of the smoke, noise, dust, etc., caused by the operation of the road.⁴

§ 232. The words in question were intended to enlarge the right to compensation.—Of this there can be no question. Any other construction would render the words nugatory. They are “an extension of the common provision for the protection of private property.”¹ “The words, *injured or destroyed*, were not used in vain and without meaning. It was intended that they should have effect, and unless they operate to impose a liability not previously existing, they are without operation.”²

⁴ Pennsylvania R. R. Co. v. Lipincott, 116 Pa. S. 472.

§ 232.

¹ Transportation Co. v. Chicago, 99 U. S. p. 642.

² City Council of Montgomery v. Townsend, 80 Ala. 489, 492. To the same effect are Hot Springs R. R. Co. v. Williamson, 45 Ark. 429; Reardon v. San Francisco, 66 Cal. 492; Denver v. Bayer, 7 Col. 113; Rigney v. Chicago, 102 Ills. 64; Gottschalk v. Chicago, Burlington & Quincy R. R. Co., 14 Neb. 550; Omaha & Republican Valley R. R. Co. v. Struden, 22 Neb. 343; Johnson v. Parkersburg, 16 W. Va. 402. In Galveston etc. R. R. Co. v. Fuller, 63 Tex. 467, the Supreme Court of Texas says: “This language is broader than that used in the former constitutions of this State, and was doubtless intended to meet all cases in which, even in the proper prose-

cution of a public work or purpose, *the right or property of any person, in a pecuniary way, may be injuriously affected by reason of the thing being made thereby less valuable*, or its use by the owner restricted by the public use to which it is wholly or partially applied, without compensation having been first made to the owner. It is also not improbable that it was intended, by the language found in the present constitution, to meet and correct evils which had sometimes been thought to result to the property-owner from a narrow and technical meaning sometimes put by the courts upon the word ‘taken’ used in the former constitutions of this State and in the constitutions of the most of the other States. The word ‘property,’ as used in the section of the constitution referred to, is doubtless used in its legal sense, and means not only the thing owned, but also

§ 233. **They include any physical injury to property not held to be a taking.**—In the chapters on What Constitutes a Taking, we have endeavored to show that any physical injury to property is a taking, but all the decisions do not bear out this conclusion. In States which hold that there is any kind of physical injury which is not a taking, the words in question would clearly cover such physical injury. Thus any invasion of one's premises by water or gases, or by casting upon them smoke or cinders, or affecting them by vibrations, if not held to be a *taking*, would certainly be a *damage* or *injury* within the constitutional provisions now under consideration.

§ 234. **Also any interference with private rights not held to be a taking.**—We have also endeavored to show that any interference with any *private right* appurtenant to property, such as the right of support, the right to pure air, etc., was a *taking* for which compensation must be made under our constitutions as they existed prior to 1870. Many courts, however, have held otherwise. We think it clear that, where such interference is held not to be a taking, it must be held to be a *damage* or *injury*. So far, we think, no question can

every right which accompanies ownership and is its incident. Thus considered, under the rules established by the great weight of judicial decisions, and opinions of elementary writers eminent for their learning, the facts of this case amount to a taking of private property for a public use." p. 469. * * * * "The word 'damaged' is evidently used in the sense in which the word 'injured' is ordinarily understood. By damage is meant 'every loss or diminution of what is a man's own, occasioned by the fault of another,' whether this results directly to the thing owned, or be but an interference with the

right which the owner has to the legal and proper use of his own. If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto; that is, if an injury, not suffered by that particular property or right only in common with other property or rights in the same community or section, by reason of the general fact that the public works exists, be inflicted, then such property may be said to be damaged." p. 470.

arise as to the interpretation of the words under consideration.

§ 235. And, generally, any damage to property arising from an interference with a right, public or private, which does not amount to a taking.—After forty years of litigation in England over the proper construction of the words *injuriously affected*, we think it may now be regarded as settled, that they include any damage to property produced by an interference with a right, either public or private, which the owner or occupier is entitled to make use of in connection with the property, and the loss or impairment of which renders the property less valuable.¹ In McCarthy's Case the Lord Chancellor says: “My Lords, in his very able argument at your Lordships' bar, Mr. Thesinger stated what he would rely upon as a definition of the right to compensation, and, having considered this case very fully, I myself should not be disposed to find fault with any part of that definition, although definitions are always matters of very considerable difficulty. Mr. Thesinger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject, was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value.”² Substantially the same test is adopted by the Supreme Court of Illinois in interpreting the word “damaged” in the constitution

§ 235.

¹ The doctrine is settled and the cases reviewed in McCarthy *v.* Metropolitan Board of Works, L. R. 7 Eng. & Irish App. 243, and

Caledonian Railway *v.* Walker's Trustees, L. R. 7 App. Cas. 259.

² Metropolitan Board of Works *v.* McCarthy, 7 E. & I. App. Cas. 243, 253.

of that State. "In all cases," says the court, "to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."³ Speaking of the same word in the constitution of Nebraska, the Supreme Court of that State say: "It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large."⁴ The test here proposed is one which can be readily applied in all cases, which gives ample scope to the words in question, and which affords full protection to the owners of private property, without casting any unnecessary burden upon those engaged in works of a public nature.

§ 236. Damages not embraced by the words in question.

—It is evident that the rule of interpretation laid down in the last section will not embrace every species of loss or depreciation to property which is due directly to public improvements. Unless the owner is disturbed in the enjoyment of some *right* which he is entitled to make use of in connection with his property, he cannot recover. If the loss or depreciation arises from the mere proximity of the work or improvement, as from its unsightly nature or its incongruity with the uses to which the neighboring property is put, there can be no recovery. There are no decided cases to which we

³ Rigney *v.* Chicago, 102 Ills. 64, 81. This language is quoted and approved as a proper interpretation of the Illinois constitution by the Supreme Court of the United States in the recent case of Chicago *v.*

Taylor, Chicago Legal News, April 8, 1888.

⁴ Gottschalk *v.* Chicago, Burlington & Quincy R. R. Co., 14 Neb. 550, 560.

can refer on this point, but we can easily illustrate our meaning. Suppose the public authorities purchase or condemn a lot in a fashionable residence locality and erect and maintain a jail thereon, and suppose the direct effect is to depreciate the surrounding property twenty-five to fifty per cent. Is the property so depreciated *damaged*, *injured*, or *injurious*ly affected within the meaning of the provisions in question? We answer in the negative, because the owners have not been disturbed, either in the enjoyment of their estates, or of any right connected with their estates. Their property and rights remain as before. The same effect might be produced if an individual should establish on the same lot a boarding-house, a school or a factory. It seems' to us the true rule is that, unless the depreciation is due to the disturbance of some *right*, no recovery can be had. In any other case the loss is the same as is often sustained by one proprietor by the lawful use of adjacent or neighboring property, and is *damnum absque injuria*.¹

§ 236.

¹The leading cases in the United States on the construction of the words in question are, Hot Springs R. R. Co. v. Williamson, 45 Ark. 429; City Council of Montgomery v. Townsend, 80 Ala. 489; Reardon v. San Francisco, 66 Cal. 492; Denver v. Bayer, 7 Col. 113; Atlanta v. Green, 67 Ga. 386; Rigney v. Chicago, 102 Ills. 64; Chicago & Western Indiana R. R. Co. v. Ayres, 106 Ills. 511; Gottschalk v. Chicago, Burlington & Quincy R. R. Co., 14

Neb. 550; Galveston etc. R. R. Co. v. Fuller, 63 Tex. 467; Johnson v. Parkersburg, 16 W. Va. 402. The leading cases in England are McCarthy v. Metropolitan Board of Works, 7 Eng. & I. App. 243; Caledonian Railway v. Walker's Trustees, 7 App. Cas. 259. Damages by reason of negligence in the construction of works are, of course, not included. Edmundson v. Pittsburgh etc. R. R. Co., 111 Pa. S. 316.

CHAPTER IX.

THE STATUTORY AUTHORITY.

§ 237. **Power of the legislature generally.**—The power of eminent domain, being an incident of sovereignty, is inherent in the federal government and in the several States, by virtue of their sovereignty.¹ It does not exist in any subordinate political division or public corporation unless granted by the sovereign power. Consequently it does not exist in any territorial government unless it has been expressly granted by congress.² This power, with all its incidents, is vested in the legislatures of the several States by the general grant of legislative powers contained in the constitution. From this it follows, *first*, that the power can only be exercised by virtue of a legislative enactment;³ *second*, that the time, manner and occasion of its exercise are wholly in the control and discretion of the legislature, except as restrained by the constitution.⁴

§ 237.

¹ *Ante*, §§ 1-3; *Kohl v. United States*, 91 U. S. 367; *Darlington v. United States*, 82 Pa. S. 38²; *Baltimore & Ohio, R. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va. 812, 841.

² *Newcomb v. Smith*, 1 Chand. Wis. 71.

³ *Leeds v. Richmond*, 102 Ind. 372; *Bethum v. Turner*, 1 Me. 111; *Parham v. Decatur County*, 9 Ga. 341; *Sholl v. German Coal Co.*, 118 Ills. 427; *Schmidt v. Densmore*, 42 Mo. 225.

⁴ *Bachler's Appeal*, 90 Pa. S. 207; *Central Branch U. P. R. R. Co. v. Atchison, T. & S. F. R. R. Co.*, 28

Kan. 453; *Seacomb v. Milwaukee etc. R. R. Co.*, 49 How. Pr. 75; *Swan v. Williams et al.*, 2 Mich. 427. In the last case the court say: "It rests in the wisdom of the legislature to determine when, and in what manner, the public necessities require its exercise, and with the reasonableness of the exercise of that discretion courts will not interfere." *Wilkin v. First Div. of St. Paul & Pacific R. R. Co.*, 16 Minn. 271; *Weir v. St. Paul, Stillwater & Taylor's Falls R. R. Co.*, 18 Minn. 155; *Roanoke City v. Berkowitz*, 80 Va. 616; *post*, § 238.

§ 238. The necessity for exercising the power is exclusively for the legislature.—Whether the power of eminent domain shall be put in motion for any particular purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the legislature.¹ “When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance.”²

§ 238.

¹ Aldridge *v.* Tuscumbia, Courtland & Decatur R. R. Co., 2 Stew. & Por. 199; Sadler *v.* Langham, 34 Ala. 311; Gilmer *v.* Lime Point, 18 Cal. 229; Sherman *v.* Brick, 32 Cal. 241; Lent *v.* Tillson, 72 Cal. 404; Whiteman’s Executrix *v.* Wilmington & Susquehanna R. R. Co., 2 Harr. (Del.) 514; Parham *v.* Justices etc. of Decatur County, 9 Ga. 341; Chicago, Rock Island & Pacific R. R. Co. *v.* Town of Lake, 71 Ills. 333; Water Works Co. *v.* Burkhardt, 41 Ind. 364; Bankhead *v.* Brown, 25 Ia. 540; Cherokee *v.* The S. C. & I. F. Town Lot & Land Co., 53 Ia. 279; Challiss *v.* Atchison, T. & S. F. R. R. Co., 16 Kan. 117, 126; Talbot *v.* Hudson, 16 Gray, 417, 424; Haverhill Bridge Props. *v.* County Coms. of Essex, 103 Mass. 120; Swan *v.* Williams, 2 Mich. 427; Dickey *v.* Tennison, 27 Mo. 373; Coster *v.* Tide Water Co., 18 N. J. Eq. 54 and 518; Beekman *v.* Saratoga & Schenectady R. R. Co., 3 Paige, 45; Harris *v.* Thompson, 9 Barb. 350; Buffalo & New York R. R. Co. *v.* Brainard, 9 N. Y. 100; People *v.* Smith, 31 N. Y. 595; Matter of William A. Fowler, 53 N. Y. 60; Matter of Deansville Cemetery Ass., 5 Hun, 482; Anderson *v.* Turbeville, 6 Coldw. 150; Tyler *v.*

Beacher, 44 Vt. 648; Roanoke City *v.* Berkowitz, 80 Va. 616; Tait’s Executor *v.* Central Lunatic Asylum (Va.), 4 S. E. R. 697; Baltimore & Ohio R. R. Co. *v.* Pittsburg, Wheeling & Ky. R. R. Co., 17 W. Va. 812; Smeaton *v.* Martin, 57 Wis. 364. “It is not indispensable that the legislature shall determine that any given enterprise is necessary or proper, before putting in operation the power of eminent domain. This power is primarily an absolute one, and theoretically exists in this absolute form in the ultimate source of authority in every organized society. In the constituted government of this State, the right of exercising it has been confided to the legislature, restricted by only two conditions: one, that compensation shall be made to the owner of the property taken; the other, that the use for which property may be taken shall be a public use. In other respects it is without limit. Whether the purpose to be subserved be necessary or wise, is for the legislature alone.” Ct. of Errors and Appeals in National Docks R. R. Co. *v.* Central R. R. Co., 32 N. J. Eq. 755, 763.

² Boom Co. *v.* Patterson, 98 U. S. 403, 406. Similar language will be found in the following cases: Geisy

§ 239. The propriety of exercising a delegated power rests with the grantee.—When authority to take property for public use has been conferred by the legislature, it rests with the grantee to determine whether it shall be exercised, and when and to what extent it shall be exercised.¹ These questions are political in their nature, and not judicial. Thus, whether a particular road or street shall be laid out,² or an existing street widened,³ or any similar improvement made,⁴ in the absence of any special statutory provisions, rests entirely with the local authorities vested with power in the premises.⁵ The courts cannot inquire into the motives which actuate the authorities or into the propriety of making the particular improvement.⁶ The same may be said of individuals and corporations vested with the power of eminent domain and acting from considerations of private emolument.

§ 240. The authority to condemn must be expressly given.—The exercise of the power being against common right, it cannot be implied or inferred, but must be given in express terms or by necessary implication.¹ If the act is

v. Cincinnati, Wilmington & Zanesville R. R. Co., 4 Ohio St. 308; *County Court v. Griswold*, 58 Mo. 175; *Chicago & Eastern Ill. R. R. Co. v. Wiltse*, 116 Ills. 449.

§ 239.

¹ *Chicago & Eastern Ill. R. R. Co. v. Wiltse*, 116 Ills. 449, 454; *Cotton v. Mississippi & Rum River Boom Co.*, 22 Minn. 372.

² *Commission's Court of Lowndes Co. v. Bowie*, 34 Ala. 461; *Harwinton v. Catlin*, 19 Conn. 520; *Dunlap v. Mount Sterling*, 14 Ills. 251; *Curry v. Mount Sterling*, 15 Ills. 320; *Lawliss v. Reese*, 4 Bibb, 309; *Baldwin v. Bangor*, 36 Me. 518; *Methodist Church v. Baltimore*, 6 Md. 391; *State v. Bishop*, 39 N. J. L. 226; *West River Bridge Co. v.*

Dix, 16 Vt. 446; *Gallup v. Woodstock*, 29 Vt. 347.

³ *Dunham v. Hyde Park*, 75 Ills. 371.

⁴ *Kelsey v. King*, 32 Barb. 410; *Stout v. Freeholders*, 25 N. J. L. 202; *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299.

⁵ Cases apparently holding a contrary doctrine are, *White's Case*, 2 Overton, 109; *Lecoul v. Police Jury*, 20 La. An. 308.

⁶ *Dunham v. Hyde Park*, 75 Ills. 371, and cases in last note.

§ 240.

¹ *Schmidt v. Densmore*, 42 Mo. 225; *Allen v. Jones*, 47 Ind. 438; *Butler v. Thomasville*, 74 Ga. 570; *Perry v. Wilson*, 7 Mass. 393; *Miami Coal Co. v. Wighton*, 19 Ohio

silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the legislature intended that the necessary property should be acquired by contract.² Thus the authority to construct and maintain booms,³ or bridges,⁴ does not carry with it the right to condemn property. If the act makes no provision for compensation, it is presumed that the legislature did not intend that the power of eminent domain should be exercised.⁵ A city had power to construct and regulate sewers, drains and cisterns, also to provide on what terms real estate in such city might be drained by means of surface or under drains over and across other real estate therein. It was held that neither provision gave power to condemn.⁶ A statute in relation to Detroit gave power to open, extend, widen or straighten streets or alleys. A subsequent provision as to compensation omitted the case of widening. It was held that the power to widen could not be exercised by condemnation.⁷ But, where a county board of supervisors was em-

St. 560. "In favor of such right there can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must, also, be a necessity which arises from the very nature of things, over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy." Pennsylvania R. R. Co's. Appeal, 93 Pa. S. 150, 159. For a case where the company was held estopped to deny power to condemn see Parsons Water Co. v. Knapp, 33 Kan. 752.

² Chamberlain v. Elizabethport Steam Cordage Co., 41 N. J. Eq. 43; Leeds v. Richmond, 102 Ind. 372.

³ Grand Rapids Booming Co. v.

Jarvis, 30 Mich. 308, 323; Perry v. Wilson, 7 Mass. 393; The Stevens Point Boom Co. v. Reilly, 44 Wis. 295.

⁴ Thatcher v. The Dartmouth Bridge Co., 18 Pick. 501. But where power was given to construct a bridge coupled with a provision for the ascertainment of damages for property taken therefor, the right to condemn was held to be necessarily implied. Linton v. Sharpsburg Bridge Co., 1 Grant's Cases, 414.

⁵ Chamberlain v. Elizabethport Steam Cordage Co., 41 N. J. Eq. 43; Chaffee's Appeal, 56 Mich. 244.

⁶ Allen v. Jones, 47 Ind. 438; see also Leeds v. Richmond, 102 Ind. 372.

⁷ Chaffee's Appeal, 56 Mich. 244.

powered to build and keep in repair county buildings and to provide suitable rooms for the use of the county, it was held that this was sufficient authority to condemn land for a court house.⁸ In another case, where commissioners were empowered to select a site for a city hall, either certain lands owned by the city or any other lands, and to cause a city hall to be erected thereon, it was held by the Court of Appeals of New York, that, in case land not owned by the city had been selected, there would have been no power to condemn, and, if the commissioners could not have agreed with the owner, they could have proceeded no further in the matter.⁹ As a rule, a municipal corporation cannot condemn property beyond its limits, unless authority to do so is expressly given.¹⁰ This principle is further illustrated in subsequent sections which treat of the construction of statutes giving authority to condemn.¹¹ No general rule can be laid down as to when the right to condemn will be implied or inferred, and when not. Such implication will more readily be made in favor of public corporations exercising powers solely for the public use and benefit than in favor of private individuals or corporations organized for pecuniary profit.

§ 241. How the authority may be given.—This is purely a matter of legislative discretion, unless limited by the constitution. The authority may be given by a special act to a particular person or corporation, or by a general act or general incorporation laws.¹

§ 242. To whom authority may be given.—Strictly speaking, the legislature cannot delegate the *power* of emi-

⁸ Supervisors of Culpepper County *v.* Gorrell, 20 Gratt. 484.

§ 241.

⁹ People *ex rel.* Hayden *v.* City of Rochester, 50 N. Y. 525.

¹ Weir *v.* St. Paul, Stillwater & Taylor's Falls R. R. Co., 18 Minn. 155; Buffalo & New York R. R. Co. *v.* Brainard, 9 N. Y. 100; Central R. R. Co. *v.* Penn. R. R. Co., 31 N. J. Eq. 475; National Docks R. R. Co. *v.* Central R. R. Co., 32 N. J. Eq.

¹⁰ Houghton *v.* Huron Copper Co., 57 Mich. 547; Drain Commissioners *v.* Baxter, 57 Mich. 127

¹¹ Post, § 245-258.

nent domain.¹ It cannot divest itself of sovereign powers. But, in exercising the power, it can select such agencies as it pleases, and confer upon them the right to take private property subject only to the limitations contained in the constitution.² Accordingly it has been held that the right may be conferred upon corporations,³ upon individuals,⁴ upon foreign corporations,⁵ or a consolidated company composed in part of a foreign corporation,⁶ and upon the federal government.⁷ Such has been the common practice since the Revolution, and the right to do so has never been a matter of serious question; and it may be regarded as settled law that it is solely for the legislature to judge what persons, corporations or other agencies may properly be clothed with this power.⁸ Some State constitutions prohibit the exercise of

755; *De Witt v. Duncan*, 46 Cal. 342.

§ 242.

¹ *Sholl v. German Coal Co.*, 118 Ills. 427.

² *Yost's Report*, 17 Pa. S. 524; *Matter of Deansville Cem. Ass.* 5 Hun, 482.

³ *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9; *L. C. & C. R. R. Co. v. Chappell*, Rice (S. C.) 383; *Ash v. Cummings*, 50 N. H. 591; *Concord R. R. Co. v. Greeley* 17 N. H. 47; *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479; *Hand Gold Mining Co. v. Parker*, 59 Ga. 419; *Mims v. Macon & Western R. R. Co.*, 3 Ga. 333; *Buffalo City R. R. Co. v. Brainard*, 9 N. Y. 100; *Boom Co. v. Patterson*, 98 U. S. 403.

⁴ *Matter of Petition of Kerr*, 42 Barb. 119; also cases in last note.

⁵ *Matter of Peter Townsend*, 39 N. Y. 171; *New York & Erie R. R. Co. v. Young*, 33 Pa. S. 175; *Dodge v. Council Bluffs*, 57 Ia. 560;

Morris Canal & Banking Co. v. Townsend, 24 Barb. 658; *Abbott v. New York etc. R. R. Co.*, 145 Mass. 450; *Gray v. St. Louis & San Francisco Ry. Co.*, 81 Mo. 126. In Iowa it was held that, though a foreign corporation did not have power to condemn land in that State, a domestic company, organized at the instance of a foreign company, could condemn land for the purpose of leasing it to such foreign corporation. *Lower v. Chicago & Quincy R. R. Co.*, 59 Ia. 563. The Iowa statute conferred power upon "railroad corporations organized under the laws of this State;" held, necessarily, a denial of the right to foreign corporations. *Holbert v. St. Louis, K. C. & N. R. R. Co.*, 45 Ia. 23.

⁶ *Toledo, A. A. & G. Ry. Co. v. Dunlap*, 47 Mich. 456.

⁷ *Burt v. Merchants' Ins. Co.*, 106 Mass. 356; *Gilmer v. Lime Point*, 18 Cal. 229.

⁸ *Ash v. Cummings*, 50 N. H. 591.

the power by foreign corporations.⁹ A proceeding by a foreign corporation as lessee of a domestic corporation, was held within the prohibition by the Nebraska Supreme Court.¹⁰ It is, of course, competent for the legislature to appropriate property directly, by an act duly passed, instead of conferring authority to do so, and this has occasionally been done.¹¹

§ 243. Delegation and transfer of authority: Contractors and agents.—When authority to take property by virtue of the power of eminent domain is conferred by the legislature, it becomes a personal trust, and cannot be delegated or transferred, except by legislative sanction.¹ Purchasers under a mortgage,² grantees³ or lessees⁴ of the property and fran-

⁹ *Ante*, chap. II.

¹⁰ *State v. Scott*, 22 Neb. 628.

¹¹ *Baltimore & Ohio R. R. Co. v. B. W. & Ky. R. R. Co.*, 17 W. Va. 812, 841; *Mims v. Macon & Western R. R. Co.*, 3 Ga. (3 Kelly) 333; *Smedley v. Erwin*, 51 Pa. S. 445; *In re Towanda Bridge Co.*, 91 Pa. S. 216; *Hingham & Quincy Bridge & Turnpike Co. v. County of Norfolk*, 6 Allen, 353; *Boom Co. v. Patterson*, 98 U. S. 403; *Township of Mahoney v. Comry*, 103 Pa. S. 362; *Matter of Union Ferry Co.*, 98 N. Y. 139; *Matter of Application of Mayor etc. of New York*, 99 N. Y. 569 (affirming 34 Hun, 441); *Gernet v. Brooklyn*, 99 N. Y. 296.

§ 243.

¹ *Harris v. Inhabitants of Marblehead*, 10 Gray, 40; *Stewart's Appeal*, 56 Pa. S. 413; *Lyon v. Jerome*, 26 Wend. 485, reversing s. c. in 15 Wend. 569. “This is an exceedingly delicate and important power, and only exists in the State by virtue of her right of eminent domain as sovereign. In expressly grant-

ing this power, a confidence in the grantee of the power, as to its exercise, is implied. It cannot, therefore, be delegated. It must be exercised by the grantee in person, and not by proxy or substitute. The commissioner can *act* by others. He must *judge* himself. He only can decide upon the necessity or expediency in any case of appropriating private property to public use; but he may employ his subordinate officers or agents to carry such decision into effect. *Lyon v. Jerome*, 26 Wend. 485, 498.

² *Atkinson v. Marietta R. R. Co.*, 15 Ohio St. 21.

³ *Mahoney v. Spring Valley Water Works*, 52 Cal. 159; *Abbott v. New York & N. E. R. R. Co.*, 145 Mass. 450. In the last of these cases the court reviews a number of acts from which an intent that the power to condemn should pass with the property and franchises of a railroad was inferred.

⁴ *Worcester v. Norwich & Worcester R. R. Co.*, 109 Mass. 103;

chises of a corporation authorized to condemn property for public use, cannot, by virtue of such purchase, grant or lease, exercise such power. Being a personal trust, the power must be exercised by the grantee in person,⁵ and, in case of corporations, by the governing body of the corporation, which ordinarily is the board of directors.⁶ From these principles it follows that, where corporations, or others who are empowered to take materials for the construction of works, employ contractors who engage to furnish their own materials, the power of eminent domain does not pass to the contractors by virtue of the contract, but they must provide their materials as best they can.⁷

Lewis *v.* Germantown etc. R. R. Co., 16 Phila. 608.

⁵ Lyon *v.* Jerome, 26 Wend. 485.

⁶ Eastern R. R. Co. *v.* Boston & Maine R. R. Co., 111 Mass. 125, 130.

⁷ Schmidt *v.* Densmore, 42 Mo. 225; Lyon *v.* Jerome, 26 Wend. 485; St. Peter *v.* Dennison, 58 N. Y. 416. A contrary doctrine is maintained in Illinois. Hinde *v.* Wabash Navigation Co., 15 Ills. 72; Lesher *v.* The Wabash Navigation Co., 14 Ills. 85. In this case, however, there appears to have been a resolution of the canal commissioners authorizing the appropriation, but the court disregarded it in their decision. In Vermont Central R. R. Co. *v.* Baxter, 22 Vt. 365, it was held that one, who contracted to build a section of road and to furnish all materials, necessarily took the company's power to appropriate them *in invitum*, and that the company was liable directly to the owner therefor. The statute in that case provided that, where a railroad company had by its engineers, agents or servants taken any materials from contiguous lands

for use in the construction of its road, and had failed to have the damages therefor assessed within two years, the owner might have his common law remedy therefor. (§ 30, C. 26 Compiled Stats. 1850). The court held that the contractors were *agents* or *servants* within the statute. Bliss *v.* Hosmer, 15 Ohio, 44, may also seem at first blush to be opposed to the text. That was trespass against the contractor on a canal for taking materials, and judgment was given for the defendant. The statute provided that the commissioners and any agent, superintendent and engineer employed by them might enter on private property and take materials. The contract provided that the contractors should furnish their own materials, but, if they could not obtain them at a fair price, the commissioners or their engineer would give an order for appropriating them. An order was, in fact, given by the engineer to take the materials in question. In this case, therefore, the statute expressly authorized any agent or engineer of

§ 244. **A lease of the property and franchises of a corporation does not destroy its right to condemn.**¹—This is true though the term of the lease is for the entire life of the corporation.² The lease is but a mode of enabling the corporation to discharge its duties to the public, and the necessities of further condemnations would be the same, whether the duties which the corporation owes to the public are discharged by the corporation directly, or by its lessee.³

§ 245. **The manner of proceeding may be changed at the pleasure of the legislature.**—It is no part of the contract between the State and a corporation vested with the power of eminent domain, that the mode of condemning property shall remain unchanged.¹ Consequently the tribunal to assess damages may be changed,² jurisdiction may be transferred from one court to another³ and a right of appeal may be granted where none existed before.⁴ These and like matters relate to the remedy which, according to well settled principles, may be changed without impairing existing contracts, provided no substantial right secured by the contract is impaired. The substantial right in the case under considera-

the commissioners to enter and take materials, which differs materially from the case of *Lyon v. Jerome, ante.* Such a contract, however, does not prevent the corporation or principal from appropriating materials by condemnation for the benefit of the contractor. *Ten Broeck v. Sherrill*, 71 N. Y. 276.

§ 244.

¹ *Matter of New York, Lackawanna & Western Ry. Co.*, 35 Hun, 220, affirmed in 99 N. Y. 12.

² *Ibid.*

³ *Kip v. New York & Harlem R. R. Co.*, 67 N. Y. 227; *Deitrichs v. Lincoln & Northwestern R. R. Co.*, 13 Neb. 361; *Chicago & Western*

Indiana R. R. Co. v. Illinois Central R. R. Co., 113 Ills. 156.

§ 245.

¹ *Long's Appeal*, 87 Pa. S. 114; *Mississippi R. R. Co. v. McDonald*, 12 Heisk. 54; *Springfield etc. R. R. Co. v. Hall*, 67 Ills. 99; *McCrea v. Port Royal R. R. Co.*, 3 S. C. 381; *Cowan v. Penobscott R. R. Co.*, 44 Me. 140; *Balt. & Susquehanna R. R. Co. v. Nesbit*, 10 How. 395; *Bohlman v. Green Bay & Minn. Ry. Co.*, 40 Wis. 157.

² *Chesapeake & Ohio R. R. Co. v. Patton*, 9 W. Va. 648.

³ *United Railroad & Canal Co. v. Weldon*, 47 N. J. L. 59.

⁴ *Farnum's Petition*, 51 N. H. 376; *Long's Appeal*, 87 Pa. S. 114.

tion is the right to take private property by compulsory proceedings.⁵

§ 246. The right to impose additional liabilities. — The charter of a corporation being a contract, the right secured by it cannot be impaired by subsequent legislation. A statute imposing upon such corporations a liability for consequential damages to property by reason of works already executed, where no such liability existed before, has accordingly been held to be unconstitutional and void.¹ If the right to repeal, alter or amend such charter is reserved, a liability for consequential damages as to the future may undoubtedly be imposed. Whatever may be the limitation of the right so reserved, it is certain that, under it, the legislature has the right to make any reasonable amendments regulating the mode in which the franchise granted shall be used and enjoyed, and to impose any reasonable duties and obligations upon the corporation.² To make the corporation liable for consequential damages to private property as to any future works by it constructed, or any future exercise by it of the power of eminent domain, would certainly be reasonable, for it is but just that such a corporation should make good to an individual any loss sustained by him in respect of his property by reason of the exercise of the corporate powers. Where the right to occupy the streets of a city is granted to a railroad corporation by the municipality, such right is subject to any conditions which may be imposed by general law prior to its exercise. Where the right to lay a double track in a street was granted to a corporation, and

⁵ *McCrea v. Port Royal R. R. Co.*,
3 S. C. 381.

§ 246.

¹ *Bailey v. Philadelphia, Wilmington & Balt. R. R. Co.*, 4 Harr. (Del.) 389; *Towle v. Eastern R. R. Co.*, 18 N. H. 547; *Monongahela Navigation Co. v. Coon*, 6 Pa. S. 379.

² *Pierce on Railways*, p. 456; *Parker v. Metropolitan Ry. Co.*, 109 Mass. 506; *Shields v. Ohio*, 95 U. S. 319, 324; *Worcester v. Norwich & Worcester R. R. Co.*, 109 Mass. 103; *Portland & Oxford Central R. R. Co. v. Grand Trunk Ry. Co.*, 46 Me. 69.

after one track was laid a law was passed requiring compensation to be made to abutting owners for damages occasioned by laying railroads in streets, it was held the second track could not be laid without making compensation as required by the act.³

Whether such corporations can be subjected to additional liabilities as to future exercises of the power of eminent domain or future improvements of property already condemned, when no right to alter, repeal or amend their charter is reserved, is a question of great importance, because upon its solution depends the efficacy, as to such corporations, of the constitutional and statutory provisions giving compensation for property damaged or injured, as well as for property taken. In Pennsylvania it is held that such liability can be imposed without impairing the obligation of the charter.⁴ The reasoning of the court is as follows: "The constitution of the United States undoubtedly precludes a State from impairing the obligation of a charter even through an amendment of its organic law; but this restriction has never been held to forbid such remedial legislation as may be requisite to give effect to antecedent rights, or provide a remedy for injuries that previously went unredressed. A child was entitled to support from its father at common law, but he could not recover damages for the frustration of this right through the parent's death from injuries occasioned by the negligence of an individual or body corporate. The act which now affords a remedy for such deprivations, and under which damages are constantly assessed and judgments rendered, is of recent origin, and was passed since the creation of the Pennsylvania Railroad Company, and yet it has never, that I am aware of, been contended that it was invalid as to pre-existing corporations or impaired their chartered privileges. In

³Drady *v.* Des Moines & Ft. D. ⁴Duncan *v.* Pennsylvania Rail-R. R. Co., 57 Ia. 393; S. P., Mul-holland *v.* D. M. & W. R. R. Co., 60 Ia. 740.

like manner the citizen has a natural right to compensation, for the consequences of acts done for the public benefit that are injurious to his estate or person, and a statute which affords a remedy cannot justly be assailed as unconstitutional. Such an argument would obviously be fallacious if advanced on behalf of an individual, and the principle is the same when the defendant is a corporation. A power conferred by a charter cannot be abrogated without impairing the obligation of the contract; but the legislature does not, in making such a grant, contract that persons who are injuriously affected by the exercise of the power are not entitled to indemnity, nor that it will not provide a means for rendering their demand effectual. This may be tested by supposing the incorporation of a railway company in a State where, as was long the case in Rhode Island, there is no constitutional restraint on the right of eminent domain, and the subsequent enactment of a law providing that land should not be taken for the use of the road without payment. Would any one contend that such a statute impaired vested rights, or was within the prohibition of the constitution of the United States? If the question must be answered in the negative, the legislature might obviously proceed to give a remedy for property injured or destroyed."

§ 247. Effect of the repeal, amendment or expiration of statutes.—The lapse of the time within which the compulsory powers conferred by a statute can be exercised puts an end to any further proceedings, as well as to the right to condemn.¹ Where the act imposes no limit, none can be imposed by construction.² Upon the expiration or repeal of a statute all inchoate proceedings founded thereon fall to the

§ 247.

¹Peavey v. Calais R. R. Co., 30 Me. 498; Atlanta & Pacific R. R. Co. v. St. Louis, 66 Mo. 228; Morris & Essex R. R. Co. v. Central R. R. Co., 31 N. J. L. 205; New York, Housa-

tonic & Northern R. R. Co. v. Boston, Hartford & Erie R. R. Co., 36 Conn. 196.

²Thicknesse v. Lancaster Canal Co., 4 M. & W. 471.

ground,³ unless there is a saving clause in the repealing act.⁴ The effect of a change or amendment of a statute pending proceedings under it must depend largely upon the circumstances of the particular case. If the right to condemn or the jurisdiction of the particular court or tribunal before which the proceedings are pending is taken away, the proceedings must necessarily fall to the ground; but if there is simply a change in the mode of procedure, then they may be continued under the new statute.⁵ Where an amendatory act provides an unconstitutional method of assessing damages, the amendment is void and the original act remains in force, and proceedings had in accordance therewith are valid.⁶ The charter of Sing Sing, passed in 1859, provided that the proceedings to lay out, open and widen streets should be according to the provisions of the Revised Statutes in regard to laying out highways. In 1880 the charter was revised and the same provision re-enacted; it was held to mean the Revised Statutes as they were in 1859, and not as they had

³ Williams *v.* County Comrs. of Lincoln County, 35 Me. 345; County of Menard *v.* Kincaid, 71 Ills. 587; Hatfield Township Road, 4 Yeates, 392; Hampton *v.* Commonwealth, 19 Pa. S. 329; Commonwealth *v.* Beatty, 1 Watts, 382; French *v.* Owen, 5 Wis. 112; Stephens *v.* Marshall, 3 Chand. Wis. 222; Pratt *v.* Brown, 3 Wis. 603; Brochlebank *v.* Whitehaven Junction Ry. Co., 15 Sim. 632; *contra*: Burrows *v.* Vandevier, 3 Ohio, 383. Where an act approved March 31st 1866, required a road to be laid out on or before March 1st., 1866, it was held to be directory as to time. People *ex rel. etc. v.* Board of Supervisors, 33 Cal. 487.

⁴ Downs *v.* Town of Huntington,

35 Conn. 588; County of Menard *v.* Kincaid, 71 Ills. 587.

⁵ Fenelon's Petition, 7 Pa. S. 173; Uwchlan Township Road, 30 Pa. S. 156; Hickory Tree Road, 43 Pa. S. 139; Bohlman *v.* Green Bay & Minnesota Ry. Co., 40 Wis. 157; Emerson *v.* Western Union R. R. Co., 75 Ills. 176; Hyslop *v.* Finch, 99 Ills. 171. In New Hampshire it is held that pending proceedings are not affected by a statute relating to procedure only. Colony *v.* Dublin, 32 N. H. 432; Boston & Maine R. R. Co. *v.* Cilley, 44 N. H. 578; Wentworth *v.* Farmington, 48 N. H. 207.

⁶ Campau *v.* Detroit, 14 Mich. 276; Shepardson *v.* Milwaukee & Beloit R. R. Co., 6 Wis. 605.

been amended by an act of 1875.⁷ An act of 1835 provided a mode of assessing damages. An act of 1838 provided a different mode. An act of 1842 abolishing the board created by the act of 1838 was held equivalent to a repeal of a repealing act, and the act of 1835 was held to be restored.⁸ A repeal of an act under which damages have been assessed, after the right thereto has vested, does not affect the rights of the parties.⁹

§ 248. General and special laws.—As a rule, a general law does not repeal a prior special law merely because it embraces the same subject matter. An intent to repeal the special law must be manifested either by express words, or by language extending the operations of the general law to all cases embraced by it, or there must be some inconsistency or absurdity in the two standing together. Accordingly a general law in regard to the assessment of damages in condemnation proceedings will not supersede the provisions of special charters on the subject,¹ unless expressly made applicable to all cases for condemnation,² or plainly intended as a revision of all prior laws, general and special, upon the subject.³ There may be two complete acts in reference to the same subject matter, such as the construction of gravel roads, though having inconsistent provisions, under either

⁷ Matter of Altering etc. Main Street, 98 N. Y. 454, affirming s. c. 30 Hun, 424.

⁸ Directors of Poor v. Railroad Co., 7 W. & S. 236.

⁹ People v. Supervisors of Westchester, 4 Barb. 64.

§ 248.

¹ Hudson River R. R. Co. v. Outwater, 3 Sands. 689; State v. Clarke, 25 N. J. L. 54; State v. Trenton, 36 N. J. L. 198; North Missouri R. R. Co. v. Gott, 25 Mo. 540; Norfolk & Southern R. R. Co. v. Ely, 95 N. C. 77.

² McCrea v. Port Royal R. R. Co., 3 S. C. 381.

³ Moore v. Superior & St. Croix R. R. Co., 34 Wis. 173. In the following cases it was held that a railroad corporation whose charter provided a complete mode of assessing damages might proceed, either under its charter, or under the general law upon the subject: McMahon v. Cincinnati & Chicago Short Line R. R. Co., 5 Ind. 413; Cascades R. R. Co. v. Sohns, 1 Wash. Ter. n. s. 558.

of which proceedings may be had, if the legislature expressly declare in the second that it was not their intention to repeal any former act on the subject.⁴

§ 249. Effect of a change in the form of municipal government.—Municipalities frequently put off one form of government for another, whereby radical changes are made in the form of government. Towns and villages become cities. One law of incorporation is exchanged for another. The laws under which such changes are made frequently do, and always ought, to make provisions for all pending suits and proceedings and all accrued rights and liabilities in such a way as to prevent confusion or loss. But sometimes this is not done, and the question arises, what would be the effect of such a change upon pending proceedings for condemnation. It would be difficult to lay down any general rule for such cases, but the following decisions may be noticed: County Commissioners acquired jurisdiction to lay out a town way in the town of Lawrence, in July, 1852. The way was finally located and established April 12, 1853. On March 29, 1853, the town became a city, by accepting a charter granted by the legislature. By this charter jurisdiction of the subject matter was taken away from the county commissioners as to the incorporated territory. The charter continued the town officers until the organization of the city government, which did not take place till April 18, 1853. The lay-out was held valid.¹ In another case the Scheme and Charter for the city and county of St. Louis was adopted on August 22, 1876, and by its terms was to be operative in sixty days thereafter. A controversy arose over its adoption, which was not determined until March 5, 1877, and until then it was unknown whether it was adopted or not. On November 26, 1876, proceedings were begun for opening a

⁴ Robinson *v.* Rippley, 111 Ind. 112.

§ 249.

¹ Durant *v.* Lawrence, 1 Allen,

125.

street, pursuant to ordinances passed in January and July, 1876. These proceedings were finally completed, by the confirmation of the commissioner's report, on March 26, 1877. The proceedings were begun and carried on according to the old charter. The new charter provided that all ordinances for the opening of any street upon which proceedings should not be begun when the charter went into operation should stand repealed. In theory the new charter was in operation from and after October 22, 1876. But the proceedings were sustained on what was called the *de facto* principle.² A statute of California provided that the board of water commissioners of a township should establish a ditch upon receiving a petition from a majority of the persons in a township liable to work on water ditches. Such petition was presented to the commissioners of San José township, and, pending proceedings under it, Azusa township was set off from San José. The commissioners of Azusa township, in which the proposed ditch would be, filed a supplemental petition and continued the proceedings. This was held to be erroneous, and it was further held that new proceedings would have to be begun, based upon a petition by the required number of persons residing in the new township.³

§ 250. Conflict of jurisdiction between different authorities having power in the same territory.—Where a city or borough is vested with power to lay out and improve streets, the authorities of a town or county embracing such city or borough are precluded from exercising the same power within the same territory.¹ So it is held that under a gen-

¹ *St. Louis v. Stoddard*, 15 Mo. App. 173.

State v. Trenton, 36 N. J. L. 198; *South Chester Road*, 80 Pa. S. 370; *Cowan's Case*, 1 Overton, 310; *Gallagher v. Head*, 72 Ia. 173. Otherwise, if the borough has no authority. *Washington v. Fisher*, 43 N. J. L. 377.

§ 250.

² *State v. Clarke*, 25 N. J. L. 54;

eral drainage act a ditch cannot be established wholly within a city which has full power to make sewers and drains for any purpose for which they are needed.² This seems the reasonable rule. To hold otherwise might bring about very disagreeable and disastrous conflicts of jurisdiction and authority. Some courts have held, however, that in such cases the jurisdiction is concurrent.³

§ 251. Statutes have no extra-territorial effect.—It is a general rule that statutes have no extra-territorial effect. It follows that one State cannot authorize the condemnation of property in another State;¹ also, that it cannot authorize works which will produce actionable damages in another State,² or in territory within a State, jurisdiction over which has been ceded to the United States.³ Where a mill erected in Massachusetts flowed lands in New Hampshire, it was held that damages could not be assessed in New Hampshire under the statutes of the latter State in relation to mills.⁴ And, generally, the mill acts of one State do not apply to

² *Anderson v. Endicott*, 101 Ind. 539.

³ *Norwich v. Story*, 25 Conn. 44; *Bennington v. Smith*, 29 Vt. 254; *Windham v. Cumberland County Commissioners*, 26 Me. 406. *Special cases:* The charter of Newark, approved March 11, 1857, gave to the city council the power to lay out and open streets. By act of March 20, 1857, *exclusive power* over the subject was conferred upon commissioners to be appointed by the council; held a repeal of the former act as to the power in question. *State v. Newark*, 28 N. J. L. 491. The city of New Orleans was divided into municipalities; held that one municipality could not open a street, the center line of which was the dividing line be-

tween it and another municipality, under a statute formerly applicable to the whole city. *Municipality No. 1 v. Young*, 5 La. An. 362.

§ 251.

¹ *Crosby v. Hannover*, 36 N. H. 404. This was an attempt to condemn a bridge across the Connecticut River, one end of which was in Vermont.

² *Farnum v. Blackstone Canal Co.*, 1 Sumner, 46; *Holyoke Water Power Co. v. Connecticut River Co.*, 22 Blatch. 131.

³ *United States v. Ames*, 1 W. & M. 76.

⁴ *Salisbury Mills v. Forsaith*, 57 N. H. 124. To the same effect, *Wooster v. Great Falls Manf. Co.*, 39 Me. 246.

mills erected out of the State, though flowing lands in the former State.⁵ But where a mill or other works in one State produce damage in another State, a common law action can be maintained in the State where the works are situated.⁶

The city of Worcester, Massachusetts, took the waters of Tatnuck Brook for public use, as a water supply for said city. The brook was a tributary of the Blackstone River, and the diversion of the waters of the brook diminished the supply of water coming to mills on the Blackstone River situated in Rhode Island. In *Manville Company v. Worcester*,⁷ the plaintiff, having a mill in the latter State, was allowed to maintain an action of tort in Massachusetts for damages caused by the diversion. In *Banigan v. Worcester*⁸ it appeared that several suits were begun in the Superior Court of Worcester county, Massachusetts, under the statutes of the latter State, by the owners of mill property situated on the Blackstone River in Rhode Island, for a statutory assessment of damages by reason of the diversion of Tatnuck Brook. These cases were removed to the Federal court, and it was held by Carpenter, J., that the suits were removable, and that the petitions were well brought under the statute.⁹

§ 252. When a naked authority to condemn may be exercised according to previous statutes, and when not.—The provision of the constitution that compensation must be made for property taken for public use is absolute and imperative. When the legislature authorizes the taking of private property it must make provision for ascertaining and paying compensation. But such provision need not be made in each

⁵ *Ibid.*

⁶ *Wooster v. Great Falls Manf. Co.*, 39 Me. 246; *Mannville Co. v. Worcester*, 138 Mass. 89.

⁷ 138 Mass. 89.

⁸ 30 Fed. R. 392.

⁹ This view is also supported by *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394, where it was

held that one who owned lands situated partly in Massachusetts and partly in New Hampshire, which were injured by the diversion of a stream in Massachusetts to supply a village, must seek his remedy under the statute for his lands in both States, and that an action of tort would not lie.

particular act conferring authority. Where authority to condemn is conferred by an act which is silent as to compensation, it sometimes becomes a nice question whether the provisions of prior statutes can be invoked to help it out. Where an additional authority to condemn property is conferred upon a company it may be exercised according to the provisions of prior statutes applicable to the company.¹ Where power to lay out streets and alleys is conferred by special act upon a particular borough, or is contained in a special charter, the municipality may proceed according to the provisions of the general law in regard to highways.² The same is true also where the legislature direct or authorize the proper authorities to lay out a particular street or highway.³ In a case which arose in Virginia it appeared that the government of county affairs was vested in the county court which was authorized to condemn property when necessary for the uses of the county. By a subsequent statute the management of the county affairs was vested in a board of supervisors, whose duty it was, among other things, to provide suitable buildings for the use of the county. It was held that the authority to condemn property for county buildings was necessarily implied, and that compensation could be assessed according to the prior statute, which in terms applied only to the county court.⁴

§ 253. The authority must be strictly pursued.—This is a proposition so universally conceded and so often reiterated by the courts that it requires no discussion, and we shall simply refer to some of the principal cases illustrating the doctrine.¹

§ 252.

¹ Railroad Co. v. State, 9 Bax. 522; Heady v. Vevay etc. Turnpike Co., 52 Ind. 117.

² Barnes v. Springfield, 4 Allen, 488; Sharett's Road, 8 Pa. S. 89.

³ Smedley v. Erwin, 51 Pa. S. 445; City of Belfast Appellants,

53 Me. 431; Warner v. Hennepin County, 9 Minn. 139; Hamlin v. New Bedford, 143 Mass. 192.

⁴ Supervisors of Culpeper v. Gorrell, 20 Gratt. 484. Compare § 240 and cases there cited.

§ 253.

¹ Roberts v. Williams, 15 Ark. 43;

§ 254. Statutes giving authority to condemn are strictly construed.—All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other.¹ “An act of this sort,” says Bland, J., “deserves no favor; to construe it liberally would be sinning against the rights of

Miller *v.* Brown, 56 N. Y. 383; Matter of Schreiber, 53 How. Pr. 359; Bensley *v.* Mountain Lake Water Co., 13 Cal. 306; Curran *v.* Shattuck, 24 Cal. 427; Lincoln *v.* Colusa, 28 Cal. 662; Damrell *v.* Board of Supervisors etc., 40 Cal. 154; Young *v.* McKenzie, 3 Ga. 31; Justices etc. *v.* Plank Road Co., 9 Ga. 475; Hyslop *v.* Finch, 99 Ills. 171; Chicago & Alton R. R. Co. *v.* Smith, 78 Ills. 96; New Orleans *v.* Sohr, 16 La. An. 393; Mayor etc. of Jefferson *v.* Delachaise, 22 La. An. 26; State *v.* Van Geison, 15 N. J. L. 339; Griscom *v.* Gilmore, same, p. 475; State *v.* Jersey City, 25 N. J. L. 309; State *v.* Town of Bergen, 33 N. J. L. 72; Harris *v.* Inhabitants of Marblehead, 10 Gray, 40; Wamesit Power Co. *v.* Allen, 120 Mass 352; Kroop *v.* Forman, 31 Mich. 144; Toledo, Ann Arbor & Northern Mich. R. R. Co. *v.* Munson, 57 Mich. 42; Stockett *v.* Nicholson, Walker (Miss.) 75; Bohlman *v.* Green Bay & Minn. Ry. Co., 40 Wis. 157; Detroit Sharpshooters’ Association *v.* Highway Commissioners, 34 Mich. 36; St. Louis *v.* Franks, 78 Mo. 41; Harbeck *v.* Toledo, 11 Ohio St. 219; Killbuck Private Road, 77 Pa. S. 39; Gulf, H. & S. A. R. R. Co. *v.* Mud Creek, I. A. & M. Co., 1 Tex. App. Civil Cas. p. 169; Adams *v.* Clarkshurg,

23 W. Va. 203. “The form by which private property may be taken for public purposes having been prescribed, it must be strictly pursued, or the attempt will be ineffectual and the proceedings void, and all persons acting under the color of them will be trespassers.” Stewart *v.* Wallis, 30 Barb. 344.

§ 254.

¹ Gray *v.* Liverpool & Bury Ry. Co., 9 Beav. 391; Martin *v.* Rushton, 42 Ala. 289; Spofford *v.* B. & B. R. R. Co., 66 Me. 26; Binney’s Case, 2 Bland. Ch. (Md.) 99; Lea *v.* Johnson, 9 Iredell Law, 15; Belknap *v.* Belknap, 2 Johns. Ch. 463; Watson *v.* The Acquacknonck Water Co., 36 N. J. L. 195; Reynolds *v.* Spears, 1 Stew. 34; Alabama Great Southern R. R. Co. *v.* Gilbert, 71 Ga. 591; Chicago & Eastern Illinois R. R. Co. *v.* Wiltse, 116 Ills. 449; Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 82 Mo. 121; Cox *v.* Tifton, 18 Mo. App. 450; Jersey City *v.* Central R. R. Co., 40 N. J. Eq. 417; Central R. R. Co. *v.* Hudson Terminal Co., 46 N. J. L. 289; Miami Coal Co. *v.* Wigton, 19 Ohio St. 560; Pittsburgh & Lake Erie R. R. Co. *v.* Brace, 102 Pa. S. 23; Simpson *v.* South Staffordshire Water Works Co., 34 L. J. Eq. 380.

property.”² But, as in other cases, such a construction will, if possible, be given to an act as will carry into effect the chief and manifest purpose for which it was passed.³ It will also be construed so as to support its validity rather than otherwise.⁴

§ 255. Construction of statutes as to location. — In determining whether statutes confer the right to exercise the power of eminent domain, the rules of strict construction are to be applied. But when the power has undoubtedly been conferred by a statute, then, in so far as it attempts to define the location or route, it is to receive a reasonable rather than a strict construction. It is against common right that a person or corporation should have the power, but, having the power, it is for the general good that they should not be hampered or embarrassed by a narrow and technical interpretation of it.¹ Power to construct a railroad “to the place of shipping lumber” on a tide-water river authorizes an extension of the tracks over flats and tide-water to a point where lumber may be conveniently shipped.² Where the route of a railroad was described in a statute in part as running through the towns A, B, C, D, etc., it was held that the order named was not imperative.³ Where an avenue was directed to be laid out in a *direct line* between two points and the act also provided that it should not be laid through any buildings, yards or orchards, without the consent of the owner, it was held that deviations might be made to avoid buildings.⁴ Authority to lay out a

² Binney's Case, 2 Bland. Ch. 99.

³ Commonwealth *v.* Fitchburg R. R. Co., 8 Cush. 240.

³ The Bellona Company Case, 3 Bland. Ch. 442.

⁴ Charles Street Avenue Co. *v.*

⁴ Pittsburgh *v.* Scott, 1 Pa. S. 309.

Merryman, 10 Md. 536. The following cases illustrate the same principle:

¹ Pierce on Railroads, p. 258; Chesapeake & Ohio Canal Co. *v.* Key, 3 Cranch, C. C. 599.

State *v.* Wilton R. R. Co., 19 N. H. 521; Fall River Iron

² Peavey *v.* Calais R. R. Co., 30 Me. 498.

Works Co. *v.* Old Colony & Fall

River R. R. Co., 5 Allen, 221; Heath *v.* Des Moines & St. Louis Ry. Co.,

highway on a line between two towns does not authorize a highway wholly within one town, but bounded on one side by the division line.⁵ On the other hand, the fact that the statute provides that, in case of a road on the line between two towns, the proceedings shall be before the commissioners of both towns, does not prevent the commissioners of one town, having jurisdiction to lay out roads in their own town, from laying out a road along the division line, but wholly in their town.⁶ The location of a railroad partly in another State will not, for that reason, be held invalid by the courts of the State to which the corporation belongs.⁷

§ 256. Particular acts construed.—Under authority to construct ditches from a highway to a natural water-course, one cannot be made to a pond.¹ Power to drain the low or swamp lands of one man *across* the lands of another does not authorize a drain onto the lands of another, unless it connects with some pond or water-course so as to produce no harm.² Statutes giving authority to lay out private roads are very strictly construed and confined to the particular cases specified in the statute.³ But authority to lay out a private road to the nearest highway does not mean that it must be laid out on the shortest line to the highway.⁴ Power to lay a double track means on the same right of way.⁵ Where ditches were allowed to be established which would

⁶¹ Ia. 11; *Clark v. Blackmar*, 47 N.Y. 150. Under a general railroad law a road may be built which is wholly within one city. *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755.

⁵ *Matter of the Town of Bridport*, 24 Vt. 176.

⁶ *Mack v. Commissioners of Highways*, 41 Ills. 378.

⁷ *Piedmont & Cumberland Ry. Co. v. Speelman*, 67 Md. 260; and see *Matter of New York L. & W. R. R. Co.*, 88 N. Y. 279.

§ 256.

¹ *McLaughlin v. Sandusky*, 17 Neb. 110.

² *Sherman v. Tobey*, 3 Allen, 7.

³ *Killbuck Private Road*, 77 Pa. S. 39; *Klicker v. Guilbaud*, 47 N.J. L. 277; *Commissioners of Bibb County v. Harris*, 71 Ga. 250; *Lyon v. Hamor*, 73 Me. 56.

⁴ *State v. Stockhouse*, 14 S. C. 417.

⁵ *People v. New York & Harlem R. R. Co.*, 45 Barb. 73.

be of benefit to any highway or street of any town or city, the turnpike of an incorporated company was held to be within the act.⁶ Authority to lay highways and townways includes a public footway.⁷ A railroad company had a general power to condemn property for the purposes of its incorporation. It was licensed by the city of Buffalo to lay its track along a street and across a canal slip, provided it built and maintained a swing-bridge over the slip. It was held that it could condemn land in order to obtain room in which to swing the bridge.⁸ So if it becomes the duty of a railroad company to carry a highway over or under its road, it may condemn the land necessary therefor.⁹ Under authority to erect a dam and reservoir for the use of a corporation and of mills below, the corporation may maintain a dam and sell part of the power to the lower mills.¹⁰ Authority to enter upon unimproved lands adjoining a highway to get materials, does not justify an entry upon improved lands.¹¹ A railroad had power to appropriate contiguous lands, not exceeding five acres, for warehouse purposes. It was held it could only take lands immediately adjoining its right of way.¹² A statute provided that land might be taken for a cemetery, when "land necessary therefor cannot be obtained in any suitable place at a reasonable price by contract with the owner." It was held that by "any suitable place" the legislature meant nothing less than the most suitable place, or a place as suitable as any other, or as suitable as the town could afford to pay for.¹³ Power to regulate and improve streets does not confer authority

⁶ *Neff v. Reed*, 98 Ind. 341.

¹⁰ *Amoskeag Manf. Co. v. Worcester*, 60 N. H. 522.

⁷ *Boston & Albany R. R. Co. v.*

¹¹ *Jackson v. Rankin*, 67 Wis. 285.

¹² *Bird v. W. & M. R. R. Co.*, 8 Rich. Eq. S. C. 46.

⁸ *Matter of New York, Lackawanna & Western R. R. Co.*, 33 Hun, 148.

¹³ *Crowell v. Londonderry*, 63 N. H. 42.

⁹ *State v. St. Paul etc. Ry. Co.*, 35 Minn. 131.

to open streets.¹⁴ Under authority to construct a "railway and works," land may be taken for a station.¹⁵ So land may be taken for a depot under a general authority to condemn land necessary for the construction of the road.¹⁶ A company was authorized to condemn lands "adjoining their road as constructed on their right of way as located." It was held not to authorize the taking of lands adjoining a side or spur track.¹⁷ A company was authorized to occupy a certain street and to take ground near or convenient to said street for depot purposes. It purchased grounds so that it had to cross another street in order to reach them. It was held it had no power to cross such street, but should have selected lands adjacent to the street occupied.¹⁸ Under authority to lay out highways from "town to town and from place to place," a highway may be laid out wholly within a town.¹⁹ Authority to lay out and vacate public roads, and to open or extend any street, lane or alley, was held not to authorize the widening of a twenty-foot alley to a fifty-foot street.²⁰ Authority to widen and straighten a street is not authority to extend it.²¹ Authority to survey a highway that has become uncertain does not justify the taking of land not included in the street.²² Under authority to "acquire, to open and to lay out public grounds or squares, streets, alleys and highways," land cannot be condemned for a city prison.²³ Authority to condemn for a mill does not authorize a taking for a

¹⁴ *Knowles v. Muscatine*, 20 Ia. 248.

¹⁵ *Cother v. Midland Ry. Co.*, 2 Phillips, 469.

¹⁶ *Nashville & Chattanooga R. R. Co. v. Cowardine*, 11 Humph. 348.

¹⁷ *Akers v. United New Jersey R. R. Co.*, 43 N. J. L. 110.

¹⁸ *Pennsylvania R. R. Co's Appeal*, 93 Pa. S. 150.

¹⁹ *New Vineyard v. Somerset*, 15 Me. 21.

²⁰ *In re Liberty Alley*, 8 Pa. S. 381.

²¹ Widening of Thirty-fourth St., 10 Phila. 197.

²² *Beckwith v. Beckwith*, 22 Ohio St. 180.

²³ *East St. Louis v. St. John*, 47 Ills. 463.

tail-race.²⁴ A statute provided for the condemnation of land "to construct a canal or a railroad or a turnpike, graded, macadamized or plank road or bridge or a work of public utility." It was held *not* to authorize condemnation for a ferry.²⁵ Under authority to a company to take land necessary for its works, it can only take land to be occupied by its works, and cannot condemn land merely to get earth or materials for construction.²⁶ Authority to enter upon unimproved lands and take materials for repairing highways and bridges does not authorize the taking of timbers which the owner has prepared for his own use.²⁷ Under authority to take materials "necessary for the prosecution of the improvements intended by this act and to make all such canals," etc., it was held that materials could be taken for repairs as well as for construction.²⁸ An existing corporation was authorized to take the waters of certain specified ponds and to "construct, lay down and maintain, any dam or dams, pipes, fountains, or reservoirs whatsoever, upon or over any land whatsoever." The only provision for compensation was to persons suffering damage "by the taking the water aforesaid." It was held it could only take the waters mentioned and that it could not condemn land for a dam or for flooding.²⁹

§ 257. Meaning of the words "to," "from," "at" or "near" a place, in statutes describing termini and location.—These words must receive a reasonable construction, and in such statutes have uniformly been held to be inclusive.¹ Authority to construct a road to or from a place is confined

²⁴ Coalter *v.* Hunter, 4 Rand. 58.

²⁷ Goodman *v.* Bradley, 2 Wis. 4

²⁵ Sandford *v.* Martin, 31 Ia. 67.

257.

²⁶ Eversfield *v.* Mid-Sussex Ry. Co., 3 DeG. & J. 286; Bentinck *v.* Norfolk Estuary Co., 8 DeG. McN. & G. 714; see also Parsons *v.* Howe, 41 Me. 218; New York etc. R. R. Co. *v.* Gunnison, 1 Hun, 496; S. C. 3 N. Y. Supm. Ct. R. 632.

²⁸ Bates *v.* Cooper, 5 Ohio, 115.

²⁹ Pickman *v.* Peabody, 145 Mass. 480.

§ 257.

¹ *To:* Farmer's Turnpike *v.* Coventry, 10 Johns. 389; Moses *v.* Pittsburgh etc. R. R. Co., 21 Ills.

to the territory then within the corporate limits, and does not authorize an extension into new territory afterwards added.² A statute fixing a terminus of a railroad *at or near* a place was held to be satisfied in one case by a location 2475 feet from the place,³ and in another by a location a mile and a half away.⁴ A statute fixing the eastern terminus of the Union Pacific Railroad at a point "on the western boundary of Iowa" was held to be satisfied by a point on the east shore of the Mississippi River.⁵

§ 258. Change of location.—In nearly all statutes conferring the power of eminent domain, some discretion is left with those who are vested with the power, in respect to the designation of the property to be taken. Formerly, when public works were constructed mostly under special laws and charters, it was common to specify with more or less particularity the termini and route of any proposed railroad, canal or other public way. In the present day it is more common to provide by general laws for all works of this character under which both the route and termini are left to the deter-

516; Indianapolis etc. R. R. Co. *v.* Hartley, 67 Ills. 439; Rio Grande R. R. Co. *v.* Brownsville, 45 Tex. 88.

From: Tennessee & Alabama R. R. Co. *v.* Adams, 3 Head, 596; Western Pennsylvania R. R. Co.'s. Appeal, 99 Pa. S. 155; Chicago & Northwestern Ry. Co. *v.* Chicago & Evanston R. R. Co., 112 Ills. 589; McCartney *v.* Chicago & Evanston R. R. Co., 112 Ills. 611; Hazelhurst *v.* Freeman, 52 Ga. 244.

At or near: Mason *v.* Brooklyn City & Newton R. R. Co., 35 Barb. 373; Mohawk Bridge Co. *v.* Utica & Schenectady R. R. Co., 6 Paige, 554; State *v.* Hudson Tunnel R. R. Co., 38 N. J. L. 518; Central R. R. Co. *v.* Pennsylvania R. R. Co., 31

N. J. Eq. 475. Generally: Pierce on Railroads, p. 258. The only case holding a contrary doctrine is North Eastern R. R. Co. *v.* Payne, 6 Rich. S. C. 177, which holds that authority to construct a road "*from* Charleston" would not permit the company to enter the city.

²Commonwealth *v.* Erie & North East R. R. Co., 27 Pa. S. 339; Pontchartrain R. R. Co. *v.* La Fayette & Pontchartrain R. R. Co., 10 La. An. 741; Chope *v.* Detroit & Howell Plank Road Co., 37 Mich. 195.

³Fall River Iron Works Co. *v.* Old Colony & Fall River R. R. Co., 5 Allen, 221.

⁴Parke's Appeal, 64 Pa. S. 137.

⁵Union Pacific R. R. Co. *v.* Hall, 91 U. S. 343.

mination of those who choose to avail themselves of the statute. In such cases the articles of incorporation take the place, somewhat, of the former special charters, and, in so far as they designate the location, route or termini of the proposed work, would probably receive a similar construction. When the choice or discretion which is thus given by statute has been exercised, the power is exhausted, and the location cannot be changed.¹ But this principle is not to be applied too rigidly. A general or material change of location cannot be made. But minor changes can be made, which experience or change of circumstances have demonstrated to be necessary or desirable. The growth of a town in a certain direction may make a former location of a depot very inconvenient. A railroad may be destroyed by a mountain slide or a wash-out in such a way that reconstruction would be impracticable or impossible. In such cases it seems to us a change of location may be made so as to obviate the inconvenience in the one case or obviate the difficulty in the other. And so are the authorities. Where the location of a lock-house on a canal proves inconvenient or unsuitable, a new location can be made.² In another case two railroads intersected at G and crossed the Y river, not far from that place, on independent bridges. These were burnt during the war. After the

§ 258.

¹ Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358; Mason v. Brooklyn City & Newton R. R. Co., 35 Barb. 373; People v. New York & Harlem R. R. Co., 45 Barb. 73; Hudson & Delaware Canal Co. v. New York & Erie R. R. Co., 9 Paige, 323; Morris & Essex R. R. Co. v. Central R. R. Co., 31 N. J. L. 205; McMurtrie v. Stewart, 21 Pa. S. 322; Morrow v. Commonwealth, 48 Pa. S. 305; Pierce on Railroads, p. 254. *Contra:* *Ex parte* South Carolina R. R. Co., 2 Rich. L. S. C. 434.

² Ligat v. Commonwealth, 19 Pa. S. 456. In this case the court say: "If a lot of ground, on which a lock-house has been erected, should be deemed no longer suitable or convenient for its appropriate uses, the canal commissioners have power to take possession of other ground for the purpose of erecting a new lock-house. Their power is not exhausted by the first appropriation. Errors of location, in matters of that kind, which are but incidents to the main work, may be corrected without special application to the legislature."

war, both roads being much crippled financially, they united in building one bridge on the line of one of the roads, and the other condemned a short intersecting line in order to avail itself of the new bridge. It was held that it might lawfully do so.³ Where the statute gave the right to railroad corporations to make a change of location, whenever a better and cheaper route could be had, or whenever any obstacle occurred, either by way of difficulty of construction or inability to procure right of way at a reasonable cost, it was held that the privilege must be exercised before completion.⁴ The charter of a horse railroad company authorized it to use a certain street, and provided that, in order to avoid an obstruction on that street, it might use such portions of any of the adjacent streets as might be necessary. It was held that, after the obstruction was removed, it could lay its track on the first-named street.⁵ Where the power to change the location of a railroad was expressly given by statute, it was held it could be exercised after a partial construction of the road.⁶

§ 259. Successive appropriations.—In the absence of any restriction or limitation, the power to take private property may be exercised by the grantee from time to time as necessity requires. If this were not so, it would be necessary to anticipate all future needs at the outset. The company condemning would thus not only have to take and pay for property in advance, but it might be saddled with property which it could never use at all. On the other hand, either from taking too narrow a view of the future or from the growth of business beyond any reasonable anticipation, it might in

³ Mississippi and Tennessee R. R. Co. v. Devaney, 42 Miss. 555.

⁴ Moorehead v. Little Miami R. R. Co. 17 Ohio, 340; Little Miami R. R. Co. v. Naylor, 2 Ohio St. 235; Atkinson v. Marietta & Cincinnati R. R. Co., 15 Ohio St. 21.

⁵ Phila. & Gray's Ferry Paseenger Ry. Co.'s Appeal, 102 Pa. S. 123.

⁶ Eel River & Eureka R. R. Co. v. Field, 67 Cal. 429; Cape Girardeau etc. Road Co. v. Dennis, 67 Mo. 438.

a few years find itself unable properly to discharge its duties to the public¹. Accordingly a railroad company, after having located and completed its road, may, as the expansion of its business requires, take additional land for right of way,² terminal facilities,³ depot accommodations,⁴ side tracks,⁵ shops,⁶ or for any other purpose for which its compulsory powers may be exercised.⁷ A company to supply a city with water may make successive appropriations of water, as the population and demands for water increase.⁸ So in regard to a power to take lands in order to secure materials for an aqueduct.⁹ A horse railroad company, authorized to lay two tracks upon a street, may lay one at one time and one at another.¹⁰ Where a railroad sixty-six feet wide is purchased by another company which had power to condemn a hundred feet in width, it was held the latter company, after operating the road for several years, might widen to a hundred feet.¹¹

§ 260. Where the provisions of one statute are adopted by another, or extended to another jurisdiction. — This is frequently done in statutes relating to eminent domain, and

§ 259.

¹ *Hamilton v. Annapolis & Elk Ridge R. R. Co.*, 1 Md. 553; S. C. 1 Md. Ch. 107.

² *Prather v. Jeffersonville etc. R. R. Co.*, 52 Ind. 16; *Peck v. New Albany & Chicago R. R. Co.*, 101 Ind. 366; *Chicago & Western Ind. R. R. Co. v. Illinois Central R. R. Co.*, 113 Ills. 156.

³ *Central Branch U. P. R. R. Co. v. Atchison, Topeka & Santa Fé R. R. Co.*, 26 Kan. 669.

⁴ *Deitrichs v. Lincoln & North Western R. R. Co.*, 13 Neb. 361.

⁵ *Philadelphia, Wilmington & Balt. R. R. Co. v. Williams*, 54 Pa. S. 103.

⁶ *Chicago, Burlington & Quincy R. R. Co. v. Wilson*, 17 Ills. 123.

⁷ *Fisher v. Chicago & Springfield R. R. Co.*, 104 Ills. 323; *Virginia & Truckee R. R. Co. v. Lovejoy*, 8 Nev. 100; *Simpson v. Lancaster & Carlisle Ry. Co.* 15 Sim. 580; *Stamps v. Birmingham & Stone Valley Ry. Co.*, 2 Phillips, 673; *Brown v. Philadelphia, W. & B. R. R. Co.*, 58 Md. 539.

⁸ *Johnson v. Utica Water Works Co.*, 67 Barb. 415.

⁹ *Matter of Water Commissioners*, 3 Edwards Ch. 552.

¹⁰ *People's Passenger Ry. Co. v. Baldwin*, 14 Phila. 231.

¹¹ *Childs v. Central R. R. Co. of New Jersey*, 33 N. J. L. 323.

sometimes leads to great confusion and perplexity. The courts will, if possible, in such cases effectuate the intention of the legislature. Certain commissioners were authorized to remove all dams on a stream and to execute other works for the benefit of health and drainage. The act provided that the damages should be assessed "in the same manner" as in laying out highways. This was held to mean that similar proceedings should be had, so far as applicable to the subject-matter, and that much was left to implication in the manner of adapting the proceedings to the subject-matter.¹ A statute in reference to assessing betterments in Boston was made applicable to the city of Charlestown. In Boston the authority was vested in the board of aldermen, which also had general authority to lay out streets. In applying the act to Charlestown it was held that the authority did not vest in its board of aldermen, but in the body which had jurisdiction in laying out and improving streets, viz: the city council.²

§ 261. Validity and effect of statutes legalizing defective proceedings.—The legislature may legalize irregular or defective proceedings which it might have authorized in the form in which they have been taken.¹ If the defect is one of power, it can be supplied by a subsequent act.² In all cases, however, intervening rights must not be impaired.³

§ 260.

¹ *Phillips v. County Commissioners*, 122 Mass. 258.

² *Lockwood v. Charlestown*, 114 Mass. 416.

§ 261.

¹ *O'Brien v. Commissioners of Baltimore County*, 51 Md. 15; *Pit-*

² *Spaulding v. Nourse*, 143 Mass. 490;

State v. Bruggerman, 31 Minn. 493; *People ex rel. etc. v. McDonald*, 69 N. Y. 362; *Burgett v. Norris*, 25 Ohio St. 308; *Mattingly v. District of Columbia*, 97 U. S. 687; *Burns v. Multnomah*, 8 Sawyer, 543; *contra: Seibert v. Linton*, 5 W. Va. 57.

² *Spaulding v. Nourse*, 143 Mass. 490.

³ *Mattingly v. District of Columbia*, 97 U. S. 687.

CHAPTER X.

WHAT MAY BE TAKEN.

§ 262. All property subject to the right.—All kinds of property, and every variety and degree of interest in property, may be taken under the power of eminent domain.¹ “The right of eminent domain is an attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of its power, and may be seized and appropriated to public uses when necessity demands it.”² These conclusions follow logically from the nature of the power itself. Notwithstanding this, many doubts and controversies have arisen, both as to the extent of the power itself, and as to the construction of particular delegations of it by the legislature. These will form the subject of the present chapter.

§ 263. Money, choses in action and other personal property.—The distinction should be borne in mind between the power of eminent domain as it exists unrestricted in the State and as it exists in the legislature limited by the constitution. Undoubtedly, money and all kinds of personal property are subject to the *State's* power of eminent domain. Sharswood, J., in speaking of this question, says: “I am

§ 262.

¹ *New York etc. R. R. Co. v. Boston etc. R. R. Co.*, 36 Conn. 196; *Eastern R. R. Co. v. Boston & Maine R. R. Co.*, 111 Mass. 125; *New York, Housatonic & Northern R. R. Co. v. Boston, Hartford & Erie R. R. Co.*, 36 Conn. 196; *Water Works Co. v. Burkhart*, 41 Ind. 364.

² *Metropolitan City Ry. Co. v. Chicago West Div. Ry. Co.*, 87 Ills. 317, 324. “All property is held subject to an inherent right in the government to appropriate it to public use when the public good may require it to be done.” *Alabama & Florida R. R. Co. v. Kenney*, 39 Ala. 307.

not able, and do not feel disposed, to enter the lists upon such a question, but it does seem to me that there may be occasions in which money may be taken by the State in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity, as in the event of an invasion by the public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations or individuals.”¹ But, when we consider the power of the legislature as limited by the constitution, it may well be doubted whether it can authorize the direct appropriation of money. Some constitutions require that compensation shall be *first* made, and some require it to be ascertained in a particular way. Such constitutions amount to a prohibition against taking money. In States whose constitutions do not require the compensation to be first made, the legislature might be justified in pressing emergencies in authorizing money to be taken.² In regard to *choses in action*, and all other kinds of personal property, there can be no doubt as to the power of appropriation. Claims of citizens against a foreign power may be taken by the national government for the purpose of adjusting its relations with such power.³ So a claim for damages to land by reason of an unlawful entry thereon may be taken and adjusted in a proceeding to take the land itself.⁴

§ 264. Public lands and lands held by grant from the State or condemning authority.—The public lands of the United States situated within a State and held for sale or settlement are subject to the eminent domain of the State.¹ But

§ 263.

¹ *Hammett v. Philadelphia*, 65 Pa. S. 146, 152. And see also the opinion of Ruggles, J., in *People v. Brooklyn*, 4 N. Y. 419, 424.

² In *Burnett v. Sacramento*, 12 Cal. 76, Field, J., expresses the opinion that the legislature cannot appropriate money.

³ *Meade v. United States*, 2 Ct. of Claims, 224.

⁴ *Morris Canal & Banking Co. v. Townsend*, 24 Barb. 658.

§ 264.

¹ *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Hendricks v. Johnson*, 6 Porter, Ala. 472.

property of the United States devoted to the particular uses of the government, as for an armory,² or military purposes, or public buildings³ and over which jurisdiction has been ceded, cannot be taken by the State in which it lies.⁴ A State may authorize property to be taken from its own grantee.⁵ Such a taking does not impair the obligation of any contract, it being an implied condition of all grants by the State that the property conveyed shall be subject to the power of eminent domain.⁶ So a city may take, for public uses, property which is held by grant from itself, and notwithstanding its covenant for quiet enjoyment.⁷ The city of Boston covenanted with the owner of a wharf that it would not obstruct or in any manner interfere with the same. It was held that this covenant did not prevent the city from laying out a street over the wharf, that the power to establish streets was vested in the city for the benefit of the general public, and it could not abridge or bargain it away by contracts with individuals.⁸

§ 265. Property affected by contracts, settlements or otherwise, or held for particular uses.—Since all property is subject to the power of eminent domain, it matters not for what purpose it is held, nor how the title or use may be involved or restricted, nor what the estate or interest which any person has therein. The property of colleges or other educational institutions,¹ and land conveyed to trustees for

²United States *v.* Ames, 1 W. & M. 76.

Schenectady R. R. Co., 3 Paige, 45.

⁶*Ibid.*

³United States *v.* Chicago, 7 How. 185.

⁷Brimmer *v.* Boston, 102 Mass. 19; Philadelphia etc. R. R. Co. *v.* Philadelphia, 9 Phila. 563.

⁴For a construction of the act of March 3d, 1875, granting the right of way through public grounds, see Red River & Lake of the Woods R. R. Co. *v.* Sture, 32 Minn. 95.

⁸Brimmer *v.* Boston, 102 Mass. 19.

§ 265.

⁵Jackson *v.* Winn's Heirs, 4 Littell, 322; Young *v.* McKenzie, 3 Ga. 31; Beekman *v.* Saratoga &

¹In re St. Paul & Northern Pacific Ry. Co., 34 Minn. 227; Opening of Streets through Girard College Grounds, 10 Phila. 145;

an academy² are subject to the power. So is mortgaged property,³ property inalienably settled upon a family by the legislature,⁴ property in the hands of a receiver⁵ or property in the possession of the party condemning by lease or otherwise.⁶ Easements appurtenant to land may be taken as well as the land itself.⁷ Where a street is opened reserving in the proprietor certain wharfage rights, another proceeding may be instituted to condemn such rights.⁸ Where the petitioner for a mill had been forever enjoined from causing the water, by means of his dam, or by any other means, to flow back into the tail-race of the defendant's mill or upon any part of his premises, it was held no bar to the proceeding to condemn a right of flowage, the purport of the injunction being merely to prevent an illegal flowing.⁹ The right secured by contract with a railroad company to have a particular crossing constructed can be condemned.¹⁰ The fact that the property of an individual or corporation is devoted to a use of a public nature for which the power of eminent domain might be exercised, does not prevent its being taken under a general authority, unless such individual or corporation is

and see University of Minnesota *v.* St. Paul & Northern Pacific Ry. Co. 36 Minn. 447.

² Trustees of Belfast Academy *v.* Salmond, 11 Me. 109.

³ Alabama & Florida R. R. Co. *v.* Kenney, 39 Ala. 307.

⁴ *In re* Cuckfield Burial Board, 24 L. J. Ch. n s. 585.

⁵ Central R. R. Co. *v.* Pennsylvania R. R. Co., 31 N. J. Eq. 475; S. C. under title of National Dock Ry. Co. *v.* Central R. R. Co., 32 N. J. Eq. 755; Western Union Tel. Co. *v.* Atlantic & Pacific Tel. Co., 7 Biss. 367. But in such case leave should be obtained from the court appointing the receiver.

⁶ Kip *v.* New York & Harlem R. R. Co., 6 Hun, 24; S. C. 67 N. Y. 227; Coster *v.* New Jersey etc. R. R. Co., 24 N. J. L. 730; DeCamp *v.* Hibernia Underground R. R. Co., 47 N. J. L. 43; Secomb *v.* Milwaukee etc. R. R. Co., 49 How. Pr. 75; Tait's Executor *v.* Central Lunatic Asylum (Va.), 4 S. E. R. 697.

⁷ Buffalo, New York & Phila. R. R. Co. *v.* Overton, 35 Hun, 157; Renesslaer *v.* Leopold, 106 Ind. 29.

⁸ Page *v.* Baltimore, 34 Md. 558.

⁹ Peck *v.* Van Rensselaer, 8 Blackf. Ind. 312.

¹⁰ Matter of New York, Lackawanna & Western Ry. Co., 44 Hun, 194.

obliged by law to continue such use for the benefit of the public so long as it continues to use the property at all.¹

§ 266. Taking railroad property for highways and streets.—A general authority to lay out highways and streets is sufficient to authorize a lay-out across the right of way of a railroad.¹ Under a statute which provided that, if a turnpike or way should be laid out over a railroad, “the said turnpike or way may be so made as to pass over or under said railroad, and said turnpike or way shall in all cases be so made as not to obstruct or injure such railroad,” it was held that a crossing at grade could not be made, but that the highway must be carried under the railroad or over it by a bridge.² A statute provided as follows: “When a new way or road is opened or made across a way or road already existing and in use, the new way must be so constructed as to cause as little injury as possible to the old way or road.” It was held that a street across a railroad must be carried over by a viaduct.³ An authority to lay out a highway across the

¹ Matter of New York, Lackawanna & Western Ry. Co., 99 N. Y. 12, 24. The court say: “If the law of its existence does not prevent it from being a mere private corporation, from disregarding if it pleases all public uses; if it may abandon its business at any moment and refuse to run its propellers and sell its lands by an absolute title without responsibility to the sovereign, which is permitted by its charter (§ 2); in short, if under that charter it may be a purely private corporation, its property is not so held as to be exempt from a taking under the law of eminent domain. Any other rule would be surrounded with difficulties. If the test should be made that of the actual use, of the character of the business done and the benefit to

the public realized, we shall never know where to draw the line, and must equally exempt individuals whose property is thus used; and in every case an uncertain and shifting question of fact would dominate the decision to be rendered.”

§ 266.

¹ Little Miami etc. R. R. Co. v. Dayton, 23 Ohio St. 510; Hannibal v. Hannibal & St. Joseph R. R. Co., 49 Mo. 480; St. Paul etc. Ry. Co. v. Minneapolis, 35 Minn. 141; Albany Northern R. R. Co. v. Brownell, 24 N. Y. 345.

² Boston & Maine R. R. Co. v. Lawrence, 2 Allen, 107; Central Vt. R. R. Co. v. Royalton, 58 Vt. 234.

³ Northern Central Ry. Co. v. Baltimore, 46 Md. 425.

track of a railroad company is authority to cross all the tracks at any place.⁴ But under a general authority to lay out highways, a part of the right of way of a railroad cannot be taken longitudinally,⁵ nor can the way be laid through depot grounds,⁶ shops,⁷ and the like, which are devoted to special uses in connection with the road and necessary to its operation and in constant use in connection therewith. But a slight interference with the platform of a depot will not prevent the establishment of a highway.⁸

§ 267. To what extent one railway company may take the property of another.—The general authority to locate and construct a railroad from one point to another does not authorize the taking of property already devoted to railroad uses.¹ In one of the cases cited the court says: “A charter to build and maintain a railroad between certain points, without describing its course and direction, but leaving that to be determined and established by the corporation,

* Albany Northern R. R. Co. v. Brownell, 24 N. Y. 345.

⁵ New Jersey & Southern R. R. Co. v. Long Branch Comrs. 39 N. J. L. 28; Bridgeport v. New York & New Haven R. R. Co., 36 Conn. 255.

⁶ St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359; Milwaukee & St. Paul Ry. Co. v. Faribault, 23 Minn. 167; Prospect Park & Coney Island R. R. Co. v. Williamson, 91 N. Y. 552.

⁷ Atlanta v. Central R. R. Co., 53 Ga. 120.

⁸ New York & Long Branch R. R. Co. v. Drummond, 46 N. J. L. 644. A contrary doctrine appears to be held in Chicago, Rock Island & Pacific R. R. Co. v. Town of Lake, 71 Ills. 333; Philadelphia etc. R. R. Co. v. Philadelphia, 9 Phila. 563. In the former case it was held that,

under the general authority to lay out streets, one could be laid out through a block of ground used for depots, switch tracks, freight houses, etc. It did not appear, however, that the street would take any part of any building.

§ 267.

¹ Housatonic etc. R. R. Co. v. Lee & Hudson R. R. Co., 118 Mass. 391; Worcester & Nashua R. R. Co. v. Railroad Comrs. 118 Mass. 561; Boston & Maine R. R. Co. v. Lowell & Lawrence R. R. Co., 124 Mass. 368; Alexandria & Fredericksburg R. R. Co. v. Alexandria & Washington R. R. Co., 75 Va. 780; Oregon Cascade R. R. Co. v. Bailey, 3 Or. 164; Contra Costa R. R. Co. v. Moss, 23 Cal. 323; California Pacific R. R. Co. v. Central Pacific R. R. Co., 47 Cal. 549.

as provided by the general laws, does not *prima facie* give any power to lay out the road over land already devoted to, and within the recorded location of, another railroad. It is not to be presumed that the Legislature intended to allow land thus devoted to one public use to be subjected to another, unless the authority is given in express words or by necessary implication. And such implication can only be found in the language of the act, or from the application of the act to the subject matter, so that the railroad could not be laid, in whole or in part, by reasonable intendment, on any other line.”² The legislature may authorize one railroad to take the property of another, and, as indicated in the opinion just quoted, this may be done by express words,³ or by necessary implication.⁴ Property not in use for railroad purposes and not necessary to the proper exercise of the corporate franchises may be taken by another company.⁵ Nor will the general rule be applied to prevent the taking of a small and immaterial part of some of the appurtenances of the company, when the taking is necessary for the right of way of another company or other imperative use.⁶

² 118 Mass. 391.

³ Eastern R. R. Co. v. Boston & Maine R. R. Co., 111 Mass. 125; Lewis v. Germantown etc. R. R. Co., 16 Phila. 621.

⁴ Providence & Worcester R. R. Co. v. Norwich & Worcester R. R. Co., 138 Mass. 277. “Where it appears by the statute, or by the application of the statute to the subject matter, that the contemplated road cannot reasonably be built without appropriating land already devoted to public use, an implication arises that the legislature intended that such appropriation might be made.”

⁵ Baltimore & Ohio R. R. Co. v. P. W. & K. R. R. Co., 17 W. Va. 812; Peoria, Pekin & Jacksonville R. R.

Co. v. Peoria & Springfield R. R. Co., 66 Ills. 174.

⁶ Chicago & North Western Ry. Co. v. Chicago & Evanston R. R. Co., 112 Ills. 589; New York, Housatonic & Northern R. R. Co. v. Boston, Hartford & Erie R. R. Co., 36 Conn. 196; North Carolina Railroad Company v. Carolina Central R. R. Co., 83 N. C. 489. And where the statute authorized the taking of any real estate, franchise or easement of any corporation, the taking by one railroad of part of the right of way of another not occupied by tracks was sustained, with remarks by the court which go much beyond the necessities of the case. Northern R. R. Co. v. Concord & Claremont R. R. Co.,

§ 268. Railroad crossings.—The general rule laid down in the last section does not operate to prevent one railroad crossing the right of way of another under general authority to build its road.¹ Railroads chartered by the federal government stand on the same footing as those chartered by the State in this respect.² On the same principle one horse railroad may cross the tracks of another,³ and a steam railroad may cross the tracks of a horse railroad company.⁴ Where one railroad granted to another a right of way across its road, thirty feet wide, on condition, that it should only be used for two tracks, the grantee was held not to be precluded from condemning an additional twenty feet to be occupied by two more tracks.⁵

§ 269. Taking railroad property for other public uses.—Under a general authority conferred upon the city of

27 N. H. 183. So, where one company owned land abutting on a street, the fee extending to the middle of the street, it was held that another company having authority to occupy the street would not be prevented from doing so by the fee being in the first company. Philadelphia etc. R. R. Co. v. Pennsylvania etc. R. R. Co. 16 Phila. 636.

§ 268.

¹ St. Louis, Jacksonville & Chicago R. R. Co. v. Springfield & Northwestern R. R. Co., 96 Ills. 274; Lake Shore & Michigan Southern R. R. Co. v. Chicago & Western Indiana R. R. Co., 97 Ills. 506; East St. Louis Connecting Ry. Co. v. East St. Louis Union Ry. Co., 108 Ills. 265; New Castle & Richmond R. R. Co. v. Peru & Indianapolis R. R. Co., 3 Ind. 464; Grand Rapids, Newaygo & Lake Shore R. R. Co. v. Grand Rapids & Indiana R. R.

Co., 35 Mich. 265; Morris & Essex R. R. Co. v. Central R. R. Co. 31 N. J. L. 205; Matter of Boston H. T. & W. Ry. Co., 79 N. Y. 64; Matter of Same R. R. Co., 79 N. Y. 69; Railway v. Railway, 30 Ohio St. 604; South Carolina R. R. Co. v. Columbia etc. R. R. Co., 13 Rich. Eq. S. C. 339.

² Northern Pacific R. R. Co. v. St. Paul, Minneapolis etc. R. R. Co., 1 McCrary, 302; Union Pacific Ry. Co. v. B. & M. R. R. Co., 1 McCrary, 452; Union Pacific Ry. Co v. Leavenworth etc. Ry. Co., 29 Fed. R. 728.

³ Brooklyn Central & Jamaica R. R. Co. v. Brooklyn City R. R. Co., 33 Barb. 420; Market Street Ry. Co. v. Central Ry. Co., 51 Cal. 583.

⁴ Lynn & Boston R. R. Co. v. Boston & Maine R. R. Co., 114 Mass. 88.

⁵ Chicago & Western Indiana R. R. Co. v. Illinois Central R. R. Co., 118 Ills. 156.

Buffalo to establish canals, basins, slips, etc., it was held it could not take for a canal a strip of land sixty feet wide and two miles long which was already devoted to railroad uses for main tracks, side tracks and general yard purposes.¹ But such general authority is sufficient to authorize laying out a canal *across* property so occupied.² Under a like general authority to establish and maintain ditches and drains, a ditch cannot be laid out upon and along the right of way of a railroad.³ A park may be laid out so as to embrace property devoted to railroad uses, but the use cannot be interfered with without express authority.⁴ So a telegraph may be established along a railroad right of way, it being no material interference with the use for railroad purposes.⁵ But a special authority to a telegraph company to build upon, over or under any public road, street or highway is to be construed strictly, and does not authorize construction over a railroad.⁶ Property acquired by a railroad company by contract, and used for a purpose for which it could not condemn, is subject to the power of eminent domain the same as though it belonged to an individual.⁷ The legislature may empower one railroad company to condemn the use of the tracks of another company,⁸ but this cannot be done without *express* authority.⁹

§ 270. Taking highways and streets.—Authority to construct a railroad between certain termini does not authorize

§ 269.

¹ Matter of City of Buffalo, 68 N. Y. 167; S. C. 64 N. Y. 547.

² Matter of Maine & Hamburg Street Canal, 50 How. Pr. 70.

³ Baltimore, Ohio & Chicago R. R. Co. *v.* North, 103 Ind. 486.

⁴ Matter of Commrs. of Central Park, 63 Barb. 282.

⁵ New Orleans, Mobile etc. R. R. Co. *v.* Southern & Atlantic Tel. Co., 53 Ala. 211; Western Union Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160; Baltimore & Ohio Tel. Co.

v. Morgan's Louisiana & Texas R. R. Co., 37 La. An. 883.

⁶ New York City and Northern R. R. Co. *v.* Central Union Tel. Co., 21 Hun, 261.

⁷ Iron R. R. Co. *v.* Ironton, 19 Ohio St. 299.

⁸ Sixth Avenue R. R. Co. *v.* Kerr, 45 Barb. 138; S. C. 72 N. Y. 330; Pennsylvania R. R. Co. *v.* Baltimore & Ohio R. R. Co., 60 Md. 263.

⁹ Central City Horse Ry. Co. *v.* Fort Clark Horse Ry. Co., 81 Ills. 523.

the appropriation of a highway longitudinally,¹ but the right to cross highways is given by necessary implication.² A private road cannot be laid out in part along a public road.³ One public road cannot be laid out along another, although it is no objection that they coincide for a short distance.⁴ Authority to a plank-road company to use part of a highway when necessary, does not warrant the use of a highway for its entire length.⁵ Authority to construct water-

§ 270.

¹ *Springfield v. Connecticut River R. R. Co.*, 4 CUSH. 63, 71. In this case the court say: "As no company or persons have authority to lay out a railroad, except so far as such is conferred by the legislature, the court are of opinion that by a grant of power by a legislative act to lay out a railroad between certain termini, where the precise course and direction are not prescribed, but are left to the corporation to be located between the termini, no authority is given *prima facie* to lay such railroad on and along an existing public highway longitudinally, or in other words, to take the road-bed of such highway as the track of their railroad. The two uses are almost, if not wholly, inconsistent with each other; so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated. The whole course of legislation, on the subject of railroads, is opposed to such a construction. The crossing of public highways by railroads is obviously necessary, and of course warranted; and numerous provisions are industriously made, to regulate such crossings, by determining when they shall be on the same and

when on different levels, in order to avoid collision; and when on the same level, what gates, fences and barriers shall be made, and what guards shall be kept to insure safety. Had it been intended that railroad companies, under a general grant should have power to lay a railroad over a highway longitudinally, which ordinarily is not necessary, we think that would have been done in express terms, accompanied with full legislative provisions for maintaining such barriers and modes of separation, as would tend to make the use of the same road, for both modes of travel, consistent with the safety of travelers on both. The absence of any such provision affords a strong inference, that, under general terms, it is not intended that such a power should be given." Authority to lay a railroad through a town does not authorize the occupation of a street. *St. Louis etc. R. R. Co. v. Haller*, 82 Ills. 208.

² *Lewis v. Germantown etc. R. R. Co.*, 16 Phila. 608.

³ *Boyer's Road*, 3 i Pa. S. 257.

⁴ *In re Road in Springdale Township*, 91. Pa. S. 260.

⁵ *Justices of Inferior Court v. Plank-road Co.*, 9 Ga. 475.

works is not authority to occupy part of a street for a reservoir.⁶ The statutes in regard to mill-dams do not justify the flooding of highways.⁷ The charter of the New York & Brooklyn Bridge Co. provides that the bridge "shall not obstruct any street which it shall cross, but that such street shall be spanned by a suitable arch or suspended platform, as shall give suitable height for the passage under the same for all purposes of public travel and transportation." It was held to prohibit *any* obstruction, however slight, and that columns could not be erected in the street spanned for the support of the superstructure.⁸

§ 271. Bridges, turnpikes, ferries, canals and mill property.—A toll-bridge,¹ turnpike,² or ferry³ may be taken for a highway when expressly authorized by the legislature, but not without such express authority.⁴ Under a general authority to construct a telegraph line a company may condemn

⁶ *Ex parte* The Manhattan Co., 22 Wend. 653.

⁷ *Commonwealth v. Stevens*, 10 Pick. 247; *State v. Phipps*, 4 Ind. 515; *Venard v. Cross*, 8 Kan. 248; *Morgan v. Banta*, 1 Bibb, 579.

⁸ *People ex rel. Stranahan v. Thompson*, 98 N. Y. 6; *S. C. Sp. T. 67 How. Pr.* 491. In the following case the defendant company was authorized to construct a canal and to occupy any lands and tenements with certain exceptions not including streets; it was held it could not occupy or flood parts of certain streets. The circumstances of the case were peculiar and there was what amounted to legislative authority by necessary implication. *Richmond v. James River & Kanawha Co.*, 12 Leigh, 278.

§ 271.

¹ *Central Bridge Corporation v.*

Lowell, 4 Gray, 474; *Northampton Bridge Case*, 116 Mass. 442; *Smith v. Conway*, 17 N. H. 586; *State v. Canterbury*, 28 N. H. 195; *Crosby v. Hanover*, 36 N. H. 404; *In re Towanda Bridge Co.*, 91 Pa. S. 216; *West River Bridge Co. v. Dix*, 16 Vt. 446; *S. C. 6 How.* 507; *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 454; *Red River Bridge Co. v. Clarksville*, 1 Sneed, 176.

² *Backus v. Lebanon*, 11 N. H. 19; *Case of Kensington*, 2 Rawle, 445; *Armington v. Barnett*, 15 Vt. 745.

³ *Sullivan v. Board of Supervisors*, 58 Miss. 790.

⁴ *Ibid.*, and *Board of Supervisors v. McFadden*, 57 Miss. 618; *Barber v. Andover*, 8 N. H. 398; *West Boston Bridge Co. v. County Comrs. of Middlesex*, 10 Pick. 270.

the right to erect poles on the outer line of a turnpike.⁵ A general authority is sufficient to authorize a railroad company to construct its road *across* a turnpike,⁶ but not to occupy it longitudinally.⁷ So a canal may be crossed by a highway without special authority,⁸ but cannot be occupied longitudinally unless expressly authorized.⁹ General power to construct drains and sewers does not authorize a sewer across canal lands so as to discharge into the canal.¹⁰ Mill-ponds may be crossed by a railroad, though in a slight degree diminishing the capacity of the pond,¹¹ and mill-dams authorized by statute may be taken or impaired for public use by the legislature.¹²

§ 272. Property of gas and water companies, parks, cemeteries, school property, etc.—A railroad company cannot, under its general power to construct a road between certain termini, locate its road through a tract of land acquired by a city for a reservoir.¹ A city authorized to construct water works may lay its pipes through the lands of a water company where it can be done without material interference.² Land of a gas company not in use by it, and which is indispensable to a railroad company, may be taken by the railroad, though there is some prospect that it may be required by the

⁵ *Turnpike Co. v. American News Co.*, 43 N. J. L. 381.

⁶ *White River Turnpike Co. v. Vermont Central R. R. Co.*, 21 Vt. 590; *Baltimore & Havre de Grace Turnpike Co. v. Union R. R. Co.*, 35 Md. 224; *La Fayette Plank Road Co. v. New Albany & Salem R. R. Co.*, 18 Ind. 90.

⁷ *Kenton County Court v. Bank Lick Turnpike Co.*, 10 Bush, 529; *In Brainard v. Missisquoi R. R. Co.*, 48 Vt. 107, which might *seem* to conflict with the text, the question was not involved and not decided.

⁸ *Morris Canal Co. v. State*, 24 N. J. L. 62.

⁹ *State v. Newark*, 28 N. J. L. 529.

¹⁰ *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223.

¹¹ *White v. South Shore R. R. Co.*, 6 Cush. 412; *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. 360.

¹² *Hazen v. Essex Co.*, 12 Cush. 475.

§ 272.

¹ *State v. Montclair R. R. Co.*, 35 N. J. L. 328.

² *Matter of Rochester Water*

gas company in the future.³ The general authority to lay out and construct railroads and highways does not authorize a location through a public park.⁴ The same may be said of cemeteries which are for public use.⁵ But a railroad may be laid along a river bank through a cemetery, over grounds which are not suitable for burial purposes, and which will not therefore be a material interference.⁶ In *Baleh v. County Commissioners*,⁷ it was held that land held for a parish burial ground could be taken to enlarge a town burial ground. Where the act incorporating a cemetery association provided that no road, street or alley should be laid through its grounds without its consent, it was held that the provision was not repealed by a subsequent general village incorporation act which gave the power to do so in general terms.⁸ But, in a similar case, where the subsequent act authorized the municipality to take property for streets, *any private statute to the contrary notwithstanding*, it was held that the restriction was abrogated.⁹ Lands and buildings in actual use for

Comrs., 66 N. Y. 413; and see *Lake Pleasant Water Co. v. Contra Costa Water Co.*, 67 Cal. 659.

³ *New York Central & Hudson River R. R. Co. v. Metropolitan Gas Light Co.*, 63 N. Y. 326.

⁴ *Wellington et al. Petitioners*, 16 Pick. 87; *Matter of New York & Brighton Beach R. R. Co.*, 20 Hun, 201; *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574.

⁵ *Egypt Street*, 2 Grant's Cases, 455.

⁶ *Wood v. Macon & Brunswick R. R. Co.*, 68 Ga. 539.

⁷ 103 Mass. 106.

⁸ *Hyde Park v. Cemetery Association*, 119 Ills. 141.

⁹ *In re Twenty-second Street*, 15 Phila. 409; S. C. 102 Pa. S. 108. The acts involved in this case were as follows: By a private act, passed

March 20, 1849 (P. L. 194), it was enacted that "No street, road, lane or alley shall be hereafter opened through the land of the United American Mechanics and Daughters of America Cemetery or Burial Place, except with the consent of said corporation, nor shall the same be liable to be taken or used for any object not connected with or appertaining to burial purposes, and shall be exempt from taxation," etc. An act of April 8, 1881 (P. L. 68), enacted that "The municipalities and courts having jurisdiction in any city of this commonwealth shall have exclusive control and direction of the opening, widening, narrowing, vacating and changing grades of all streets, alleys and highways within the limits of such city, and may open or widen streets

public schools cannot be taken for other public uses under a general authority.¹⁰

§ 273. Works upon, across or over navigable waters.—Waters where the tide ebbs and flows, and navigable streams, whether tidal or not, stand upon the same footing as public highways and other property devoted to public use. They cannot be interfered with or occupied under a mere general authority to take property for public use. Thus a highway cannot be built over tidal waters¹ or a bridge thrown across a navigable stream,² without express authority.³ And where express authority is given it must be strictly pursued,⁴ and also strictly construed.⁵ Authority to construct a railroad along a river was held not to authorize its construction upon or over the river.⁶

at such points and of such width as may be deemed necessary by such city authorities and courts, any private or special statute to the contrary notwithstanding; proceedings to be had in such cases as are now required by law."

¹⁰In *Rominger v. Simmons*, 88 Ind. 453, it was held that under general authority a highway might be laid out so as to take part of a public school house and grounds, but this decision seems to us contrary to both the current and the reason of the authorities and wholly inconsistent in principle with *Baltimore & Ohio R. R. Co. v. North*, 103 Ind. 486, decided by the same court.

§ 273.

¹*State v. Anthoine*, 40 Me. 435; *Marblehead v. County Comrs. of Essex*, 5 Gray, 451; and see *Haskell & New Bedford*, 108 Mass. 208.

²*Charlestown v. County Comrs. of Middlesex*, 3 Met. 202.

³In Connecticut it is held that a bridge may be built across the entrance to a cove where the tide ebbs and flows, but which is not navigable for any useful purposes of commerce, under a general authority in regard to highways. *Weathersfield v. Humphry*, 20 Conn. 218; *Groton v. Hurlbut*, 22, Conn. 178. Also that, under a like general authority, a bridge may be built over a navigable stream, provided it is constructed with a draw. *Brown v. Preston*, 38 Conn. 219.

⁴*Cape Elizabeth v. County Comrs.* 64 Me. 456.

⁵Thus authority to bridge a navigable stream was held not to authorize a bridge such as to destroy navigation, that not being in dispensable. *Hickok v. Hine*, 23 Ohio St. 523.

⁶*Stevens v. Erie R. R. Co.*, 21 N. J. Eq. 259.

§ 274. Corporate property and franchises may be taken.

—Although a corporate charter is a contract and protected by the constitution of the United States, yet the rights and privileges secured by it are property, and, like all other property, are subject to the eminent domain power of the State.¹ It follows, therefore, that not only all corporate property,² but the corporate franchises themselves, may be appropriated to public use as the public exigencies require.³ This point is now too well settled to require any discussion, and we simply quote from one of the leading cases on the subject sufficiently to show the course of reasoning upon which the authorities go:

“Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as the community or State may have thought proper to ordain. It can rest on no other foundation, can have no other guaranteee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothe-

§ 274.

¹ West River Bridge Co. v. Dix, 6 How. 507; Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 454; Crossly v. O'Brien, 24 Ind. 325; La Fayette Plank Road Co. v. New Albany & Salem R. R. Co., 13 Ind. 90; Boston Water Power Co. v. Boston & Worcester R. R. Co., 23 Pick. 360; Central Bridge Corporation v. Lowell, 4¹ Gray, 474; Grand Rapids, Newago & Lake Shore R. R. Co. v. Grand Rapids & Indiana R. R. Co., 35 Mich. 265; Backus v. Labanon, 11 N. H. 19; State v. Canterbury, 28 N. H. 195; Crosby v. Hannover, 36 N. H. 404; Matter of Petition of Ker, 42 Barb.

119; Case of Kensington, 2 Rawle, 445; *In re Towanda Bridge Co.*, 91 Pa. S. 216; Lewis v. Germantown etc. R. R. Co., 16 Phila. 621; Red River Bridge Co. v. Clarksville, 1 Snead, 176; West River Bridge Co. v. Dix, 16 Vt. 446; Armington v. Barnett, 15 Vt. 745; White River Turnpike Co. v. Vermont Central R. R. Co., 21 Vt. 590; James River & Kanawha Co. v. Thompson, 3 Gratt. 270.

² New York Central etc. R. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326; Bellona Co.'s Case, 3 Bland Ch. 442; *In re Twenty-second Street*, 15 Phila. 409.

³ See cases cited in note 1.

sis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfill it. But into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof.”⁴

⁴ Daniel, J., in *West River Bridge Co. v. Dix*, 6 How. 507, 532; and see language to the same effect by Bigelow, J., in *Central Bridge Corporation v. Lowell*, 4 Gray, 474, 480, 481.

§ 275. **Exclusive rights and privileges.**—The legislature cannot divest itself of its sovereign powers. If it should expressly stipulate with a corporation or individual that certain rights and property should not be taken or interfered with under its right of eminent domain, it would be nugatory, because beyond its power. The legislature may grant exclusive rights and privileges, but such rights and privileges remain subject to the eminent domain power. Hence, an exclusive right to maintain a toll-bridge or ferry may be taken upon making compensation.¹ So an exclusive right to maintain any kind of a public way between two points,² or to lay down and operate horse railroads upon certain streets,³ or to construct a telegraph along a railroad right of way.⁴ The fact of any right or privilege being exclusive does not change its nature, it only affects its value. It is merely property, and, like all other property, may be taken upon making just compensation.

§ 276. **General principles deducible from the foregoing decisions in respect to the taking of property already devoted to public use.**—*First.* All property held for public use is still subject to the eminent domain power of the State, with this exception: that it cannot be taken to be used *for the same purpose in the same manner*. If this were not so, then, as remarked by a learned judge, “great public improvements, rendered necessary by the increasing wants of society in the development of civilization and the progress of

§ 275.

¹ *Piscataqua Bridge Co. v. New Hampshire Bridge*, 7 N. H. 35.

² *Salem & Hamburg Turnpike Co. v. Lyme*, 18 Conn. 451.

³ *Phila. & Gray's Ferry Passenger Ry. Co.'s Appeal*, 102 Pa. S. 123; *Street Ry. Co. v. West Side Street Ry. Co.*, 48 Mich. 433. So a right of one horse railroad company *not* to have any competing

railroad laid down on certain streets may be taken. *Metropolitan Ry. Co. v. Chicago West Div. Ry. Co.*, 87 Ills. 317.

⁴ *New Orleans etc. R. R. Co. v. Southern & Atlantic Tel. Co.*, 53 Ala. 211; *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; *Baltimore & Ohio Tel. Co. v. Morgan's La. & Tex. R. R. Co.*, 37 La. An. 883.

the arts, might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete."¹ But the legislature cannot take the property of A, such as a toll-bridge, and transfer it to B to be still used as a toll-bridge by B in the same manner as it had previously been by A.² This would simply be taking the property of A and giving it to B, which the legislature is powerless to do.

Second. The right to take property already devoted to public use must be given *in express terms or by necessary implication.*³

Third. Whether such authority has been given in any case, either in express terms or by implication, is necessarily a question for the courts.⁴

Fourth. Whether the power exists in any given case is a question of legislative intent, to be ascertained in the first place from the terms of the statute, and in the second place by the application of the statute to the subject matter. If the language of the statute is explicit, as where a particular turnpike is authorized to be taken and laid out as an ordinary highway, the courts have nothing to do but to give effect to the express language of the statute. But, if the language of the statute is not explicit, then it is a question of *reasonable*

§ 276.

¹ Bigelow, J., in *Central Bridge Corporation v. Lowell*, 4 Gray, 474, 482.

² *West River Bridge Co. v. Dix*, 6 How. 507, 537.

³ Cases cited in §§ 266 *et seq.*; and see especially *Boston Water Co. v. Boston & Worcester R. R. Co.*, 23 Pick. 360; *Springfield v. Connecticut River R. R. Co.*, 4 Cush. 63; *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223; *Housatonic etc. R. R. Co. v. Lee & Hudson R. R. Co.*, 118 Mass. 391;

Boston & Maine R. R. Co. v. Lowell, 124 Mass. 368; *Providence & Worcester R. R. Co. v. Norwich & Worcester R. R. Co.*, 138 Mass. 277; *New Jersey & Southern R. R. Co. v. Long Branch Comrs.*, 39 N. J. L. 28; *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574; *People ex rel. Stranahan v. Thompson*, 98 N. Y. 6.

⁴ See cases cited in the last note, in all of which the question was entertained, and in some of which the power claimed was found to exist and in others not.

intendment, in view of all the circumstances of the case. Authority to construct a railroad through a narrow gorge already occupied by a public way would authorize the use of the old way if the new road could not reasonably be built without it.⁵ The chief difficulty arises when authority to condemn property for any purpose is given in general terms, as is usually the case in these latter years. In such case the presumption is against the right to take property which is already devoted to public use.⁶ This presumption may be overcome by showing a reasonable necessity for the property desired, as compared with its necessity and importance to the use to which it is already devoted.⁷

⁵ Matter of City of Buffalo, 68 N. Y. 167, 178; Anniston & Cincinnati R. R. Co. v. Jacksonville, Gadsden & Attalla R. R. Co., 82 Ala. 297; Denver & R. G. Ry. Co. v. Denver, S. P. & P. R. R. Co., 17 Fed. R. 867; Montana Central Ry. Co. v. Helena etc. R. R. Co., 6 Mont. 416.

⁶ "In determining whether a power generally given, is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid; if the latter use, when exercised, must supersede the former; it is not to be implied from a general power given, without having in view a then existing and par-

ticular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise, to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject matter of it, so that, by reasonable intendment, some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner." Matter of City of Buffalo, 68 N. Y. 167, 175.

⁷ Springfield v. Connecticut River R. R. Co., 4 Cush. 63. In this case the defendant company was authorized by statute to build a branch road from its main track in Cabotville "to and near the mills in said

Under the general laws of Illinois a corporation may be organized for the purpose of constructing a road from any point in the State to the city of Chicago. But the general authority which such a corporation would have, would not authorize it to condemn the terminal facilities of an existing road, or to pass through its depot or freight houses, or to take a school building or the water works or the court house. It would be authorized to extend its road into the city to such a point as would reasonably accommodate the public

village, passing up the south bank of Chicopee River, near the same, and thence extending up said river to the Chicopee Falls village." The company laid its track along a public street, and this was a bill to enjoin its use. In pronouncing the opinion of the court, Chief Justice Shaw says: "In the present case, it is manifest, that there are no words in the act of 1845 which give the defendants authority to locate and construct their railroad over Front street, where it was actually laid, or over any other highway in Cabotville; and if they had the power, it must be derived from necessary implication, though no such implication appears on the face of the act. If it exists, it must arise from the application of the act to the subject matter, so that the railroad could not, by reasonable intendment, be laid in any other line. The grant of a right is, by reasonable construction, a grant of power to do all the acts reasonably necessary to its enjoyment. It is not an absolute or physical necessity, absolutely preventing its being laid elsewhere; but if, to the minds of reasonable men, convergent with the subject, another line could have been adopted between

the termini, without taking the highway, reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made, then there was no such necessity as to warrant the presumption that the legislature intended to authorize the taking of the highway." In order to show the mode adopted in that case, which was an ordinary equity suit for the purpose of determining the question, we quote the directions found at the end of the opinion: "It is a fit case, therefore, in our judgment, to be referred to three commissioners, of competent skill and experience in such subjects, to examine the whole subject, and to consider and report: Whether under the grant of an authority to the defendants to construct and open for use a branch railroad from the junction or main track of their road in the village of Cabotville, to and near the mills in said village, passing up the south bank of Chicopee River, near the same, and thence extending up said river into the Chicopee Falls village, it was, by fair and reasonable intendment, necessary to lay and construct the same upon and along Front street, or either of the public

and render the enterprise reasonably successful. While it could not pass through the depot of another company, it might infringe slightly on its depot grounds or cut a corner from one of its freight buildings.⁸ But any interference that might reasonably be avoided could not reasonably be made. The general question is ably discussed in the cases cited below.⁹

§ 277. Extent of interest which the legislature may authorize to be taken.—In the absence of any constitutional restraint, it rests with the legislature to say what interest or estate in lands shall be taken for public use.¹ The whole matter thus being in the discretion of the legislature, it may

ways in Cabotville or not; and as incident to this inquiry, to consider, whether, by such fair and reasonable intendment, the said railroad could or could not have been laid out and constructed, 1st, between Front street and the canal; or, 2d, over the canal; or, 3d, between the canal and the mills; or, 4th, between the mills and the bank of the Chicopee River; considering for this purpose, the street, the canals, the mills, the land, and the entire space between the street and Chicopee River, as they were in March, 1845, when the act was passed by the legislature. Also, if they should be of opinion, that it was not necessary to lay the railroad over Front street, where it now is, whether any, and if any, what further fences, gates, barriers, guards, or other precautions are required by the act of 1846, c. 271, in order to render it safe and convenient for the general travel, to pass through, over and across that street."

⁸ Chicago & North Western Ry.

Co. v. Chicago & Evanston R. R. Co., 112 Ills. 589.

⁹ Matter of Boston & Albany R. R. Co., 53 N. Y. 574; Boston & Maine R. R. Co. v. Lowell & Lawrence R. R. Co., 124 Mass. 368; Housatonic R. R. Co. v. Lee & Hudson R. R. Co., 118 Mass. 391; Baltimore & Ohio R. R. Co. v. North, 103 Ind. 486; New York & Long Branch R. R. Co. v. Drummond, 46 N. J. L. 644; Milwaukee & St. Paul Ry. Co. v. Faribault, 23 Minn. 167; Prospect Park & Coney Island R. R. Co. v. Williamson, 91 N. Y. 552; New York Central & Hudson Riv. R. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326; and other cases cited in this and previous sections of this chapter.

§ 277.

¹ Edgerton v. Huff, 26 Ind. 35; Water Works Co. v. Burkhart, 41 Ind. 364; Challiss v. Atchison, Topeka & Santa Fe R. R. Co., 16 Kan. 117; Heyward v. New York, 7 N. Y. 314; Sweet v. Buffalo, New York & P. Ry. Co., 79 N. Y. 293; Dingley

authorize a fee to be taken,² and necessarily may authorize any lesser estate or interest to be taken, according to its views of the requirements of the grantee and the demands of the public good.

§ 278. What right, estate or interest may be taken or acquired under particular statutes.—Upon the principle that statutes conferring compulsory powers are to be strictly construed, it follows that, where the estate taken is not defined, only such an estate or interest will vest as is necessary to accomplish the purpose in view.¹ Where an easement is sufficient, no greater estate can be taken.² Thus, under authority to take *land* for a highway, railroad or other use, only an easement can be acquired.³ If the statute provides that a fee shall vest, it is usually held to mean a fee simple absolute,⁴

v. Boston, 100 Mass. 544; Raleigh & Gaston R. R. Co. *v.* Davis, 2 Dev. & B. Law, N. C. 451; DeVaraigne *v.* Fox, 2 Blach, 95. Where the constitution limited the estate which might be taken for railroad purposes to an easement, and a statute authorized a fee to be taken, it was held that the statute was modified by the constitution and would be effectual to vest an easement in the company. Scott *v.* St. Paul & Chicago Ry. Co., 21 Minn. 322.

² Cases cited in last note and Prather *v.* Western Union Tel. Co., 89 Ind. 501; Taylor *v.* Baltimore, 45 Md. 576; Heyward *v.* New York, 7 N. Y. 314; S. C. 8 Barb. 486; Malone *v.* Toledo, 34 Ohio St. 541; Patterson *v.* Boom Co., 3 Dill. 465; see New Orleans Ry. Co. *v.* Gay, 32 La. An. 471; New Orleans Pacific Ry. Co. *v.* Gay, 31 La. An. 430; Morgan's La. & Texas R. R. Co. *v.* Bourdier, 1 McGloin, La. 232.

§ 278.

¹ Clark *v.* Worcester, 125 Mass. 226; Washington Cemetery Co. *v.* Prospect Park etc. R. R. Co., 68 N. Y. 591; New Orleans Ry. Co. *v.* Gay, 32 La. An. 471; Strong *v.* Brooklyn, 68 N. Y. 1; Board of Comrs. *v.* Beckwith, 10 Kan. 603; Henry *v.* Dubuque & Pacific R. R. Co., 2 Ia. 288.

² *Ibid.*

³ Washington Cemetery Co. *v.* Prospect Park etc. R. R. Co., 68 N. Y. 591; Strong *v.* Brooklyn, 68 N. Y. 1; People *ex rel.* etc. *v.* Blake, 19 Cal. 579; Harbeck *v.* Boston, 10 Cush. 295; McCombs *v.* Stewart, 40 Ohio St. 647; Corwin *v.* Cowan, 12 Ohio St. 629; Pittsburgh etc. R. R. Co. *v.* Bruce, 102 Pa. S. 23.

⁴ Malone *v.* Toledo, 28 Ohio St. 643; S. C. 34 Ohio St. 541; People *v.* White, 11 Barb. 26; Rexford *v.* Knight, 15 Barb. 627; Birdsall *v.* Cary, 66 How. Pr. 358; Water Works Co. *v.* Burkhart, 41 Ind. 364;

but, in *Kellogg v. Mallin*,⁵ where the act provided that a fee simple title should vest in a railroad company to its right of way, it was held to mean a qualified or terminable fee, and that the land would revert if the company ceased to use it for the purposes for which it was taken. Where the act provided, in respect of lands taken for a canal, that the State should be seized of an absolute estate in perpetuity, it was held to mean an ordinary fee simple.⁶ Where the language of the act was that a railroad company should be “seized and possessed of the land” taken, it was held to take only an easement.⁷ Where the act provided that the *title* to the land taken should vest in the party condemning, it was held, in one case where the taking was by a city for sewerage purposes, that a fee vested,⁸ and in another, where the taking was by a turnpike company, that only an easement vested.⁹ If the legislature defines the interest which shall be taken or acquired, a less interest than that specified cannot be taken.¹⁰ Under a statute which provides that a fee shall vest upon condemnation proceedings, an easement for a sewer¹¹ or for water pipes cannot be acquired.¹² But, if the act simply authorizes the taking of a fee, or the right to use and occupy forever, or for a term of years, an easement for a water conduit may be taken.¹³ A railroad cannot ap-

Nelson v. Fleming, 56 Ind. 310; *Cromie v. Board of Trustees*, 71 Ind. 208; *Logansport v. Shirk*, 88 Ind. 563; *Mason v. Lake Erie etc. Ry. Co.*, 9 Biss. 239.

⁵ 50 Mo. 496.

⁶ *Haldeman v. Pennsylvania R. R. Co.*, 50 Pa. S. 425; *North Branch Canal Co. v. Hieren*, 44 Pa. S. 418; *Wyoming Coal & Transportation Co. v. Price*, 81 Pa. S. 156.

⁷ *Quimby v. Vermont Central R. R. Co.*, 23 Vt. 387.

⁸ *Page v. O'Toole*, 144 Mass. 303.

⁹ *Dunham v. Williams*, 36 Barb. 136.

¹⁰ *Matter of Water Comrs. of Amsterdam*, 96 N. Y. 351; *DeCamp v. Hibernia Underground R. R. Co.*, 47 N. J. L. 43; *S. C. 47 N. J. L.* 518; *Roanoke City v. Berkowitz*, 80 Va. 616; *Currier v. Marietta & Cincinnati R. R. Co.*, 11 Ohio St. 228; *Pinchin v. London & Blackwall Ry. Co.*, 24 L. J. n. s. Ch. 417.

¹¹ *Roanoke City v. Berkowitz*, 80 Va. 616.

¹² *Matter of Water Comrs. of Amsterdam*, 96 N. Y. 351.

¹³ *Taylor v. Baltimore*, 45 Md. 576; *Charleston etc. R. R. Co. v. Blake*, 12 Rich. S. C. 634.

propriate land for a limited period to be used while its main track is being reconstructed.¹⁴ Under a statute which authorized the condemnation of lands and materials, a railroad attempted to condemn a way through a vein of coal underground, but without taking a support for its road-bed, leaving the owner at liberty to mine the coal underneath, and providing that, in such case, it might either support its tracks by timbers or excavate a new roadway in the wall of the vein. It was held that it could not condemn less than a way for its road and so much of the coal and *strata* underneath as was necessary for its support; also, that it could not condemn a right to shift its road-bed as proposed.¹⁵ Under a power to condemn lands it was held that the right to the flow of a stream over land could not be taken without taking the bed of the stream.¹⁶

§ 279. How much may be taken.—It is the province of the legislature to determine the *quantity*, as well as the *estate*, which may be taken for public use.¹ If the quantity is specified or a maximum prescribed, no more can be taken.² If the authority permits the acquisition of as much as may be necessary, or in still more general terms confers the power to condemn property for the purposes of the undertaking, it will be construed to authorize the taking of so much as may be reasonably necessary under the circumstances.³ More may be taken than is needed

¹⁴ *Currier v. Marietta & Cincinnati R. R. Co.*, 11 Ohio St. 228; see *Wheelock v. Young*, 4 Wend. 647.

¹⁵ *DeCamp v. Hibernia Underground R. R. Co.*, 47 N. J. L. 43, affirmed in 47 N. J. L. 518; see also *Brown v. Corey*, 43 Pa. S. 495; *Matter of Hartford & Connecticut Western R. R. Co.*, 65 How. Pr. 133.

¹⁶ *Watson v. Acquaquanonck Water Co.*, 36 N. J. L. 195.

S 279.

¹ *Matter of Union Ferry Co.*, 98

N. Y. 139; *Hingham & Quincy Bridge & Turnpike Corporation v. County of Norfolk*, 6 Allen, 353.

² *Pittsburgh Nat'l Bank of Commerce v. Shoenberger*, 111 Pa.S. 95; *County of Ramsey v. Stees*, 28 Minn. 326.

³ *Lockie v. Mutual Union Tel. Co.*, 103 Ills. 401. In this case a strip half a rod in width was held to be a reasonable amount for a telegraph line. That which is *convenient* may be taken, though not necessary in

in the present, in anticipation of the increased demands of the future.⁴ Where a canal company took an entire tract, when it might have left a valuable property to the owner after satisfying its reasonable needs, the inquisition was set aside.⁵

§ 280. Instances.—Authority to a railroad to take one hundred feet in width was held to refer to right of way only, and not to ground for depots, side tracks, etc., at stations.¹ The same authority to a turnpike company was held to preclude it from taking land for a toll-house beyond the hundred feet.² The hundred feet may be taken, though the company owns land adjacent thereto.³ Where the act prohibits the taking of more than sixty feet for a highway, the authorities may accept a donation of more.⁴ An act provided that a road should not exceed eighty feet in width, it was held that one road could not be laid out alongside another so that both should exceed eighty feet.⁵ A railroad company was authorized to take and hold so much real estate as should be necessary for the location, construction and convenient use of its railway, “the land so taken otherwise than by consent of owners, shall not exceed one hundred feet in width except for wood and water stations unless where greater width is necessary for excavation, embankment or depositing earth.” It was held it could condemn more than one hundred feet for the purposes specified.⁶ Where a railroad company was authorized to take a strip one hundred feet wide, or more, if

the strict sense. *Sadd v. Maddon Ry. Co.*, 6 Exch. 143.

⁴ *Lodge v. Phila. Wilmington & Baltimore R. R. Co.*, 8 Phila. 345; *Matter of Staten Island Rapid Transit Co.*, 103 N. Y. 251.

⁵ *Chesapeake & Ohio Canal Co. v. Mason*, 4 Cranch, 123.

§ 280.

¹ *Carmody v. Chicago & Alton R. R. Co.*, 111 Ills. 69.

² *Lessee of Kemper v. Cincinnati etc. Turnpike Co.*, 11 Ohio, 392.

³ *Stark v. Sioux City & Pacific R. R. Co.*, 43 Ia. 501.

⁴ *Hays v. Lewis*, 28 Ohio St. 326; and see *Embry v. Connor*, 3 N. Y. 511.

⁵ *Road Case*, 4 W. & S. 39.

⁶ *Johnson v. Chicago, Milwaukee & St. Paul Ry. Co.*, 58 Ia. 537.

necessary for cutting and filling, and the petition was to condemn one hundred and twenty feet, and the right was not questioned in the court below, it was held to have been conceded.⁷

§ 281. Construction of statutes prohibiting the taking of certain buildings and enclosures: Dwellings.—Statutes frequently prohibit the taking of certain buildings and enclosures for rights of way. A lay-out in violation of such a statute is void.¹ In general, it may be said that such statutes should receive a reasonable construction, such as will substantially protect private rights without needless embarrassment to public improvements.² A billiard saloon, built as an L to a tavern, and used in connection therewith, is part of a dwelling.³ A dwelling-house includes so much of the yard or curtilage as is necessary for its reasonable enjoyment.⁴ A statute prohibited the invasion of a dwelling-house or any space within sixty feet thereof. The limitation of sixty feet was held to apply only to land belonging to the owner, and not to prevent a road within sixty feet on the land of another.⁵ A dwelling, to be protected by the statute, must have been erected in good faith.⁶ The statute prohibited the laying out of a cemetery *within* twenty rods of

⁷ *Booker v. Venice & Caraidelet Ry. Co.*, 101 Ills. 333; *Bowman v. Same*, 102 Ills. 459.

⁵ *Richmond & York River R. R. Co. v. Wicker*, 13 Gratt. 375.

¹ *Cuyler v. Rochester*, 12 Wend. 165; *Ex parte Clapper*, 3 Hill, 458; Extension of Twenty-second Street in Columbia, 23 Pa. S. 346.

² *Lansing v. Caswell*, 4 Paige, 519.

³ *State v. Troth*, 36 N. J. L. 422.

⁴ *Swift & Given's Appeal*, 111 Pa. S. 516; *contra*: *Wells v. Somerset & Kennebec R. R. Co.*, 47 Me. 345.

⁶ A statute prohibited the condemnation of a quarry within two hundred yards of any dwelling. Appellant, while the company was organizing, erected a frail shanty within two hundred yards of the quarry in question, which was occupied by tenants and then by free negroes. It was held to be a question of good faith, and the finding of the jury that it was not in good faith was affirmed. *Morris v. Schallsville Branch etc.*, 4 Bush. 448.

any dwelling, store or other place of business. This was held to apply as well to a purchase as to a condemnation,⁷ but not to prevent the taking of land with such building upon it.⁸ The benefit of all such statutes may be waived by the owner to be affected.⁹

§ 282. The same continued: Other buildings and structures.—An inclined-plane railway, in use at the terminus of the plaintiff's road for the purpose of handling freight and passengers was held to be within the statutes prohibiting the taking of fixtures or erections used for trade or manufacture.¹ A house over a spring is an out-house.² A tail-race is not part of a mill or building.³ A railroad was built over land without acquiring title. The owner erected a building near the track, within the limits of the right of way which the company was entitled to take; held, it was protected from condemnation the same as if there originally.⁴ A building moved onto the line of a proposed way after application for the lay-out has been made is not protected.⁵ Application was made for a road running through A's barn, to which he orally consented. The lay-out was refused. Pending an appeal, A sold to B, who opposed the lay-out. It was held that A's consent was no longer binding after the refusal, and the sale was a revocation.⁶ Where the trustees of a village were prohibited from altering a street so as to run over the site of any building the expense of removing which would exceed one hundred dollars, they have no jurisdiction in a case where the expense will exceed that sum, though the owner

⁷ *Stevens v. Manchester*, 63 N. H. 390.

² *Willoughby v. Shipman*, 28 Mo. 50.

⁸ *Crowell v. Londonderry*, 63 N. H. 42.

³ *Worthington v. Bicknell*, 1 Bland, Md. 186.

⁹ *Chesapeake & Ohio R. R. Co. v. Pack*, 6 W. Va. 397.

⁴ *Alabama, Great Southern R. R. Co. v. Gilbert*, 71 Ga. 591.

§ 282.

⁵ *Carris v. Comrs. of Waterloo, 2 Hill*, 443.

¹ *Mohawk & Hudson R. R. Co. v. Artcher*, 6 Paige, 83.

⁶ *People v. Goodwin*, 5 N. Y. 568.

consents.⁷ A statute which prohibited the laying out of a highway through any building, or yards or enclosures, necessary to the use thereof, was held to prevent the establishment of a road through lands acquired by a railroad company for an engine-house, turn-table and station, the last of which had been built.⁸

§ 283. The same continued: Gardens, orchards, yards and other enclosures.—Under a statute prohibiting a lay-out through any building or any fixtures or erections used for trade or manufacture, or through any yards or enclosures necessary to the use thereof, a way may not be laid through a railroad yard in which are an engine-house, turn-table, etc.,¹ nor over a dock used for storage in connection with a ferry,² nor through a mill-yard.³ The term *garden* does not protect land enclosed with a garden, but not used for garden purposes.⁴ In an English case the term *garden* was held to include all gardens, and to apply to a tract of ten acres used for market-gardening.⁵ The words “improved or cultivated land” are to be taken as opposed to wild land.⁶ The term *orchard* protects the trees and the ground which they overhang, and as much more as is reasonably necessary for their cultivation or enjoyment.⁷ An enclosure with two or three old fruit trees is not an orchard.⁸ Prohibiting a lay-out through an orchard does not prevent passing through a field in which there is an orchard.⁹ Where a statute pro-

⁷ *Starr v. Rochester*, 6 Wend. 564.

⁸ *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345.

§ 283.

¹ *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345.

² *Flanders v. Wood*, 24 Wis. 572.

³ *People v. Kingman*, 24 N. Y. 559. Where the mill-yard was not enclosed or defined, it was held that it was for the commissioners to

say how much was necessary. *Ibid.*

⁴ *People v. Horton*, 8 Hun, 357; *People v. Comrs. of Highways*, 57 N. Y. 549.

⁵ *Hughes v. Trustees of Morden College*, 1 Ves. Sr. 188; 3 Ves. Sr. 105.

⁶ *Clark v. Phelps*, 4 Cow. 190.

⁷ *Seymour v. State*, 19 Wis. 240.

⁸ *People ex rel. c. Judges of Dutchess County*, 23 Wend. 360.

⁹ *Ibid.*, and see *Snyder v. Plass*, 28

hibited a lay-out through any inclosure of one year's standing, "unless upon examination a good way cannot otherwise be had," a construction placed on this by adding the words "without departing essentially from the route petitioned for" was held to be correct.¹⁰

§ 284. Section 92 of the English land clauses consolidation act.—The construction of this section involves questions analogous to those considered in the last three sections. The section referred to provides "that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house, or other building, or manufactory, if such party be willing and able to sell and convey the whole thereof." The term *house* includes whatever would pass by a conveyance thereof.¹ It accordingly includes the yard and gardens attached to a house and used in connection therewith.² So the words *building* and *manufactory* include whatever grounds and structures are appurtenant thereto and reasonably necessary to their proper use and enjoyment.³

N. Y. 465; *Snyder v. Trumphour*, 38 N. Y. 355.

¹⁰ *Cummins v. Shields*, 34 Ind. 154.

§ 284.

¹ *King v. Wycombe Ry. Co.*, 28 Beav. 104; S. C. 29 L. J. Ch. n. s. 462.

² *Cole v. West London & Crystal Pal. Ry. Co.*, 27 Beav. 242; *Alexander v. Same*, 30 Beav. 556; S. C. 31 L. J. Ch. n. s. 500; *Salter v. Metropolitan District Ry. Co.*, 39 L. J. Eq. 567; *Marson v. London, Chatham & Dover Ry. Co.*, L. R. 6 Eq. Cas. 101; S. C. 37 L. J. Ch. 483.

³ *Furniss v. Midland Ry. Co.*, L. R. 6 Eq. Cas. 473; *Sparrow v. Oxford, Worcester & Wolverhampton Ry. Co.*, 2 DeG. M. & G. 94; Gros-

venor *v. Hempstead Junction R. R. Co.*, 1 DeG. & J. 446; and, generally, on the construction of this section, see *Fergusson v. London, Brighton & South Coast Ry. Co.*, 3 DeG. J. & S. 653; S. C. 33 Beav. 103, and 33 L. J. Ch. 29; *Pulling v. London, Chatham & Dover Ry. Co.*, 3 DeG. J. & S. 661; S. C. 33 Beav. 644; *Faulkner v. Somerset & Dorset Ry. Co.*, 42 L. J. Ch. 851; *Reddin v. Metropolitan Board of Works*, 31 L. J. Ch. 660; *St. Thomas Hospital v. Charing Cross Ry. Co.*, 1 J. & H. 400; *Gardner v. Same*, 2 J. & H. 248; *Pinchin v. London & Blackwall Ry. Co.*, 5 DeG. McN. & G. 851; *Stone v. Commercial Ry. Co.*, 9 Sim. 621; *Walker v. London & Blackwall Ry. Co.*, 3 A. & E. n. s.

§ 285. What may be taken under the term "land," "ground," etc.—The term *land*, in statutes conferring power to condemn, is to be taken in its legal sense, and includes both the soil and buildings and other structures on it,¹ and any and all interests therein.² Land under water may be taken as well as any other land.³ That which can only exist in connection with the land cannot be taken under a power to condemn land without taking the land itself, as the right to the flow of a stream of water.⁴ Land includes the soil and right of support, and under a general power to take land a right to use the soil above or below the surface cannot be taken without taking the right of support of the soil used.⁵ The term *ground* in such statutes means the same as *land* and includes buildings.⁶

§ 286. Designating the property to be taken.—This is a matter which rests wholly with the legislature.¹ The legislature may designate the particular property to be taken,² or this may be left to the discretion of those upon whom the

744; 43 E. C. L. R. 954; Queen *v.* London & Greenwich Ry. Co., 3 A. & E. n. s. 166, 43 E. C. L. R. 681; and see also Lloyd's Compensation, pp. 18 to 27, where this subject is treated.

§ 285.

¹ Brocket *v.* Ohio & Pennsylvania R. R. Co., 14 Pa. S. 241; State *v.* Reed, 38 N. H. 59.

² Philadelphia etc. R. R. Co. *v.* Williams, 54 Pa. S. 103.

³ Matter of New York Central & Hudson River R. R. Co., 77 N. Y. 248.

⁴ Watson *v.* Acquackanonck Water Co., 36 N. J. L. 195. But under authority to take water rights a prescriptive right to foul the waters of a brook may be taken without taking any land. Martin *v.* Gleason, 139 Mass. 183.

⁵ DeCamp *v.* Hibernia Underground R. R. Co., 47 N. J. L. 43; S. C. *Ibid.* 518.

⁶ Ferree *v.* Sixth Ward School District, 76 Pa. S. 376.

§ 286.

¹ Matter of Union Ferry Co., 98 N. Y. 139; Warren *v.* First Division of the St. Paul & Pacific R. R. Co., 18 Minn. 384.

² Genet *v.* Brooklyn, 99 N. Y. 296; Matter of Application of Mayor etc. of New York, 34 Hun, 441; 99 N. Y. 569; Matter of Union Ferry Co., 98 N. Y. 139; Mahoney *v.* Comry, 103 Pa. S. 362; Haverhill Bridge Proprietors *v.* County Comrs. of Essex, 103 Mass. 120; Northampton Bridge Case, 116 Mass. 442.

authority is conferred, with or without limitations.³ In the absence of any statutory provision the particular route to be followed between designated points in case of a railroad or similar way, rests in the discretion of the company.⁴

§ 287. What may be taken under particular statutes.—
We have already treated of this subject in the last chapter, in considering the construction of particular statutes.¹ Numerous examples of the construction of particular statutes will also be found in the preceding sections of this chapter, and any further instances are deemed unnecessary.

³ *DeWitt v. Duncan*, 46 Cal. 342; *Stoddard*, 6 Minn. 150; *Norton v. Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. 360; *Supervisors of Culpeper v. Gorrell*, 20 Gratt. 484.

Walkill Valley R. R. Co., 61 Barb. 476; *Walker v. Mad River etc. R. R. Co.*, 8 Ohio, 38.

⁴ *Southern Minn. R. R. Co. v.*

¹ *Ante*, § 256.

§ 287.

CHAPTER XI.

ACQUISITION OF PROPERTY BY AGREEMENT OR PRESCRIPTION.

§ 288. **The power to obtain property by agreement.**—In case of private corporations clothed with the power of eminent domain, unless they are restricted by their organic law or by statute, they may undoubtedly acquire by purchase whatever they may condemn.¹ Frequently, if not usually, the failure to agree with the owner of the property desired, is made a condition precedent to the exercise by such corporations of their compulsory powers.² This is equivalent to an express power to purchase.³ In the case of municipal corporations and those acting on behalf of the public, there is no power to agree unless it is given by statute, either expressly or by implication.⁴ Such corporations and public agents must pursue strictly the mode pointed out by law.⁵ The public having through the legislature pointed out how property shall be acquired, and how the amount of compensation and damages shall be ascertained for property taken

§ 288.

¹ Pierce on Railroads, p. 130; Page *v.* Heineberg, 40 Vt. 81, 85; Hill *v.* Western Vermont R. R. Co., 32 Vt. 68; Nicoll *v.* New York & Erie R. R. Co., 12 N. Y. 121. In Page *v.* Heineberg, the court say: "At common law corporations generally have the legal capacity to take a title in fee to real property, some of the cases holding that it is incident to every corporation. This has been long and well settled, un-

less in a case where a corporation purchases and undertakes to hold real property for purposes wholly outside and foreign to the object of its creation, or unless restricted by its charter or by statute."

² Post, § 301 *et seq.*

³ Draper *v.* Williams, 2 Mich. 536.

⁴ See 2 Dillon, sec. 562 *et seq.*

⁵ Hanlon *v.* Supervisors of Westchester, 57 Barb. 383; McCann *v.* Otoe Co., 9 Neb. 324; Paret *v.* Bayonne, 39 N. J. L. 559.

by the public for public use, the agents of the public should not be allowed to depart from the course so laid down.⁶

§ 289. Who are competent to agree or convey.—Contracts made between the owners of property and those vested with authority to condemn the same for public use are subject to the same general rules and principles as though the power to condemn did not exist. The parties must be competent to contract and able to convey the interest or bind the property in the manner proposed. A deed from a mortgagor conveys only his interest and is subject to the mortgage.¹ The deed or contract of a life tenant does not bind the reversioner.² But the life tenant may authorize any use of the land which does not injure the inheritance.³ A deed of a right of way by a husband over land which is the separate property of his wife is invalid.⁴ But the husband may make a valid grant of a right of way through lands belonging to him and occupied as a homestead.⁵ A release of damages by a married woman in which her husband did not join was held to be invalid in Pennsylvania.⁶ In South Carolina it has been held

⁶ *Ibid.*, and see further upon this subject: *People v. Supervisors of Richmond County*, 20 N. Y. 252; *Noyes v. Chapin*, 6 Wend. 461; *Griggs v. Foote*, 4 Allen, 195.

§ 289.

¹ *Wade v. Hennessey*, 55 Vt. 207. In this case the mortgagor deeded a right of way to a railroad company. The money received was actually paid to the mortgagee on his debt, though he did not know the source from whence it came. On a bill to foreclose it was held that the company took no more than any other purchaser would have done and could make no defense but what the mortgagor could have made. See also *Price v. Wee-*

hawken Ferry Co., 31 N. J. Eq. 31.

² *Bentonville R. R. Co. v. Baker*, 45 Ark. 252; *Hope v. Norfolk & Western R. R. Co.*, 79 Va. 283; *Chicago & Alton R. R. Co. v. Goodwin*, 111 Ills. 273; *Bradley v. Missouri Pacific R. R. Co.*, 91 Mo. 493; and see *Austin v. Rutland R. R. Co.*, 45 Vt. 215.

³ *Chicago & Alton R. R. Co. v. Goodwin*, 111 Ills. 273.

⁴ *Galveston C. & Santa Fe Ry. Co. v. Donahoo*, 59 Tex. 128; *Texas & P. Ry. Co. v. Durrett*, 57 Tex. 48.

⁵ *Randall v. Texas Central Ry. Co.*, 63 Texas, 586; *Chicago & South Western R. R. Co. v. Swinney*, 38 Ia. 182.

⁶ *Delaware etc. R. R. Co. v. Burson*, 61 Pa. S. 369.

that a trustee to manage real estate for the benefit of others could give a valid license to a railroad company to occupy a right of way during the trusteeship.⁷ A deed by a guardian of a right of way through the land of his ward, unless pursuant to a regular sale according to the statute and approved by the court, is void.⁸ Administrators cannot give a valid consent to the lay-out of a highway over lands of their intestate.⁹ But it has been held that executors with a power of sale may do so.¹⁰ Those representing corporations, and others desiring to acquire property, must have due authority, or their acts will not bind their principals.¹¹ In this respect the general laws of agency apply.

§ 290. Sufficiency of the description in deeds and contracts.—It is a general rule, that a deed in which the description of the property attempted to be conveyed is so uncertain that the property cannot be ascertained or located, is void.¹ Upon this principle a deed, conveying a right of way through a tract of land, without any description by which it can be located, will be inoperative.² But a deed of a right of way ninety-nine feet wide, being forty-nine and one-half feet on each side of the center line of a railroad as it should be finally located through a described tract of land, was held to be good, and to be binding upon a subsequent grantee of the

⁷ *Tutt v. Port Royal & Augusta Ry. Co.*, 16 S. C. 365.

§ 290.

¹ *3 Washburn on Real Prop.* (3d ed.) p. 331.

⁸ *State v. Comrs.*, 39 Ohio St. 58; *Indiana, Bloomington & Western Ry. Co. v. Brittingham*, 98 Ind. 294; *Indiana, Bloomington & Western Ry. Co. v. Allen*, 100 Ind. 409.

² A deed simply conveying a certain number of acres out of a larger tract was held void in Illinois. *Shackleford v. Bailey*, 35 Ills. 491. But a similar deed was held good in Texas, and it was also held that the grantee could select the number of acres out of any part of the tract. *Wofford v. McKinua*, 23 Tex. 36, 45.

⁹ *Rush v. McDermott*, 50 Cal. 471.

¹⁰ *Thompkins v. Augusta & Knoxville R. R. Co.*, 21 S. C. 420.

¹¹ *Central Mills Co. v. New York & New England R. R. Co.*, 127 Mass. 537; *Reynolds v. Dunkirk & State Line R. R. Co.*, 17 Barb. 613.

grantor therein having a notice of the deed.³ Such a deed was held to be void in Maine.⁴ A bond or agreement to convey a right of way to be afterwards selected is undoubtedly good, and may be enforced.⁵ An agreement was made as follows: "Know all men by these presents: That I, Lewis W. Ross, of Lewiston, Fulton County, Illinois, in consideration of one dollar to me in hand paid by the Peoria and Hannibal Railroad Company, the receipt of which is hereby acknowledged, do hereby agree to release and convey unto said company the right of way for said railroad over any land, or town lots owned by me, in Fulton County, Illinois, except those having buildings on the line, and to execute and deliver to the said company a proper release and conveyance of the same as soon as the said road is located. In testimony whereof, I have hereunto subscribed my name and affixed my seal, this 26th day of June, A. D. 1854.

"LEWIS W. ROSS, (SEAL.)"

After the P. & H. Co. had partially built its road over Ross' land, its property and franchises passed by mesne conveyances to the defendant, which completed it. It was held that the latter company could compel a specific performance of the contract.⁶ And so, where a right of way or other easement is granted by deed without fixed and definite limits, the practical location and use of such way or easement by the grantee under his deed, acquiesced in by the grantor, operate as an assignment of the right and are deemed to be that which was intended to be conveyed by the deed and are the same in legal effect as if the location so selected and

³ *Burrow v. Terre Haute & Logansport R. R. Co.*, 107 Ind. 432.

⁴ *Hall v. Pickering*, 40 Me. 548; see also *Barlow v. Chicago, Rock Island & Pacific R. R. Co.*, 29 Ia. 276.

⁵ *Conwell v. Springfield & North Western R. R. Co.*, 81 Ills. 232. This was an agreement by Conwell

to convey to the railroad company the right of way for its railroad over any lands owned by Conwell in Mason County, Ills. See also *Hill v. Western Vermont R. R. Co.*, 32 Vt. 68; *Macon & Augusta R. R. Co. v. Bowen*, 45 Ga. 531.

⁶ *Ross v. Chicago, Burlington & Quincy R. R. Co.*, 77 Ills. 127.

used had been fully described by the terms of the grant.⁷ And when an indefinite grant of that sort has been once located and defined by actual user, no enlargement or extension of the right can afterwards be made by the grantee, though such enlargement or extension might have been included in the original location.⁸ Thus, where the right to lay and maintain a pipe across land of the grantor was granted to a railroad company, and a pipe was afterwards laid down, it was held that the company could not afterwards either lay a larger pipe or change its location.⁹ So where, under grant of a right of way not exceeding one hundred feet in width, a railroad company took possession of and used less than one hundred feet, it was held that it could not, years after, occupy the balance of the hundred feet.¹⁰

§ 291. The title conveyed, or which may be acquired.—Where the right to acquire property by purchase exists, a fee may be acquired in the absence of any limitation.¹ And this is true though the grantee could acquire only an easement by condemnation.² A bond or agreement to convey, however, in the absence of any specification of the estate to be conveyed, is satisfied by the conveyance of such an interest as would be acquired by condemnation.³ The right to purchase the fee implies the right to purchase any less estate.

§ 292. Conveyances upon condition.—The general doctrine in regard to conditions applies to the conveyances now under consideration. “No precise technical words are re-

⁷ *Bannon v. Angier*, 2 Allen, 128; *Onthank v. Lake Shore & Michigan Southern R. R. Co.*, 71 N. Y. 194; *Warner v. Railroad Co.*, 39 Ohio St. 70.

⁸ *Ibid.*

⁹ *Onthank v. Lake Shore & Michigan Southern R. R. Co.*, 71 N. Y. 194.

¹⁰ *Warner v. Railroad Co.*, 39 Ohio St. 70.

§ 291.

¹ *Page v. Heineberg*, 40 Vt. 81; *State v. Brown*, 27 N. J. L. 13; *Holt v. Somerville*, 127 Mass. 408; *Nicoll v. New York & Erie R. R. Co.*, 12 N. Y. 121; *Heath v. Barmore*, 50 N. Y. 302; *Yates v. Van De Bogert*, 56 N. Y. 526.

² *Heath v. Barmore*, 50 N. Y. 302.

³ *Hill v. Western Vermont R. R. Co.*, 32 Vt. 68.

quired to make a condition precedent or subsequent. The construction must always be founded on the intention of the parties. The same words have been construed both ways, and much has been made to depend on the order of time in which the conditions are to be performed. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent.”¹ Where a right of way is granted *in consideration* of the construction and operation of a railroad upon a certain line, the construction and maintenance of the road is a condition subsequent, and the land reverts if the road is abandoned.² Nor can the right of way so granted be used for a substantially different road running in a different direction.³ Where the grant is *in consideration* of the doing of something which is merely incidental to the main purpose, it will not be construed as a condition, but as a mere promise upon which the usual remedies may be had. Thus H granted the right of way to a railroad company, in consideration of five dollars and the location of a depot on his land. The grantee entered but did not locate the depot as agreed. It was held not a condition, and that the only remedy was for specific performance or damages.⁴ So where the grant was of the right of way to a railroad company with a provision that the com-

§ 292.

¹ Underhill *v.* Saratoga & Washington R. R. Co., 20 Barb. 455. To same effect Parmelee *v.* Oswego & Syracuse R. R. Co., 6 N. Y. 24; Nicoll *v.* New York & Erie R. R. Co., 12 N. Y. 121.

² Cleveland, Columbus etc. R. R. Co. *v.* Coburn, 91 Ind. 557.

³ Crosbie *v.* Chicago, Iowa & Dakota Ry. Co., 62 Ia. 189.

⁴ Hubbard *v.* Kansas City, St. Joseph etc. R. R. Co., 63 Mo. 68; and see Kansas Pacific Ry. Co. *v.* Hopkins, 18 Kan. 494; Hooper *v.* Savannah & Memphis R. R. Co., 69 Ala. 529.

pany should fence it after it was built.⁵ But the grant of a right of way, *provided* the company locates a depot within a certain distance, creates a condition by the express language of the grant.⁶ Where the grant of a right of way to a railroad company was "on condition that the road is built by the expiration of two years from date," it was held to mean the *whole* road.⁷ In another case substantially the same language was held to require, not only that the road should be built, but also that it should be maintained.⁸ If the grant is of a fee, no one can take advantage of a breach of a condition subsequent, except the grantor or his heirs.⁹ If of a less estate than a fee, then the right of forfeiture follows the fee.¹⁰

§ 293. Effect of conveyance as to damages to other property of the grantor.—The conveyance of land for a public purpose will ordinarily vest in the grantee the same rights as though the land had been acquired by condemnation.¹ The conveyance will be held to be a release of all damages which would be presumed to be included in the award of damages if the property had been condemned.² The grantor therefore cannot recover for any damages to the remainder of his land which result from a proper construction, use and operation of works upon the property conveyed.³ Damages which result from improper construction, such as

⁵ *Hornback v. Cincinnati & Zanesville R. R. Co.*, 20 Ohio St. 81.

⁶ *Taylor v. Cedar Rapids & St. Paul R. R. Co.*, 25 Ia. 371; see also *Williamson & Farboro R. R. Co. v. Baile*, 66 N. C. 540.

⁷ *White v. Memphis etc. R. R. Co.*, 64 Miss. 566.

⁸ *Louisville & Nashville R. R. Co. v. Covington*, 2 Bush, 526.

⁹ *Nicoll v. New York & Erie R. R. Co.*, 12 N. Y. 121.

¹⁰ *Ibid.*

§ 293.

¹ *St. Louis etc. R. R. Co. v. Hurst*, 14 Ills. App. 419.

² Cases cited in the following notes. For damages presumed to be included in the award, see *post*, chap. xxiv.

³ *Houston & E. T. Ry. Co. v. Adams*, 58 Tex. 476; *Chicago, Rock Island & Pacific R. R. Co. v. Smith*, 111 Ills. 363; *I. & G. N. R. R. Co. v. Bost*, 2 Tex. App. Civil Cas. p. 334; *North & West Branch Ry. Co*

lack of necessary culverts,⁴ or diverting a stream of water,⁵ or negligence of any kind,⁶ may, of course, be recovered. The damages presumed to be included in the assessment or award are the subject of a subsequent chapter, where the matter is treated at length. It is sufficient for the present purpose to establish the principle that a deed is a bar to any damages which would be barred by a condemnation proceeding. Such a grant does not bar the right to recover for damages caused by the construction of works upon land taken from other proprietors.⁷

§ 294. Release of Damages.—A release of damages has the same effect as the assessment and payment of damages under the statute.¹ And so when the amount of damages is agreed upon and a receipt therefor given by the owner.² If the owner releases all damages except for removing a fence, he is entitled to have those damages estimated in the manner provided by law.³ As to what will amount to a release or waiver of damages and as to what is a valid release, the same considerations apply as in other cases. If the release is obtained by fraud, it is voidable at the election of the releasor.⁴ If it is upon condition that a certain number of

v. Swank, 105 Pa. S. 555; Benson *v.* Chicago & Alton R. R. Co., 78 Mo. 504; McCarty *v.* St. Paul, Minneapolis & Manitoba Ry. Co., 31 Minn. 278; Gilbert *v.* Savannah, Griffin & North Ala. R. R. Co., 69 Ga. 396; Norris *v.* Vermont Central R. R. Co., 28 Vt. 99; Stodghill *v.* Chicago, Burlington & Quincy R. R. Co., 43 Ia. 26; Croft *v.* London & North Western Ry. Co., 3 Best & Smith, 436; 113 E. C. L. R. 485.

⁴ Heath *v.* Texas & Pacific Ry. Co., 37 La. An. 728.

⁵ Stodghill *v.* Chicago, Burlington & Quincy R. R. Co., 43 Ia. 26.

⁶ St. Louis, I. M. & S. Ry. *v.* Walbrink, 47 Ark. 330.

⁷ Eaton *v.* Boston & Maine R. R. Co., 51 N. H. 504; St. Louis etc. Ry. Co. *v.* Harris, 47 Ark. 340.

§ 294.

¹ Eaton *v.* Boston & Maine R. R. Co., 51 N. H. 504.

² Rockland Water Co. *v.* Tillson, 69 Me. 255.

³ Sturtevant *v.* County of Plymouth, 12 Met. 7.

⁴ Rockford, Rock Island & St. Louis R. R. Co. *v.* Shunick, 65 Ills. 223.

signatures shall be obtained thereto, the party relying upon it must show a compliance with the condition.⁵ A release by a married woman, her husband not joining, has been held invalid.⁶

§ 295. Oral stipulations inconsistent with written contracts.—In this respect the same rules apply as to other contracts. Thus, where the owner grants to a railroad company a right of way, and the deed is silent as to the location of a depot, the courts will not engraft upon the contract a condition or agreement in that regard.¹ If the agreement was omitted by accident or mistake, the deed may be reformed, or, if a fraud has been perpetrated, it may be set aside.²

§ 296. Specific performance, and other remedies.—Specific performance of an agreement to convey may be had, though the subject matter of the grant is a right of way to be afterwards located.¹ Agreements by a railroad company to build crossings,² or fences,³ or to locate and build a depot,⁴ or to do other things for the benefit of the grantor⁵ may be specifically enforced. It is no answer to a suit for specific performance that a specific description of the thing to be done is not contained in the deed or contract. That which is reasonably suitable under the circumstances to an-

⁵ *Ibid.*

⁶ *Delaware etc. R. R. Co. v. Burson*, 61 Pa. S. 369.

§ 295.

¹ *Houston & T. C. R. R. Co. v. McKinney*, 55 Tex. 176; *East Line R. R. Co. v. Garrett*, 52 Tex. 133.

² *Ibid.*

§ 296.

¹ *Ross v. Chicago, Burlington & Quincy R. R. Co.*, 77 Ills. 127; see also *New Jersey Midland Ry. Co. v. Van Syckle*, 37 N. J. L. 496.

² *Gray v. Burlington etc. R. R.*

Co., 37 Ia. 119; *Hull v. Chicago, Burlington & Pacific Ry. Co.*, 65 Ia. 713; *Haynes v. Buffalo, New York & Phila. R. R. Co.*, 38 Hun, 17.

³ *Hull v. Chicago, Burlington & Pacific Ry. Co.*, 65 Ia. 713; *Hornback v. Cincinnati & Zanesville R. R. Co.*, 20 Ohio St. 81.

⁴ *Hubbard v. Kansas City, St. Joseph etc. R. R. Co.*, 63 Mo. 68; *Lawence v. Saratoga Lake R. R. Co.*, 36 Hun, 467.

⁵ *Williamston & Farboro R. R. Co. v. Battle*, 66 N. C. 540.

swer the purpose intended is what the contract implies.⁶ L granted the right of way to a railroad company over his premises, in consideration of which the company agreed to erect and maintain bridges over certain crossings, and also to erect at or near Excelsior Spring a neat and tasteful station building, to be called Excelsior Spring, at which all regular trains should stop. The company entered and built its road, but refused to comply with its agreements. On a bill for specific performance, it was contended by the company that the agreements were too indefinite to be enforced, that the style and plan, size and materials, of the structure were not specified. But the court held otherwise: "To insist that the railroad cannot build a bridge because they do not know whether it should be of wood or iron, or gold, or platinum, is a poor excuse. A bridge suitable for a highway crossing is what was intended, and that is definite enough."⁷ Instead of suing for specific performance, an action for damages may be maintained for the breach of such agreements.⁸ Where a railroad company has a valid contract for right of way from the owner, and is not itself in default, it may restrain him from prosecuting an action for possession;⁹ and in Iowa it has been held that it may restrain the owner from prosecuting a proceeding under the statute for compensation.¹⁰

§ 297. By and against whom the agreements may be enforced.—Deeds and contracts for rights of way to railroad companies are assets and pass to the grantees or mortgagees

⁶ *Gray v. Burlington etc. R. R. Co.*, 37 Ia. 119; *Lawrence v. Saratoga Lake R. R. Co.*, 36 Hun, 467; and other cases cited in this section.

⁷ *Lawrence v. Saratoga Lake R. R. Co.*, 36 Hun, 467. But see *Wilson v. Northampton etc. Ry. Co.*, L. R. 9 Ch. 279.

⁸ *Erie & Pittsburg R. R. Co. v. Johnson*, 101 Pa. S. 555; *Pusey v. R. R. Co.*

Wright, 31 Pa. S. 387; *Hornback v. Cincinnati & Zanesville R. R. Co.*, 20 Ohio St. 81; *Hull v. Chicago, Burlington & Pacific Ry. Co.*, 65 Ia. 713; *Hubbard v. Kansas City, St. Joseph etc. R. R. Co.*, 63 Mo. 68; *St. Louis v. Bissell*, 46 Mo. 157.

⁹ *Ross v. Chicago, Burlington & Quincy R. R. Co.*, 77 Ills. 127.

¹⁰ *Chicago & South Western R. R. Co. v. Swinney*, 38 Ia. 182.

of such companies,¹ but only for the use specified and subject to such burdens or conditions as are contained therein.² Land was conveyed to the territory of Colorado, to be used only for the purpose of erecting thereon a capitol and other public buildings. Before any use was made of the land, the territory became a State. On a bill to enjoin the use of the land for a capitol by the State, it was held that the State succeeded to all rights of the territory and was entitled to all the benefit of the deed.³ B conveyed to a railroad company a right of way over his land, in consideration of the location and construction of its road thereon. After some work had been done by the company, it was sold under foreclosure to T, who conveyed to I. Afterwards another and entirely independent company condemned part of the same land. It was held that B was entitled to the compensation.⁴ C agreed to sell to a railroad company a right of way for a stipulated price. The road was built and the company passed into the hands of a receiver. On a bill by C to enforce payment of the purchase price, it appeared that the price agreed upon was exorbitant, being three times the value of the land, and the chancellor, apparently on this ground alone, decreed payment of compensation to be ascertained under the direction of the court.⁵ An oral agreement of a railroad company to give the grantor of a right of way annual passes for himself and family during his life, is personal and does not run with the land or bind the lessees or successors of the first company.⁶ So the agreement of the grantor to fence the road is personal, and

§ 297.

¹ Barlow *v.* Chicago, Rock Island & Pacific R. R. Co., 29 Ia. 276; Williamston & Farboro R. R. Co. *v.* Battle, 66 N. C. 540; New Jersey Midland Ry. Co. *v.* Van Syckle, 37 N. J. L. 496.

² Hooper *v.* Savannah & Memphis R. R. Co., 69 Ala. 529; Williamston & Farboro R. R. Co. *v.* Battle, 66

N. C. 540. *Contra:* Hammond *v.* Port Royal & Augusta R. R. Co., 16 S. C. 567; S. C. 15 S. C. 10.

³ Brown *v.* Grant, 116 U. S. 207.

⁴ Ingalls *v.* Byer's Administrator, 94 Ind. 134.

⁵ Coe *v.* New Jersey Midland Ry. Co., 30 N. J. Eq. 21.

⁶ Pennsylvania Co. *v.* Erie & Pittsburgh R. R. Co., 108 Pa. S. 621.

does not bind his grantee, and the latter, notwithstanding such agreement of his grantor, can compel the company to fence under the statute.⁷ The possession of a railroad company under an unrecorded deed or contract is notice of its rights under such contract.⁸

§ 298. Oral agreements and licenses.—A large amount of litigation has arisen out of oral agreements and arrangements made between the owners of property and those entitled to condemn for public use. As is usual, where similar questions have been passed upon by many different courts, in different forms of action, and presenting a great variety of circumstances, there is much apparent, and some real, discrepancy in the decided cases. It may be laid down as a general principle that a person or corporation entitled to acquire property for public use must do so either by contract with the owner or pursuant to the statute conferring compulsory powers. If the mode of acquiring property by contract is attempted, the same rules, in general, apply as in case of private individuals acquiring property for private use. The Statute of Frauds applies to all parties and to transfers for all purposes. An interest in land cannot be transferred by a mere oral agreement. It can only be done pursuant to such formalities as are required by the Statute of Frauds. A mere oral consent or license, therefore, to use or occupy land for any purpose for which it might be taken under compulsory powers, does not confer any permanent right or interest in the land, but is revocable at any time at the pleasure of the licensor.¹ It justifies all that has been

⁷ *Bosworth v. Pittsburgh, Cincinnati & St. Louis Ry. Co.*, 1 Ohio Cir. Ct. 69.

S. 365. See *Prescott v. Beyer*, 34 Minn. 493.

§ 298.

⁸ *Burrow v. Terre Haute & Logansport R. R. Co.*, 107 Ind. 432; *Day v. Railroad Co.*, 41 Ohio St. 392; *Bell v. Boston*, 101 Mass. 506; *Lawrence & Others Appeal*, 78 Pa.

¹ *To build a railroad over one's land: Baltimore & Hannover R. R. Co. v. Algire*, 63 Md. 319; *Eggleston v. New York & Harlem R. R. Co.*, 35 Barb. 162; *Blaisdell*

done under it up to the time of revocation, but from that time any continuation of the acts or structures authorized becomes unlawful, and the owner may resort to the ordinary common law remedies of ejectment or trespass.² The only States which have held the contrary are Indiana, Mississippi, Missouri and Pennsylvania.³ No hardship can result from the above doctrine, since the licensee, as soon as the license or consent is revoked, can immediately proceed to acquire by condemnation the same property or easement which it had enjoyed under the license. And where the licensee has acted in good faith, or where the public interests would suffer from an interruption of the user, a court of equity will enjoin the prosecution of a common law suit for damages or for possession, pending proceedings to ascertain the just compen-

v. Portsmouth, Great Falls & Conway R. R. Co., 51 N. H. 483; *Hatfield v. Central R. R. Co.*, 29 N. J. L. 571; *Miller v. Auburn & Syracuse R. R. Co.*, 6 Hill 61; *Murdock v. Prospect Park & Coney Island R. R. Co.*, 73 N. Y. 579. *Contra: Currie v. Natchez, Jackson & Columbus R. R. Co.*, 61 Miss. 725; S. C. 62 Miss. 506; *Provost v. Chicago, Rock Island & Pacific R. R. Co.*, 57 Mo. 256; *Baker v. Same*, *Ibid.* 265; *Hosher v. Kansas City, St. Joseph & Council Bluffs R. R. Co.*, 60 Mo. 329; *Kanaga v. St. Louis etc. R. R. Co.*, 76 Mo. 207; *Campbell v. Indianapolis & Vincennes R. R. Co.*, 110 Ind. 490.

To build mill or dam: *Kivett v. McKeithan*, 90 N. C. 106; *Mumford v. Whitney*, 15 Wend. 380; *Stevens v. Stevens*, 11 Met. 251; but see *Wordbury v. Parshley*, 7 N. H. 237.

To flood land: *Foote v. New Haven & Northampton Co.*, 23 Conn. 214; *Morrill v. Mackman*, 24

Mich. 279; *Woodward v. Seely*, 11 Ills. 157; *Bridges v. Purcell*, 1 Dev. & B. 492; *Clute v. Carr*, 20 Wis. 531; but see *Rerick v. Kern*, 14 S. & R. 267; *Thompson v. McElarney*, 82 Pa. S. 174.

Other public uses: *Selden v. Delaware & Hudson Canal Co.*, 29 N. Y. 634; *Parry v. Richmond*, 27 Ind. 66; *Ruggles v. Lesun*, 24 Pick. 187; *Cape Girardeau etc. Road Co. v. Renfroe*, 58 Mo. 265; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453. In Massachusetts it is held that an owner whose land is flowed by a mill-dam may waive his claim for damages by parol, but that such waiver is personal as to him and does not bind him or those claiming under him. *Seymour v. Carter*, 2 Met. 520; *Fitch v. Seymour*, 9 Met. 462; *Smith v. Goulding*, 6 Cush. 154; *Craig v. Lewis*, 110 Mass. 377.

² *Ibid.*

³ See cases cited in last note.

sation.⁴ Where a corporation has power to take property for works of a public nature, and has a choice of location, and an owner, in order to induce a location upon his land, and in consideration of expected benefits from such location, agrees to give the property desired if the company will locate and construct its works on his land, and the company accepts the offer and actually locates and constructs its works, then, while this will amount in law to a mere oral license, revocable at the pleasure of the owner, yet in equity it will be regarded as such a part performance of an oral agreement as will take it out of the Statute of Frauds.⁵ But in such case the performance, to be available, must be in strict accordance with the agreement.⁶ And the owner may repudiate the agreement at any time before it is acted upon.⁷

Another class of cases remains to be noticed, which are often confounded with those previously considered in this section. Where the statute in regard to the exercise of compulsory powers requires the location to be made and recorded or filed in some public office, particularly describing the property to be taken, and prescribes a mode for ascertaining the damages and compensation to be paid, and provides that upon deposit or payment the title to the property and right of possession shall vest in the condemning party, and also gives the right to agree upon compensation, then the matter of damages may be settled by oral agreement, and the title will vest by virtue of the statute the same as if ascertained

⁴ *Trenton Water Power Co. v. Chambers*, 9 N. J. Eq. 471; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463; *Paterson, Newark & New York R. R. Co. v. Kamlah*, 42 N. J. Eq. 93; *Baltimore & Hanover R. R. Co. v. Algire*, 63 Md. 319, 324.

⁵ *New Jersey Midland Ry. Co. v. Van Syckle*, 37 N. J. L. 496; *Macon & Augusta R. R. Co. v. Bowen*, 45

Ga. 531; *Fazendel v. Morgan*, 31 La. An. 549; and see *Crockett v. Boston*, 5 Cush. 182; *Marble v. Whitney*, 28 N. Y. 297.

⁶ *Unangst's Appeal*, 55 Pa. S. 128; *East Pennsylvania R. R. Co. v. Schollenberger*, 54 Pa. S. 144.

⁷ *Parry v. Richmond*, 27 Ind. 66; *Fuller v. County Comrs.*, 15 P.ck. 81; *Turner v. Village of Stanton*, 42 Mich. 506.

and deposited pursuant thereto.⁸ Or the owner may waive prepayment simply, and, thereupon, the title will vest subject to the lien for just compensation to be afterwards adjusted and paid.⁹ But where the statute authorized an agreement as to damages for land taken for a highway but required such agreement to be in writing, a lay-out on a mere oral waiver of damages was held void in a collateral proceeding.¹⁰

§ 299. Particular contracts construed.—A grant of a right of way, with the privilege of “borrowing or wasting earth in the construction and operation of the railway,” does not authorize the use of land outside of right of way as a dump for superfluous earth.¹ A right of way was granted “for all purposes connected with the construction, use and occupation of said railway.” The railway company was authorized to take and hold “so much real estate as may be necessary for the location, construction and convenient use of its railway, and may also take, remove and use for the construction and repair of said railway and its appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken.” It was held that the company could not take sand from the right of way to be used in building a round-house,—that the company could take sand for its railway but not for its appurtenances.² An agreement by a land-owner that, if a railroad company will construct its road on a specified line, he will pay a certain sum of money, is against public policy and cannot be enforced.³ Where a railroad enters by consent, it is not liable in an action for use and occupation.⁴ Though a company occupies by consent, it must

⁸ *Rock Island Water Co. v. Fillson*, 69 Me. 255. In *Smith v. Goulding*, 6 Cush. 154, it was held that the claim for damages might be waived by oral agreement.

⁹ *McAulay v. Western Vermont R. R. Co.* 33 Vt. 311.

¹⁰ *McKee v. Hull*, 69 Wis. 657.

***§ 299.**

¹ *McCord v. Doniphan Branch Ry. Co.*, 21 Mo. App. 92.

² *Vermilyon v. Chicago, Milwaukee & St. Paul Ry. Co.*, 66 Ia. 606.

³ *Dix v. Shaver*, 14 Hun, 392.

⁴ *Marquette etc. R. R. Co. v. Harlow*, 37 Mich. 554.

comply with the statute as to the manner of constructing its road.⁵ In the absence of any limitation in the grant, a railroad company is not compelled to build within any given time.⁶ If a railroad company agrees with the owner to remove upon notice to another part of the same land so as to permit the mining of coal and refuses, it is liable for the value of the coal, and a tenant may give the notice.⁷ The grant of a right of way is irrevocable.⁸ The mayor and aldermen of Mobile passed a resolution to pay the defendants in error \$660.75 for land to be appropriated for a street, to which the defendants assented. This was held to create an obligation upon which *debt* would lie.⁹

§ 300. Rights by prescription.—There appears to be no reason why rights in land for public use may not be acquired by prescription the same as for private use. It has been held that a railroad right of way may be acquired by adverse possession for the requisite period.¹ So also the right of flowage.²

⁵ Houston & Great Northern R. R. Co. v. Meador, 50 Tex. 77.

§ 300.

⁶ Ross v. Chicago etc. R. R. Co., 77 Ills. 127; but see Baker v. Metropolitan Ry. Co., 31 Beav. 504.

¹ Ryan v. Mississippi Valley & Ship Island R. R. Co., 62 Miss. 162; Blair v. St. Louis etc. R. R. Co., 24 Fed. R. 539.

⁷ Mine Mill etc. R. R. Co. v. Lipincott, 86 Pa. S. 468.

² Williams v. Nelson, 23 Pick. 141; Borden v. Vincent, 24 Pick. 301; Ray v. Fletcher, 12 Cush. 200; Vail v. Mix, 74 Ills. 127; Gilford v. Winnipiseogee Lake Co., 52 N. H. 262; and see Griffin v. Foster, 8 Jones Law, 337.

⁸ Fazende v. Morgan, 31 La. An. 519.

⁹ Mobile v. Richardson, 1 Stew. & Por. (Ala.) 12.

CHAPTER XII.

PRELIMINARY AND MISCELLANEOUS MATTERS PERTAINING TO PROCEEDINGS.

§ 301. Necessity of an attempt to agree.—Statutes conferring the power of eminent domain usually require that an attempt shall be made to agree with the owner of property desired, before instituting proceedings to condemn it. In whatever form of words this direction is couched, it is generally held to be imperative, and a condition precedent to the exercise of compulsory powers.¹ It is generally held that the inability to agree should be alleged and proven.² But, if the allegation is not traversed and the parties go to trial on the question of damages, proof of the allegation may be re-

§ 301.

¹ *Lincoln v. Colusa Co.*, 28 Cal. 662; *Gilmer v. Lime Point*, 19 Cal. 47; *Williams v. Hartford & New Haven R. R. Co.*, 13 Conn. 397; *Arnold v. Village of Decatur*, 29 Mich. 77; *Morseman v. Ionia*, 32 Mich. 283; *Dickinson v. Van Wormer*, 39 Mich. 141; *Whistler v. Drain Comr.*, 40 Mich. 591; *Lind v. Clemens*, 44 Mo. 540; *Leslie v. St. Louis*, 47 Mo. 474; *Anderson v. St. Louis*, 47 Mo. 479; *Ells v. Pacific R. R. Co.*, 51 Mo. 200; *Cunningham v. Pacific R. R. Co.*, 61 Mo. 33; *Kansas City etc. R. R. Co. v. Campbell*, 62 Mo. 585; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Graf v. St. Louis*, 8 Mo. App. 562; *Doughty v. Somerville etc. R. R. Co.*, 21 N. J. L. 442; *Coster v. New Jersey R. R. Co.*, 23 N. J. L. 227; *State v. Trenton*, 36 N. J. L. 499;

State v. Plainfield, 41 N. J. L. 138; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107; *Matter of New York & Boston R. R. Co.*, 62 Barb. 85; *Matter of Opening House Ave.*, 67 Barb. 350; *S. C. 3 N. Y. Supme. Ct.* 770; *Adams v. Saratoga etc. R. R. Co.*, 10 N. Y. 328; *Matter of Marsh*, 71 N. Y. 315; *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Pa. S. 100; *Powers v. Railway Co.*, 33 Ohio St. 429; *Oregon Ry. etc. Co. v. Oregon Real Estate Co.*, 10 Or. 444.

² *Gilmer v. Lime Point*, 19 Cal. 47; *Lincoln v. Colusa Co.*, 28 Cal. 662; *Williams v. Hartford & New Haven R. R. Co.*, 13 Conn. 397; *Oregon Ry. etc. Co. v. Oregon Real Estate Co.*, 10 Or. 444; *Powers v. Railway Co.*, 33 Ohio St. 429; *Matter of Marsh*, 71 N. Y. 315.

garded as waived.³ The allegation may, of course, be controverted,⁴ and, if disproven, the proceedings must be dismissed.⁵ It has been held that the objection may be taken at any stage of the proceedings and will be good ground for setting aside an award or quashing the proceedings on certiorari.⁶ If the record fails to show such inability to agree, the proceedings are generally held to be void collaterally.⁷ In Massachusetts it has been held that, under a statute which authorized proceedings, in case the parties "shall not agree upon the damages to be paid," no attempt to agree was necessary, but the commencement of proceedings was an election not to agree.⁸ In Illinois in a collateral proceeding, it was held that the provision of the statute as to agreement was directory.⁹ In Indiana, in a case in which condemnation proceedings were interposed as a defense to an action of trespass, it was held an attempt to agree was not essential to the jurisdiction of the court.¹⁰ The matter of requiring an attempt to agree rests wholly in the discretion of the legislature, and a statute is not invalid because it does not require it.¹¹ If the parties can agree, no proceedings can be had.¹²

³ *Post*, § 103.

⁴ *Gilmer v. Lime Point*, 19 Cal. 47.

⁵ *Matter of Marsh*, 71 N. Y. 315.

⁶ *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107; *State v. Plainfield*, 41 N. J. L. 138; *State v. Trenton*, 36 N. J. L. 499; *Lind v. Clemens*, 44 Mo. 540; *Whistler v. Drain Comr.*, 40 Mich. 591; *Dickinson v. Van Wermers*, 39 Mich. 141; *Morseman v. Ionia*, 32 Mich. 283; and see next section.

⁷ *Adams v. Saratoga etc. R. R. Co.*, 10 N. Y. 328; *Graf v. St. Louis*, 8 Mo. App. 562; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Kansas City etc. R. R. Co. v. Camp-*

bell, 62 Mo. 585; *Cunningham v. Pacific R. R. Co.*, 61 Mo. 33; *Ells v. Pacific R. R. Co.* 51 Mo. 200; *Leslie v. St. Louis*, 47 Mo. 474; *Anderson v. St. Louis*, 47 Mo. 479. *Contra*: *Ney v. Swinney*, 36 Ind. 454.

⁸ *Burt v. Brigham*, 117 Mass 307; *Aetna Mills v. Waltham*, 126 Mass. 422. To same effect, *Bigelow v. Mississippi Central & Tenn. R. R. Co.*, 2 Head, 624.

⁹ *Hall v. People*, 57 Ills. 307.

¹⁰ *Ney v. Swinney*, 36 Ind. 454.

¹¹ *Grand Rapids v. Grand Rapids & Indiana R. R. Co.*, 58 Mich. 641.

¹² *Matter of House Ave.*, 3 N. Y. Supme. Ct. 770.

§ 302. What is a sufficient attempt to agree.—No general rule can be laid down on this question. The attempt must be made in good faith and reasonable efforts put forth. Where the owner offered to take one hundred dollars for land desired for a street, and the council simply laid the offer on the table and no further attempt to agree was made, it was held insufficient.¹ Where plaintiff made two propositions to the agent of the defendant company at its office, and no reply was made, it was held sufficient.² The attempt need not be prosecuted further than to develop the fact that an agreement is impossible.³ The inability to agree required by the statute does not mean an inability to buy at any price, but only at a price which the condemning party is willing to pay.⁴ Where there was a contingent dower and a tenancy, it was held that a failure to agree with the owner of the fee was sufficient.⁵ Negotiations may be carried on by an authorized agent, and where the president of a company had such authority, it was held that he might depute an agent to negotiate, and that such negotiations would satisfy the statute.⁶

§ 303. How excused or waived.—If the property desired is owned by persons under disability, no attempt to agree need be made, because no agreement is possible.¹ In Tennessee it was held that, where the owners had combined against the improvement and declared it should not go through, the attempt to agree was useless and need not be

§ 302.

¹ *Lane v. Saginaw*, 53 Mich. 442.

² *West Virginia Trans. Co. v. Volcanic Oil & Coal Co.*, 5 W. Va. 382.

³ *Matter of the Village of Middletown*, 82 N. Y. 196.

⁴ *Matter of Application of Prospect Park & Coney Island R. R. Co.*, 67 N. Y. 371.

⁵ *Toledo etc. Ry. Co. v. Dunlap*, 47 Mich. 456.

⁶ *Matter of New York Central & Hudson River R. R. Co.*, 33 Hun, 274.

§ 303.

¹ *Balch v. County Comrs. of Essex*, 103 Mass. 106; *Indiana Central R. R. Co. v. Oakes*, 20 Ind. 9.

made.² It is held that the owner may waive the attempt to agree,³ and that a failure to object at the proper time constitutes a waiver.⁴

§ 304. How the inability to agree should be alleged and shown.—It has generally been held sufficient to state the inability to agree in the language of the statute, or in general terms having substantially the same effect, without setting forth the facts which constitute such inability.¹ Where the statute requires an inability to agree as to compensation, and the petition alleges an inability to agree as to right of way, it is good after verdict.² But, where the statute requires it to appear that the petitioner has been unable to agree, and the reason of such inability, the reasons must be set forth in the petition.³ The affidavit of the petitioner or its agent is sufficient *prima facie* evidence of the fact.⁴ If the allegation is traversed, as it may be,⁵ the issue should be disposed of by the court as preliminary to a trial of the question of damages.⁶ If not traversed, it has been questioned whether any proof need be offered in support of the petition.⁷

§ 305. Priority of right to appropriate specific property: Mill cases.—It is usual, in mill acts, to provide that no dam shall be erected to the injury of any existing mill or dam or

¹ President etc. *v.* Diffebach, 1 Yates, 367.

² United States *v.* Reid, 56 Mo. 565.

³ In the Matter of the Water Comrs., 3 Edwards, ch. 552; President etc. *v.* Diffebach, 1 Yates, 367; Ney & Swinney, 36 Ind. 454; Taylor *v.* Clemson, 11 Clark & Finnelly, 610; and see last section.

§ 304.

¹ Chicago, B. & Q. R. R. Co. *v.* Chamberlain, 84 Ills. 333; Booker *v.* Venice etc. R. R. Co., 101 Ills. 333; Bowman *v.* Same, 102 Ills. 459; Hannibal etc. R. R. Co. *v.*

Muder, 49 Mo. 165; Matter of Lockport & Buffalo R. R. Co., 77 N. Y. 557; Reitenbaugh *v.* Chester Valley R. R. Co., 21 Pa. S. 100.

² Oregon Ry. etc. Co. *v.* Oregon Real Estate Co., 10 Or. 444.

³ Matter of Marsh, 71 N. Y. 315.

⁴ Doughty *v.* Sommerville R. R. Co., 21 N. J. L. 442.

⁵ Gilmer *v.* Lime Point, 19 Cal. 47; Williams *v.* Hartford & New Haven R. R. Co., 13 Conn. 397.

⁶ Powers *v.* Railway Co., 33 Ohio St. 429.

⁷ Ward *v.* Minnesota & North Western R. R. Co., 119 Ills. 287.

improved water power. Under such statutes the one who first in good faith commences the erection of a mill or dam is prior in point of time, not the one who first commences proceedings.¹ A mill site from which the mill has been burned within a year, and on which a temporary but insufficient mill has been erected, is within the protection of such a statute.² But one on which no mill had existed for a hundred and fifty years was regarded as abandoned.³ Disuse for a short period, with other circumstances showing intention, may be sufficient to establish an abandonment.⁴ So much of the fall below the mill as is necessary to the use, operation and convenient repair of the mill is protected from subsequent appropriation as part of the mill itself.⁵ In the absence of such provisions in the statutes, the one who first institutes proceedings under the statute is entitled to priority.⁶ But this priority may be lost by delay in prosecuting the proceedings and erecting the mill.⁷ Where two applications were filed on the same day, it was held that it might be shown by parol which was first in time, and that the priority of the first application was not defeated by an error of the clerk of the court in issuing the writ, whereby it was

§ 305.

¹ Larsh *v.* Test, 48 Ind. 130; Nosser *v.* Seelye, 10 Neb. 460; Bigelow *v.* Newell, 10 Pick. 348. *Contra:* Miller *v.* Troost, 14 Minn. 365.

² McDougle *v.* Clark, 7 B. Mon. 448.

³ Curtiss *v.* Smith, 35 Conn. 156.

⁴ McArthur *v.* Morgan, 49 Conn. 347; French *v.* Braintree, 23 Pick. 216.

⁵ Occum Co. *v.* Sprague Manf. Co., 35 Conn. 496; Elting Woolen Co. *v.* Williams, 36 Conn. 310; Gleason *v.* Assabet Manf. Co., 101 Mass. 72; Bottamly *v.* Chism, 102 Mass. 463.

⁶ Hendricks *v.* Johnson, 6 Porter,

472; Lummary *v.* Braddy, 8 Ia. 33.

⁷ Macon *v.* Owen, 3 Ala. 116. In this case A applied for a writ of *ad quod damnum*, under the mill act, in September, 1836, but took no further step until February, 1837. In the meantime B had instituted proceedings, prosecuted them to judgment, and built a mill appropriating a part of the power which A sought to appropriate. It was held that A lost his priority by delay in prosecuting his writ, and that he could not build a mill to interfere with B's. And see, to same effect, Humes *v.* Shugart, 10 Leigh, 332.

quashed, but the new writ would relate back to the time of application.⁸

§ 306. The same continued: Railroads and other public works.—Where there are two grants by the legislature of the right to take the same property for public use, that which is prior in time will have priority of right.¹ Where two companies had authority to lay down tracks on a certain street, it was held that the one which first commenced laying its tracks on a definite line had a prior right to go on and complete its track on that line.² Such a right is a valuable franchise or privilege, and is property, and cannot be taken or impaired without compensation.³ As the legislature may take property already devoted to public use for the same or a different use, it may also take the *right* to appropriate specific property as well as the property after it has been appropriated.⁴ Where the conflict arises out of rival locations over the same property, by companies acting under general powers, that one is entitled to priority which is first in making a *completed location* over the property, and the relative dates of their organizations or charters are immaterial.⁵ In the case first cited the Warren Company was, on the 12th of February, 1851, authorized to construct a railroad from the Central Railroad to the Delaware River. On the 19th of the same month the Morris Company was authorized to ex-

⁸ *Hendricks v. Johnson*, 6 Porter, 472. In *Hook v. Smith*, 6 Mo. 225, a priority of a few hours in making the application was disregarded and leave granted to the one whose dam would do the least damage.

§ 306.

¹ *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R. R. Co.*, 4 G. & J. 1; *Morris & Essex R. R. Co. v. Blair*, 9 N. J. Eq. 635, 644.

² *Waterbury v. Dry Dock etc. R. R. Co.*, 54 Barb. 388.

³ *Ibid.*

⁴ For the extent of this right and its limitations, see *ante*, chap. x.

⁵ *Morris & Essex R. R. Co. v. Blair*, 9 N. J. Eq. 635; *New Brighton etc. R. R. Co. v. Pittsburgh etc. R. R. Co.*, 105 Pa. S. 13, 20; *Davis v. Titusville & Oil City Ry. Co.*, 114 Pa. S. 308; *Railway Co. v. Alling*, 99 U. S. 463; *Rochester etc. R. R. Co. v. New York etc. Ry. Co.*, 44 Hun, 206.

tend its road from its then terminus to the Delaware River. Both acts provided in substantially the same language that "when the route of such road shall have been determined upon, and a survey of such route deposited in the office of the Secretary of State, then it shall be lawful for said company to enter upon," etc. The routes selected by the two companies conflicted through certain passes, and the question was as to which had priority. The surveys of both companies were filed in the office of the Secretary of State on the same day, March 8, 1853. It appeared that the Morris Company was the first to make actual surveys over the route in question, but the Warren Company was the first to adopt a definite route, and was the first to file its survey with the Secretary of State. It was held that the Warren Company was entitled to priority.

In the first Pennsylvania case cited the following facts appeared: In 1875-6 the Pennsylvania Company caused a route to be surveyed and located over the property in dispute for a railroad from Newcastle to New Brighton. It was marked by stakes in the usual way, and a map thereof made and reported to the company. In March, 1881, the New Brighton Company was organized. On March 30, 1881, the map of the route surveyed by the Pennsylvania Company was presented to its board of directors, and a resolution adopted "that the location of this company's line of road, as shown by the map now presented, be and the same is hereby adopted, and the president is instructed to take such steps as may be necessary to secure such location." On April 11, 1881, the New Brighton Company commenced to re-survey and to mark anew with stakes in the usual way the route previously adopted, and within a week the work of re-location was completed over the territory in dispute. The Pittsburgh Company was organized in December, 1880. Prior to that time, and in April, 1880, the projectors of the company had caused a survey and location of a railroad to be made and to be marked with stakes in the usual way. On February 15,

1881, the directors of the Pittsburgh Company, by resolution, adopted the survey so made, and directed the president to cause a re-survey to be made where necessary, preparatory to the procurement of the right of way and the construction of the road. Nothing, however, was done upon the ground until May 10, 1881, when the work of re-surveying was commenced. Both companies were organized under the same acts, which provided that "the president and directors of such company shall have power and authority, by themselves, their engineers, superintendents, agents, artisans and workmen, to survey, ascertain, locate, fix, mark and determine such route for a railroad as they may deem expedient," etc., * * * "and, in like manner, by themselves or other persons by them appointed, or employes, as aforesaid, to enter upon or into and occupy all land on which the said railroad, or depots," etc., may be located. In deciding the case the court say: "The provisions of the act are clear and explicit. Every railroad company, incorporated thereunder, is created for a purpose that is essentially public; and to that end, it is clothed with the right of eminent domain, which is never delegated by the commonwealth to unincorporated associations or private individuals. It is expressly authorized to survey, mark and determine the route of its road, between the points designated in its charter, and to enter upon and occupy all lands on which its road may be so located, subject however to the constitutional obligation of making compensation for property taken or injured. In thus exercising the right of appropriating to public use the lands of private individuals, it is necessary, in the first place, to survey, locate, and designate by appropriate marks the property to be taken. It was undoubtedly intended that these essential acts upon the ground should be performed, not by the projectors of a railroad company before its incorporation, nor by any one not authorized by the legislature to do so, but only by the president and directors of a duly incorporated company, their engineers and employes. Indeed, the act expressly authorizes

them to do so, but it is silent as to the right of all others. No such thing as a wholesale adoption, by mere resolution, of an unauthorized preliminary survey and location appears to have been contemplated. Doubtless a preliminary survey, made at the instance of persons contemplating the procurement of a charter, greatly facilitates the work of the corporation, afterwards created, in making its location, and designating the same by marks on the ground; and there can be no impropriety in the corporation resolving to adopt such preliminary survey, but that alone, without more, will not secure to it the right of location as against another company that goes upon the ground, surveys, marks, and actually appropriates the proposed location. The unauthorized preliminary survey, though well marked by a line of stakes indicating the location of a railroad, cannot be regarded as sufficient notice of a prior legal appropriation of the land. The marks upon the ground would of course suggest the purpose for which they were made, and thus impose the duty of inquiring when and by whom they were placed there, but the due prosecution of that inquiry would disclose the fact that the survey was made by persons who had no authority to locate and construct a railroad on that route, and before any company was incorporated for the purpose. There the duty of inquiry would end, and the company first on the ground would have an undoubted right to consider it unoccupied for railroad purposes, and to proceed with its survey and location. The facts of the case before us serve as an apt illustration of the construction which we think should be given to the act. The appellant company was the first to go upon the ground in controversy, and there, by actual survey and appropriate marks, fix and determine the location of the road it was authorized to build. All this was done before actual notice was given by the appellee that its line had been located partly on the same ground. The only constructive notice appellant had was that a survey and location had been made without authority from the commonwealth and before

either company was incorporated. That was no notice, either to appellant or land-owners, that the location had been previously appropriated by authority of law. It follows therefore that the general conclusion, drawn by the learned court 'from the facts found by the master, was erroneous."

We have referred to this case at length, because it is the decision of a court of high authority upon a point on which there are but few reported cases. It seems to the writer, however, that the case was wrongly decided upon the facts as they were conceded to exist. No point was made that the survey adopted by the Pittsburgh Company was defective in any respect, or that it was not fully marked on the ground by stakes in the usual way. Five years had elapsed since the survey adopted by the other company was made, and the stakes which marked it had mostly disappeared. Conceding that the survey of 1880 was definite and complete, and that the stakes which marked it were still standing, we see no reason why the adoption of that survey by the Pittsburgh Company should not have the same effect as though it had been made by its own agents acting under its authority.⁶ It would be an idle ceremony to require the Pittsburgh Company, in order to make the adoption effective, to re-survey the lines and re-drive the stakes and possibly re-map the location, ending with precisely the same result with which it began. If both locations had become substantially obliterated by the disappearance of the stakes, the case would be different; so if there had been any unreasonable delay on the part of the Pittsburgh Company in proceeding with its work. But there was no unreasonable delay, and the route of the latter company was easily retraced by means of stakes still standing. It is agreed, in the opinion, that the line of stakes adopted by the Pittsburgh Company was notice of a prior survey for a railroad and imposed the duty of inquiring who placed them there. The court say this duty ended when it was

⁶ *Lower v. Chicago, Burlington & Essex R. R. Co. v. Blair*, 9 N. & Quincy Ry. Co., 59 Ia. 563; *Mor. J. Eq.* at p. 645. .

ascertained that the stakes were set by persons having no authority to build a railroad. But why did the duty end there? Railroad surveys are expensive and people do not engage in them as a pastime. The men who made the survey must have had in contemplation the construction of a railroad on the line surveyed. Why was it not the duty of the New Brighton Company to inquire whether those men had taken any steps towards getting authority for that purpose? The "marks on the ground" suggested this as much as they suggested "the purpose for which they were made." Had inquiry been made, the fact would have been ascertained that the men referred to had organized a company to construct a road on the line in question and had actually adopted the survey marked by the stakes.

As to what is such a *completed location* as to secure priority must depend largely upon local statutes. We should say, in general, that it includes everything necessary to perfect the right to proceed and condemn the property. Where priority of right has thus been secured by priority of location, it cannot be defeated by a rival company agreeing with the owners and purchasing the property.⁷ The reasoning of Shiras, J., upon this point is so cogent that we cannot do better than quote it: "It is certainly equitable that a company, which in good faith surveys and locates a line of railway, and pays the expense thereof, should have a prior claim for the right of way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right, and better equity. The right to the use of the right of way is a public, not a private, right. It is, in fact, a grant from the State, and although the payment of the damages to the owner is a necessary prerequisite, the State

⁷ Sioux City etc. R. R. Co. v. Warren etc. R. R. Co., 12 Phila. 770; Chicago etc. Ry. Co., 27 Fed. R. 642; Morris & Essex R. R. Co. v. Titusville etc. R. R. Co. v. Blair, 9 N. J. Eq. 635, 646.

may define who shall have the prior right to pay the damages to the owner, and therefore acquire a perfected right to the easement. The owner cannot, by conveying the right of way to A, thereby prevent the State from granting the right to B. All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the State has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest, and also what shall constitute an abandonment of such right." * * * * "The injustice and injury to private and public rights alike, which would arise, were it held that, after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road, or extort a heavy and exorbitant payment from the company first locating its line as a condition to the right to build the same as originally located, are strong reasons for holding that the first location, if made in good faith, and followed up within a reasonable time, may confer the prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property owners after the location, but before the application to the sheriff for the appointment of commissioners."⁸ In cases where no location or survey is necessary, and where the statute does not require any map, survey or description to be recorded, that person will have priority of right to appropriate particular property who first institutes proceedings to condemn it.⁹ But, to secure such priority, the proceedings must be lawfully instituted, and so as to be capable of being prosecuted to a successful issue, and where one company commenced proceedings without a

⁸ Sioux City etc. R. R. Co. v. Chicago etc. Ry. Co., 27 Fed. R. 770, 774.

⁹ Lake Merced Water Co. v. Cowles, 31 Cal. 215; and see cases cited in note, last section.

previous attempt to agree with the owner when that was required by statute, such proceedings will not defeat a subsequent purchase of the same property by a rival company organized for the same purpose.¹⁰ A priority once obtained in any of the ways or cases above specified may be lost by laches in following it up,¹¹ or by permitting another company to occupy and build over the same property.¹²

§ 307. The property must be legally designated; plans, surveys, etc.—Before instituting proceedings, the property to be condemned should be designated in such manner as may be required by law.¹ Where the taking is by a corporation, the governing body of the corporation, which is ordinarily the board of directors, should designate or approve the location by a definite description.² Frequently a map, plan, survey or other description of the location is required to be filed or recorded in some public office. This is usually made preliminary to the institution of proceedings, and if so must be strictly complied with.³ If the description is indefinite or the instrument defective, it will not be sufficient to authorize proceedings,⁴ but formal defects are

¹⁰ San Francisco & Alameda Water Co. v. Alameda Water Co., 36 Cal. 639.

¹¹ New York etc. R. R. Co. v. Boston etc. R. R. Co., 36 Conn. 196.

¹² Coe v. New Jersey Midland Ry. Co., 31 N. J. Eq. 105.

§ 307.

¹ Heck v. School District, 49 Mich. 551; Darlington v. United States, 82 Pa. S. 382; Williams v. Hartford & New Haven R. R. Co., 13 Conn. 397; Riddell v. Animas Canon Toll Road Co., 5 Col. 230.

² Lancaster v. Kennebec Log Driving Co., 62 Me. 272. In this case a vote of the company authorized the directors "to build the

Brown's Island Boom this season." This was held to be too indefinite for the foundation of proceedings.

³ Matter of New York & Boston R. R. Co., 62 Barb. 85; Indianapolis etc. Ry. Co. v. Reed, 52 Ind. 357.

⁴ Convers v. Grand Rapids & Indiana R. R. Co., 18 Mich. 459; Hamor v. Bar Harbor Water Co., 78 Me. 127; Warren v. Spencer Water Co., 143 Mass. 9; Kenesin v. Arlington, 141 Mass. 456; Woodbury v. Marblehead Water Co., 145 Mass. 509; Matter of Boston etc. R. R. Co., 10 Abb. N. C. 104; New York & Albany R. R. Co. v. New York, etc. R. R. Co., 11 *Ibid.* 386. A map designating the location of a rail.

waived, if not insisted upon, until after a hearing on the merits.⁵ A statute, which provides that when the route of a railroad company has been determined upon and a survey thereof deposited in the office of the Secretary of State, then proceedings may be instituted to condemn, requires the entire route to be first surveyed.⁶ A statute required a map and profile of a railroad into and through a county to be filed before the construction of the road. It was held that it need not be done before instituting proceedings,⁷ and that as to any proprietor it was sufficient if a map and profile of the route through his land had been filed, though not through the entire county.⁸ In Indiana it is held that the instrument of appropriation may be amended in aid of proceedings founded thereon.⁹

§ 308. When an ordinance, resolution or vote of a corporate body is essential.—When the taking is by a municipal corporation, it usually must be authorized by a vote of the governing body, and this must be passed in such manner and by such formalities as are required by law. No general rule can be laid down, except that the statute must be strictly complied with.¹ Sixty days' notice of an application to pass such an ordinance was required to be given by publication. It was held that the notice was indispensable, and that the ordinance must correspond with the notice. And where the ordinance was for only part of the street described in the notice the ordinance and all proceedings founded on it were held void.² So, where the ordinance was required to be

road by a single line without showing whether it was the center or side, was held altogether insufficient.

⁵ Logansport etc. Ry. Co. v. Buchanan, 52 Ind. 163.

⁶ Doughty v. Somerville etc. R. R. Co., 7 N. J. Eq. 51.

⁷ Missouri River etc. R. R. Co. v. Shepard, 9 Kan. 647.

⁸ Hunt v. Smith, 9 Kan. 137; see also Doughty v. Sommerville etc. R. R. Co., 21 N. J. L. 442.

⁹ Hunt v. New York, Chicago & St. Louis Ry. Co., 99 Ind. 593; Chicago & Gt. Southern Ry. Co. v. Jones, 103 Ind. 386.

§ 308.

¹ St. Louis v. Franks, 78 Mo. 41.

² Baltimore v. Grand Lodge, 44

introduced at a previous regular or stated meeting, this must appear or it will be void.³ Where the resolution for opening a street was required to be passed by a two-thirds vote entered on the journal, the vote must be so entered, or it is void.⁴ If the *form* is prescribed, it is material and cannot be disregarded. A statute required that if the trustees of a village should decide to make an improvement they should "so decide by resolution to be entered in the minutes of the board." The record showed that a petition for an improvement was received and placed on file, and then the following: "Moved that improvement asked for in the said petition be made. Motion carried, all voting aye." This was held insufficient.⁵ But, if the statute is silent as to the form of such a vote or order, then *form* becomes immaterial, and either a resolution or ordinance may be adopted.⁶ Nothing can be done under a resolution or ordinance, except what is authorized by it. Under a resolution to open a street, one already opened cannot be widened.⁷ The resolution or ordinance need not express that the improvement is necessary unless required.⁸ The charter of St. Louis provided that no street should be extended nearer than five hundred feet of a street already opened, without the unanimous recommendation of the board of public works submitted in writing to the assembly. It was held that this must affirmatively appear, and that it could not be inferred from the passage of

Md. 436; to same effect State *v.* Elizabeth, 32 N. J. L. 357.

³ State *v.* Jersey City, 25 N. J. L. 309; State *v.* Bergen, 33 N. J. L. 39; S. C. *Ibid.* 72. In the latter case the ordinance was required to name three commissioners. At a subsequent meeting one of these was changed and the ordinance passed. It was held to be invalid.

⁴ Matter of Widening Carlton St., Buffalo, 16 Hun, 497; S. C. 78 N. Y. 362. In this case it was also held

that the city was not estopped to move to set aside the confirmation of the report of the commissioners and to dismiss the proceedings.

⁵ People *ex rel.* Johnson *v.* Whitney's Point, 32 Hun, 508.

⁶ Sower *v.* Philadelphia, 35 Pa. S. 231.

⁷ *In re Powelton Ave.*, 11 Phila. 447.

⁸ Trinity Church *v.* Higgins, 4 Robt. 1.

the ordinance.⁹ Where a statute provided that a petition for a highway should be presented to the town council for approval before being presented to the court, a lay-out without such approval was held void.¹⁰ Authority to lay out streets whenever, in the opinion of the city council, the public good requires it, does not necessitate any formal declaration of opinion as preliminary to action.¹¹

§ 309. When a previous refusal of some other tribunal is essential to jurisdiction.—In the New England States, upon the neglect or refusal of the selectmen of a town to lay out a way which has been petitioned for, jurisdiction is given to some other tribunal to act in the matter, not by way of an appeal but by an original application. In such case the previous refusal or neglect is essential to jurisdiction, and should appear upon the face of the proceedings.¹ Where the jurisdiction of county commissioners depended upon an unreasonable refusal of the town to accept the report of selectmen laying out a way, there must be a legal report to accept.² The petition to the second tribunal may be signed by different persons, but it must be for the same road.³ The *lay-out* of a road includes all that is essential to its legal establishment, and a neglect to perform any essential act is a refusal within the statute.⁴ Where a petition was pending before selectmen for eight months, and their last action was to meet

⁹ *St. Louis v. Franks*, 78 Mo. 41. Where an ordinance for opening an alley makes the improvements conditional upon the dedication of certain property the condition must be complied with before any valid proceedings can be had under the ordinance. *St. Louis v. Cruikshank*, 16 Mo. App. 495.

¹⁰ *Norwegian Street*, 81 Pa. S. 349.

¹¹ *Elwood v. Rochester*, 43 Hun, 102.

§ 309.

¹ *Inhabitants of Pownal*, 8 Me.

271; *State v. Inhabitants of Pownal*, 10 Me. 24; *Small v. Pennell*, 31 Me. 267; *Scarborough v. Commissioners*, 41 Me. 604; *Belchertown v. County Comrs.*, 11 Cush. 189. The previous refusal may be found at any stage of the proceedings, *Southington v. Clark*, 13 Conn. 370.

² *Lewiston v. County Coms. of Lincoln*, 30 Me. 19.

³ *Simpson v. Oxford*, 41 N. H. 228.

⁴ *Wolcott v. Pond*, 19 Conn. 597.

and view the route, and they then separated without any action or adjournment, it was held a sufficient neglect to give jurisdiction.⁵ The second tribunal is held to have the same powers as the selectmen in the premises, where not otherwise specified by law.⁶ Where an application is made to the second tribunal, showing the necessary neglect or refusal of the selectmen, if this is contested, it should be done before commissioners are appointed to act on the application, and, if not, the point is waived.⁷

§ 310. Other preliminaries.—Since the statutory authority to take private property for public use must be strictly pursued, whatever is required by way of preliminaries must be complied with.¹ If a preliminary estimate of the cost of an improvement, such as widening a street, is required, it is essential to the validity of proceedings.² A statute which provides that an expenditure by a village exceeding five hundred dollars must be authorized by a vote of the taxable inhabitants before being incurred, was held not to apply to a taking of property for widening a street.³ The charter of St. Louis provided that: “ Whenever the assembly shall provide by ordinance, for establishing, opening, widening or altering any street, avenue, alley, wharf, market-place or public square or route for sewer or water pipe, either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground fronting thereon, and it becomes necessary for that purpose to appropriate private property, the city counsellor, in the name of the city of St. Louis, shall apply to the circuit court of the eighth judicial circuit, or to any one of the judges in vacation, by petition,” etc. Under this provision either a recommendation of the board of public im-

⁵ Stratton's Petition, 21 N. H. 41.

§ 310.

⁶ Matter of Town of Bridport, 24 Vt. 176. ¹ State v. Bayonne, 35 N. J. L. 332.

⁷ Kennett's Petition, 24 N. H. 139. ² State v. Bergen, 33 N. J. L. 72. ³ Allen v. Northville, 39 Hun, 240.

provements or a petition of property-owners, in compliance with the charter, is indispensable to the jurisdiction of the city assembly to pass a valid ordinance for the extension of a street.⁴ A statute required railroad companies to give notice to the actual occupants of land over which a proposed road was to be located, and which had not been purchased or donated to the company, of the time and place where the map and profile were filed, and that the route passed over the land of such occupant. The giving of the notice to *all* such actual occupants was held to be a condition precedent to the right to condemn, and that one who had notice could object because others had not been notified.⁵ A statute applicable to New York city provides for a report of commissioners in lieu of the consent of property-owners for a railroad on a street. Cases construing and applying this section are referred to below.⁶

§ 311. Of the right to a common law jury.—Some constitutions provide that the compensation for property taken for public use shall be ascertained by a jury of twelve men, according to the course of the common law. Other constitutions provide that the compensation may be ascertained by commissioners, or by a jury of less than twelve men.¹ In either case the express provision of the constitution removes any question as to the right to a common law jury. In the absence of any express provision on the subject, the authorities almost uniformly hold that it is not a matter of constitutional right.² The line of reasoning upon which

⁴ *St. Louis v. Gleason*, 89 Mo. 67; 93 Mo. 33; S. C. 15 Mo. App. 25.

⁵ *Matter of Niagara Falls & Whirlpool Ry. Co.*, 46 Hun, 94.

⁶ *Matter of Elevated R. R. Co.*, 18 Hun, 378; *Matter of Kings County El. R. R. Co.*, 20 Hun, 217; *Matter of Broadway Underground Ry. Co.*, 23 Hun, 693; *Matter of Broadway Surface R. R. Co.*, 34

Hun, 414; *Matter of Nassau Cable Co.*, 36 Hun, 272; *Matter of New York Cable Co.*, 36 Hun, 355; *Hilton v. Thirty-fourth Street R. R. Co.*, 1 How. Pr. N. S. 453; *Matter of Nassau Cable Co.*, 2 How. Pr. N. S. 124.

§ 311.

¹ See §§ 15-52.

² *Cairo & Fulton R. R. Co. v.*

these decisions are founded is that, before any of our constitutions were adopted, it had been the practice in America and England to ascertain the compensation to be paid for property taken for public use by other agencies than

Trout, 32 Ark. 17; Hoppikus *v.* State Capitol Comrs., 16 Cal. 248; People *ex rel.* Heyneman *v.* Blake, 19 Cal. 579; Kimball *v.* Board of Supervisors, 46 Cal. 19; White-man's Executrix *v.* Wilmington & Susquehanna R. R. Co., 2 Harr. Del. 514; Bailey *v.* Phila., Wilmington & Balt. R. R. Co., 4 Harr. Del. 389, 417; Drouberger *v.* Reed, 11 Ind. 420; Hymes *v.* Aydelott, 26 Ind. 431; Evansville & Crawfordsville R. R. Co. *v.* Miller, 30 Ind. 209; Anderson *v.* Caldwell, 91 Ind. 451; Indianapolis & Cumberland Gravel Road Co. *v.* Christian, 93 Ind. 360; Lipes *v.* Hand, 104 Ind. 503; Central Branch U. P. R. R. Co. *v.* Atchison etc. R. R. Co., 28 Kan. 453; People *ex rel.* Green *v.* Michigan Southern R. R. Co., 3 Mich. 496; Smith *v.* McAdam, 3 Mich. 506; Langford *v.* County Comrs. of Ramsey Co., 16 Minn. 375; Bruggeman *v.* True, 25 Minn. 123; Minneapolis *v.* Wilkin, 30 Minn. 140; Louisiana & Frankford Plank Road Co. *v.* Pickett, 25 Mo. 535; City of Kansas *v.* Hill, 80 Mo. 523; Virginia & Truckee R. R. Co. *v.* Elliott, 5 Nev. 358; Backus *v.* Lebanon, 11 N. H. 19; Dalton *v.* Northampton, 19 N. H. 362; Baker *v.* Holderness, 26 N. H. 110; Petition of the Mount Washington Road Co., 35 N. H. 134; Scudder *v.* Trenton Del. Falls Co., 1 N. J. Eq. 694; Beekman *v.* Saratoga & Schenectady R. R. Co., 3 Paige, 45; Livingston *v.* New York, 8 Wend. 85; People *v.* Smith, 21 N. Y. 595; Matter of Comrs. of State Reservation at Niagara, 37 Hun, 537; S. C. 102 N. Y. 734; Raleigh & Gaston R. R. Co. *v.* Davis, 2 Dev. & B. Law, 451; Willyard *v.* Hamilton, 7 Ohio, Pt. 2, 111; Kendall *v.* Post, 8 Or. 141; Ligat *v.* Commonwealth, 19 Pa. S. 456; Penna. R. R. Co. *v.* Lutheran Congregation, 53 Pa. S. 445; Anderson *v.* Turbeville, 6 Coldw. 150; Houston etc. R. R. Co. *v.* Milburn, 34 Tex. 224; Gold *v.* Vermont Central R. R. Co., 19 Vt. 478; Hood *v.* Finch, 8 Wis. 381; Warts *v.* Hoagland, 114 U. S. 606; Missouri Pacific Ry. Co. *v.* Hunes, 115 U. S. 512; Great Falls Manf. Co. *v.* Garland, 25 Fed. R. 521; Bonaparte *v.* Camden & Amboy R. R. Co., 1 Baldwin, 205; Johnson *v.* Joliet & Chicago R. R. Co., 23 Ills. 203 (see, *contra*, Rich *v.* Chicago, 59 Ills. 286); Central Branch U. P. R. R. Co. *v.* Atchison etc. R. R. Co., 28 Kan. 453; Henderson & Nashville R. R. Co. *v.* Dickerson, 17 B. Monroe, 173; Ames *v.* Lake Superior & Miss. R. R. Co., 21 Minn. 241; Kramer *v.* Cleveland etc. R. R. Co., 5 Ohio St. 140; Buffalo Bayou etc. R. R. Co. *v.* Ferris, 26 Tex. 588; Rhine & McKinney, 53 Tex. 354. *Opposing decisions and dicta:* South Western R. R. Co. *v.* Southern & Atlantic Tel. Co., 46 Ga. 43; Rich *v.* Chicago, 59 Ills. 286; Lake Erie etc. R. R. Co. *v.* Heath, 9 Ind. 558; Piper *v.* Connerville & Liberty Turnpike Co., 12 Ind. 400;

a common law jury; that this practice was well known to the framers of those constitutions, and that presumably they did not intend by any general language employed to abrogate a practice so universal and of such long standing and against which no complaint existed.³ The provisions relied upon in support of the opposite contention are those which prescribe in substance that the right of trial by jury shall remain inviolate and that no person shall be deprived of his property without due process of law. Though the constitution provides that the compensation shall be ascertained by a jury, yet a jury may be waived by agreement of parties.⁴ When the constitution provides for a jury in such cases, an ordinary jury of twelve will be intended.⁵ But where the constitution recognized a jury of six in proceedings before justices of the peace, an assessment in a condemnation proceeding before a justice by such a jury was upheld.⁶ Where by law a jury may be demanded, it is a substantial right and should not be trifled with nor denied on technical grounds.⁷

§ 312. It is sufficient, in any event, if a jury trial may be had on appeal.—Even in those States in which a jury trial is a matter of right, either by virtue of the express provision of the constitution or the manner of interpreting it by the courts, it is held sufficient that a jury trial may be had on appeal.¹ If a party does not appeal, he thereby waives his

Norristown etc. Turnpike Co. *v.* Burkett, 26 Ind. 53; Louisville etc. R. R. Co. *v.* Dryden, 39 Ind. 393; Harness *v.* Chesapeake & Ohio Canal Co., 1 Md. Ch. 248; Salem Turnpike etc. Corporation *v.* County of Essex, 100 Mass. 282; Newcomb *v.* Smith, 1 Chandler, Wis. 71; Hanlon *v.* Supervisors of Westchester, 57 Barb. 383; Heyward *v.* New York, 7 N. Y. 314, 324.

³ *Ibid.*

⁴ Chicago, Milwaukee & St. Paul Ry. Co. *v.* Hock, 118 Ills. 537.

⁵ Clark *v.* Utica, 18 Barb. 451.

⁶ McManus *v.* McDonough, 107 Ills. 95.

⁷ Port Huron etc. Ry. Co. *v.* Callanan, 61 Mich. 12.

§ 312.

¹ Atlanta *v.* Central R. R. Co., 53 Ga. 120; Thorp *v.* Witham, 65 Ia. 566; Stewart *v.* Baltimore, 7 Md. 500; Aldridge *v.* Tuscumbia etc. R. R. Co., 2 Stew. & Por. 199; Reckner *v.* Warner, 22 Ohio St. 275; Norristown etc. Turnpike Co. *v.*

right to a jury trial.² The requirement of a bond as a condition to an appeal in such a case is not invalid.³

§ 313. What tribunal is sufficient.—In the absence of any special constitutional provision prescribing how compensation shall be ascertained, there is no limitation on the legislature, except the provision that no man shall be deprived of his property except by due process of law or the law of the land. The legislature may provide such mode as it sees fit for ascertaining the compensation,¹ provided only that the tribunal is an impartial one² and that the parties interested have an opportunity to be heard.³ A court or judge, with or without a jury, is an impartial tribunal;⁴ so are any disinterested men of integrity and fair intelligence forming a committee or board. An agent of the party condemning and two disinterested freeholders do not form an impartial tribunal.⁵ A committee of three freeholders appointed by the council of a city is not an impartial tribunal to assess the compensation for property taken by such city for streets.⁶

Burkett, 26 Ind. 53; Whitemen's Executrix *v.* Wilmington & Susquehanna R. R. Co., 2 Harr. Del. 514.

² Thorp *v.* Witham, 65 Ia. 566; Stewart *v.* Baltimore, 7 Md. 500.

³ Rechner *v.* Warner, 22 Ohio St. 275.

§ 313.

¹ Virginia & Truckee R. R. Co. *v.* Elliott, 5 Nev. 358; Raleigh & Gaston R. R. Co. *v.* Davis, 2 Dev. & B. Law, 451; Kramer *v.* Cleveland etc. R. R. Co., 5 Ohio St. 140; New Orleans etc. R. R. Co. *v.* Drake, 60 Miss. 621; Evansville & Crawfordsville R. R. Co. *v.* Miller, 30 Ind. 209; Indianapolis *v.* Cumberland Gravel Road Co., 93 Ind. 360; Ames *v.* Lake Superior & Miss. R. R. Co., 21 Minn. 241.

² Ames *v.* Lake Superior & Miss.

R. R. Co., 21 Miss. 241; Rhine *v.* McKinney, 53 Tex. 354; Koppikus *v.* State Capitol Comrs., 16 Cal. 248; Langford *v.* County Comrs., 16 Minn. 375; Bruggerman *v.* True, 25 Minn. 123; Uhrig *v.* St. Louis, 44 Mo. 458.

³ Zimmerman *v.* Canfield, 42 Ohio St. 463; Wurts *v.* Hoagland, 114 U. S. 606; United States *v.* Jones, 109 U. S. 513; Gamble *v.* McCrady, 75 N. C. 509; Harness *v.* Chesapeake & Ohio Canal Co., 1 Md. Ch. 248; and see *post*, §§ 363–368.

⁴ Evansville & Crawfordsville R. R. Co. *v.* Miller, 30 Ind. 209; Indianapolis etc. Gravel Road Co. *v.* Christian, 93 Ind. 360.

⁵ Powers *v.* Bears, 12 Wis. 213.

⁶ Rhine *v.* McKinney, 53 Tex. 354; House *v.* Rochester, 15 Barb. 517.

If the constitution requires a jury, it is imperative.⁷ By the term *jury*, in the constitution, is to be understood a common law jury, unless otherwise specified.⁸ But in New York, whose constitution required the damages to be assessed by a jury or not less than three commissioners appointed by a court of record, it was held that a jury of twelve, a majority of whom could decide, was valid.⁹ This was put on the ground that damages in such cases had been assessed by such juries for twenty years prior to the adoption of that provision of the constitution. In interpreting the same provision it has been held that the legislature was not limited to one mode in the same proceeding, but might provide that compensation should be assessed by commissioners in the first instance and by a jury on review or appeal.¹⁰ Also, that an act which required the court to select by lot three commissioners from among twelve persons designated by the common council of a city to act in street cases was void, as an attempt to control the discretion vested in the court by the constitution.¹¹

§ 314. Nature of the proceeding generally: Whether a "suit," "action," "special proceeding," etc.—The character of proceedings for condemnation depends mainly upon the statute under which they are authorized. In general, they partake of the nature of legal rather than of equitable proceedings.¹ They have sometimes been called proceedings

⁷ Pusey's Appeal, 83 Pa. S. 67; William's Executors *v.* Pittsburgh, 83 Pa. S. 71; Whitehead *v.* Arkansas Central R. R. Co., 28 Ark. 460; Shaver *v.* Starrett, 4 Ohio St. 494; West End Narrow Gauge R. R. Co. *v.* Almeroth, 13 Mo. App. 91.

⁸ Lamb *v.* Lane, 4 Ohio St. 167; Smith *v.* Atlantic & Great Western R. R. Co. 25 Ohio St. 91; Chicago etc. R. R. Co. *v.* Sanford, 23 Mich. 418; Clark *v.* Utica, 18 Barb. 451.

⁹ Cruger *v.* Hudson River R. R. Co., 12 N. Y. 190.

¹⁰ Clark *v.* Miller, 54 N. Y. 528.

¹¹ Menges *v.* Albany, 56 N. Y. 374.

§ 314.

¹ Bevier *v.* Dillingham, 18 Wis. 529; Union Canal Co. *v.* Woodside, 11 Pa. S. 176; Pack *v.* Chesapeake & Ohio R. R. Co., 5 W. Va. 118; and see cases cited in next section, in which they are held to be common law proceedings.

*in rem.*² A proceeding under the flowage acts has been held to be a *civil action* within the statute as to removals;³ or within a statute abolishing special pleading in *all civil actions*,⁴ or prohibiting arrest of judgment in *all civil actions*,⁵ or relating to the competency of parties as witnesses *in civil actions*,⁶ or relating to *error in civil cases*.⁷ In Indiana a proceeding to condemn land for a railroad was held to be a *civil case*, within the meaning of the constitution guaranteeing a trial by jury,⁸ but a proceeding to establish a drain was held not to be within the same provision.⁹ In the same State in one case a drainage proceeding was held to be a *special proceeding* and not a *civil action* to which the code applied,¹⁰ but in another case it was held to be so far a *civil action* that the provisions of the code as to a change of venue applied.¹¹ A condemnation case is a *special proceeding*, and not an *action*, within the New York code.¹² It is a *special case or proceeding*, and not a *case at law*, within the meaning of the constitution of California conferring appellate jurisdiction on the Supreme Court.¹³ It is a *remedial case* within the meaning of the constitution of Minnesota, which gives the Supreme Court original jurisdic-

² Smith *v.* Taylor, 34 Tex. 589; Stewart *v.* Board of Police, 25 Miss. 479; New Orleans etc. R. R. Co. *v.* Hemphill, 35 Miss. 17; St. Paul, M. & M. R. R. Co. *v.* Minneapolis, 35 Minn. 141; Wilson *v.* Hatheway, 42 Ia. 173; Costello *v.* Burke, 63 Ia. 361.

³ Hale *v.* Burwell, 2 Patten & Heath, 608; Colorado Midland Ry. Co. *v.* Jones, 29 Fed. R. 193; Bannigan *v.* Worcester, 30 Fed. R. 392; and see next section.

⁴ Howard *v.* Proprietors of Locks & Canals, 12 Cush. 259.

⁵ Bryant *v.* Glidden, 36 Me. 36.

⁶ Hosmer *v.* Warner, 15 Gray 46.

⁷ Atlantic etc. R. R. Co. *v.* Sullivan, 5 Ohio St. 276.

⁸ Lake Erie etc. R. R. Co. *v.* Heath, 9 Ind. 558.

⁹ Anderson *v.* Caldwell, 91 Ind. 451.

¹⁰ Dukes *v.* Working, 93 Ind. 501; so also in Colorado, Knoth *v.* Barclay, 8 Col. 300.

¹¹ Bass *v.* Elliott, 105 Ind. 517.

¹² King *v.* New York, 36 N. Y. 182.

¹³ Sacramento, Placer & Nevada R. R. Co. *v.* Harlan, 24 Cal. 334; Appeal of Houghton, 42 Cal. 35; Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70.

tion in such *remedial cases* as may be prescribed by law.¹⁴ In Massachusetts a complaint for flowage was held not to be within a statute which provided for the submission to arbitration of any demands which might be the subject of a suit in law or equity.¹⁵ In Maine such a complaint was held to be a *personal action* within the meaning of a statute as to service of process¹⁶ In Michigan such proceedings have been held to be "civil cases" within the purview of an act allowing challenges in "civil cases,"¹⁷ and also not "suits at law" within the statute as to change of venue.¹⁸ In Iowa they have been held to be "civil cases" within the act regulating appeals in "civil cases."¹⁹

§ 315. Jurisdiction of the Federal Courts: Removals.—In *Kohl v. United States*.¹ it was held that a proceeding by the United States to condemn land for a public building was a suit at common law within the meaning of the act as to the jurisdiction of the circuit courts of the United States. Similar decisions have been made in some of the circuits.² It may also be regarded as settled that a condemnation proceeding pending in the State courts, whether by appeal from commissioners or otherwise, may be removed to the federal court of the proper district.³ From these cases it would

¹⁴ *Warren v. First Div. of St. Paul & Pacific R. R. Co.*, 18 Minn. 384.

¹⁵ *Henderson v. Adams*. 5 *Cush.* 610.

¹⁶ *Hull v. Decker*, 48 *Me.* 255.

¹⁷ *Converse v. Grand Rapids & Indiana R. R. Co.* 18 *Mich.* 459.

¹⁸ *People v. Brighton*, 20 *Mich.* 57.

¹⁹ *Scott v. Lasell*, 71 *Ia.* 180.

§ 315.

Missouri etc. R. R. Co. v. Texas & St. Louis Ry. Co., 4 *Wood*, 360.

³ *Boom Co. v. Patterson*, 98 *U. S.* 403; *Affirming S. C.* 3 *Dillon*, 465; *Searl v. School District No. 2*, 124 *U. S.* 197; *Northern Pacific Terminal Co. v. Lowenberg*, 9 *Sawyer* 348; *Warren v. Wisconsin Valley R. R. Co.*, 6 *Biss.* 425; *Hale v. Burwell*, 2 *Patten & Heath*, 608; *Mineral Range Ry. Co. v. Detroit & Lake Superior Copper Co.*, 25 *Fed. R.* 515; *Reed v. Chicago, M. & St. P. Ry. Co.*, 25 *Fed. R.* 886; *Colorado Midland Ry. Co. v. Jones*, 29 *Fed. R.* 193; *Banigan v. Worcester*,

seem to follow that such proceedings, when instituted in a court in the first instance, may be brought in the federal court, provided the requisite conditions as to citizenship and value exist.

§ 316. Venue.—In the absence of provisions to the contrary, proceedings should be instituted in the county or district in which the land taken or affected is situated.¹ When the works executed are in one county or jurisdiction and the property affected is in another, the proceedings should be in the county or jurisdiction where the affected property lies. Thus, water was diverted from a stream for the purpose of supplying a village with water, and thereby damaged a mill situated below. The point of diversion was in one judicial district and the mill in another. It was held the proceedings were properly had in the district in which the mill was situated.² In Indiana it is held that proceedings to establish a ditch which is partly in two counties may be had in either county.³

30 Fed. R. 392; *Simplot v. Same*, 5
McCrary, 158.

§ 316.

¹ *Missouri Pacific Ry. Co. v. Carter*, 85 Mo. 448; *Dotson v. Sibert*, 4
Bibb, 464; *Commissioners v. Thompson*, 18 Ala. 694; *Damrell v. Board*
of Supervisors, 40 Cal. 154; *Commissioners v. Tarver*, 25 Ala. 480;

Wooster v. Great Falls Manf. Co.,
39 Me. 246; *Casey v. Kilgore*, 14
Kan. 478; *Sutherland v. Holmes*, 78
Mo. 399.

² *Stamford Water Co. v. Stanley*,
39 Hun, 424.

³ *Updegraff v. Palmer*, 107 Ind.
181; *Merinda v. Spurlin*, 100 Ind.
380.

CHAPTER XIII.

THE PARTIES TO PROCEEDINGS AND THE VARIOUS ESTATES AND INTERESTS TO BE CONSIDERED.

§ 317. General view.—There is much discrepancy in practice as to who are necessary or proper parties to condemnation proceedings. Some of this may be accounted for by differences in constitutions and statutes; some of it is due to the different views taken by different courts of the same questions. We shall not attempt to reconcile conflicting decisions, but to point out what seems to us the correct law and practice in the matter. It has already been shown that the owner of property taken for public use is entitled to have the compensation ascertained by an impartial tribunal, and is entitled to a reasonable opportunity to be heard before such tribunal.¹ As a general rule, then, all persons who have any proprietary interest in the property taken, or proposed to be taken, should be made parties to the proceedings, and also all other persons, if any, who are required to be made parties by statute. By a proprietary interest is meant any interest which is recognized as property by the laws of the State, and will be more fully explained in the following sections.

§ 318. Grantor and Grantee.—It is plain that the one who is entitled to receive the compensation is the one who should be made a party in proceedings to ascertain its amount. Where the proceedings have reference to a future acquisition of title by the condemning party, the owner at the time proceedings are instituted is the proper party defendant.¹ Where, under the constitution and laws as inter-

§ 317.

¹ *Ante*, § 313.

§ 318.

¹ *Elizabethtown & Paducah R. R.*

preted by the courts, the title vests before compensation is made, by virtue of the location or other acts, such as the filing or recording of a survey or other instrument describing the property to be taken, the owner at the time the title vests is the proper party.² The right to compensation is a personal claim, and after it has once accrued does not pass by a deed of the land.³ Where land is occupied wrongfully or by mere consent of the owner, expressed or implied, no right or title to the land so occupied passes, and a subsequent deed by the owner vests the entire estate in the grantee, and such grantee, in the absence of any reservation, is entitled to the just compensation for the land so occupied.⁴ The grantor in such case who has not consented to the occupation of his land may recover for all damages sustained up to the time of the deed, to be estimated as in an action of trespass.⁵ These

Co. v. Helm's Heirs, 8 Bush, 681; *Smith v. Chicago etc. R. R. Co.*, 67 Ills. 191.

² *Davidson v. Boston & Maine R. R. Co.*, 3 Cush. 91; *Wood v. Comrs. of Bridges*, 122 Mass. 394; *Drury v. Midland R. R. Co.*, 127 Mass. 571; *Tenbrooke v. Jahke*, 77 Pa. S. 392; *Inge v. Police Jury*, 14 La. An. 117.

³ *Tenbrooke v. Jahke*, 77 Pa. S. 392.

⁴ *Donald v. St. Louis etc. R. R. Co.*, 52 Ia. 411; *Harrington v. St. Paul & Sioux City R. R. Co.*, 17 Minn. 215; *Hetfield v. Central R. R. Co.*, 29 N. J. L. 571; reversing S. C., 29 N. J. L. 206; *Galveston etc. R. R. Co. v. Pfeuffer*, 56 Tex. 66; compare with last case *Central Ry. Co. v. Merkel*, 32 Tex. 723. Contrary decisions are *Pomeroy v. Chicago & Northwestern Ry. Co.*, 25 Wis. 641; *Indiana etc. Ry. Co. v. Allen*, 100 Ind. 409; *McLendon v. Railroad Co.*, 54 Ga. 293; *McFad-*

den v. Johnson, 72 Pa. S. 335; *Davis v. Titusville & Oil City Ry. Co.*, 114 Pa. S. 308. In *Rand v. Townshend*, 26 Vt. 670, the statute provided that any person interested in lands through which a highway is laid out might petition for damages. This was held to mean the owner at the time the highway was laid. In *Lewis v. Wilmington, etc. R. R. Co.*, 11 Rich. Law 91, the statute gave the right to apply to have compensation assessed to the owner at the time the railroad was finished, and the court held that a grantee of such owner could not apply. The Wisconsin case cited is virtually overruled by the case of *Sabine v. Johnson*, 35 Wis. 185; and the Pennsylvania case probably went on the theory that title passed to the railroad company upon its location upon and occupying the land which was before the conveyance in question.

⁵ *Ibid.*

rules apply as well to flowage cases as to other forms of taking. If the owner of land flowed conveys, after the flowing and before the easement has been acquired, the right to compensation for the easement passes to the grantee.⁶ But the right to recover such damages as have been sustained up to the time of the conveyance remains with the grantor.⁷ The right to recover for damages which are consequential in their nature is in the owner at the time the injury is done.⁸ So under statutes giving damages for a change of grade in a street⁹ or by reason of the discontinuance of a highway.¹⁰ It is held that the person condemning is not affected by an unrecorded deed of which he has no notice, and that good title is acquired by making the owner of record a party.¹¹ And, where the grantee in an unrecorded deed is present and makes no claim for damages, he cannot afterwards intervene for the purpose of quashing the proceedings.¹² Where the conveyance reserves a water power, the right to recover for injury to that remains with the grantor.¹³ The city of Worcester had taken certain waters and lands and constructed valuable works and improvements for the purpose of supplying the city with water, but doubt existed as to the city's title. In 1871 an act was passed that the city should, within sixty days from the time the council should vote to take any

⁶ *Newell v. Smith*, 15 Wis. 101; *Sabine v. Johnson*, 35 Wis. 185; overruling *Mead v. Hein*, 28 Wis. 583; *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433; *Sweaney v. United States*, 62 Wis. 396.

⁷ *Walker v. Oxford Woolen Manf. Co.*, 10 Met. 203; *Sabine v. Johnson*, 35 Wis. 185.

⁸ *Illinois Central R. R. Co. v. Allen*, 39 Ills. 205; *Toledo etc. Ry. Co. v. Morgan*, 72 Ills. 155; *Chicago & Alton R. R. Co. v. Maher*, 91 Ills. 312; *Chicago & Eastern Ills. R. R. Co. v. Loeb*, 118 Ills. 203; *Wabash, St. Louis & Pacific Ry.*

Co. v. McDougal, 118 Ills. 229; *Chicago & Eastern Illinois R. R. Co. v. Loeb*, 8 Ills. App. 627; *Zimmerman v. Union Canal Co.*, 1 W. & S. 346; *Heilman v. Union Canal Co.*, 50 Pa. S. 268.

⁹ *Sargent v. Machias*, 65 Me. 591; *Dixon v. Baltimore etc. R. R. Co.*, 1 Mackey (D. C.) 78.

¹⁰ *King v. New York*, 102 N. Y. 171.

¹¹ *Cool v. Crommet*, 13 Me. 250.

¹² *Brown v. County Comrs.*, 12 Met. 208.

¹³ *Galena etc. R. R. Co. v. Haslam*, 73 Ills. 494.

lands, ponds or streams of water, file in the office of the registry of deeds an instrument describing the lands, etc., taken, and stating the purposes for which the same were taken, and that title thereto should vest in the city from the time of filing such instrument. The act also provided that any land-owner injured by the taking might petition for damages. It was held that under this act a corporation which acquired land in 1870 could recover for injuries thereto occasioned by a former taking in 1864,—that the city must take the act with its burdens.¹⁴ A deed reserved to the grantor “all the damages sustained in consequence of the railroad crossing the lands conveyed.” At the time the deed was made a railroad was in possession of a strip across the land, but had no title. Afterwards the company paid the grantee and took a deed from him. The grantor sued the grantee for the money so received. It was held that he could not recover, and that the only effect of the provision in the deed was to reserve the damages which had already accrued.¹⁵

§ 319. **In case of executory contracts.**—In case of an executory contract of sale it is generally held that the vendee is entitled to the compensation, on the ground that he is the equitable owner of the property, and that what is taken is subtracted from what he is to receive by his contract, while the vendor remains entitled to the whole amount of purchase money agreed to be paid.¹ The better course, however, would seem to be to make both the vendor and vendee parties, and then the compensation can be paid to the one or the

¹⁴ Crompton Carpet Co. v. Worcester, 123 Mass. 498.

¹⁵ Dennison v. Taylor, 15 Abb. (N.C.) 439.

§ 319.

¹ St. Louis, Lawrence & Denver R. R. Co. v. Wilder, 17 Kan. 239; Kuhn v. Truman, 15 Kan. 423, 426;

Hastings & Grand Island R. R. Co. v. Ingalls, 15 Neb. 123; Pinkerton v. Boston & Albany R. R. Co., 109 Mass. 527; but see Smith v. Ferris,

6 Hun, 553, which holds that the vendor only can give a valid release.

other, or apportioned between them as may seem just to the court. This has been held proper in Massachusetts.² One in possession of land under a verbal contract to purchase the same, and who has paid no money, has no interest in the land entitling him to compensation.³

§ 320. Heirs, devisees and personal representatives.—The transfer of title which takes place at the death of a person, whether by will or by descent, corresponds to the transfer by deed. What has been said in regard to grantors and grantees will apply if, in place of grantors, we substitute personal representatives, and, in place of grantees, we substitute heirs and devisees. If the right to compensation had accrued to the decedent in his life time, then it is personality, and passes to his administrators or executors, and they are the proper parties plaintiff or defendant, as the case may be; otherwise the right is in the heirs or devisees, and they are the proper parties. In those States where it is held that title vests by virtue of certain acts done before compensation is made, and those acts are done before the death of the owner, then the right to compensation is complete in him, and, upon his death, vests in his personal representatives.¹ In other cases the heirs or devisees are the proper parties.² But, where an estate is insolvent, the administrator is entitled to the compensation.³ Heirs should be made parties by name and not under the collective title of *heirs*.⁴ In like manner per-

¹ Proprietors of Locks & Canals v. Nashua & Lowell R. R. Co., 10 Ired. L. 24; St. Albans v. Seymour, 41 Vt. 579.

Cush. 385.

² Clark v. Close, 43 Ia. 92.

§ 320.

¹ Church v. Grand Rapids etc. R. R. Co., 70 Ind. 161; Neal v. Knox & Lincoln R. R. Co., 61 Me. 298; Moore v. Boston, 8 Cush. 274; Whitman v. Boston & Maine R. R. Co., 3 Allen, 133; Howcott v. Warren, 7 Ired. L. 20; Howcott v. Coffield, 7

Ired. L. 24; St. Albans v. Seymour,

41 Vt. 579.

² Pittsburgh etc. R. R. Co. v. Swinney, 97 Ind. 586; McLaughlin v. Dorsey, 1 Harris & McHenry, 224; Boynton v. Peterborough & Shirley R. R. Co., 4 Cush. 467; Boonville v. Ormrod's Admr., 26 Mo. 193.

³ Goodwin v. Milton, 25 N. H. 458; see Boynton v. Peterborough & Shirley R. R. Co., 4 Cush. 467.

⁴ Hughes v. Sellers, 34 Ind. 337.

sonal representatives should be made parties by name instead of using the description of the "Estate of ____."⁵ But "Estate of Thomas Carr and Clarka Carr, of which Joseph Booth is Executor," was held sufficient in a petition.⁶

§ 321. Trust estates.—In case of trust estates the trustee is the proper party, and not the *cestui que trust*.¹ The former represents the entire estate and is entitled to receive the compensation. But, where one of two partners held property in trust for the firm, it was held proper for both to join in a petition for damages.²

§ 322. Husband and wife.—Where the fee is in the husband, his interest may undoubtedly be divested by making him a party without the wife. If the fee is in the wife, it is certain that she must be a party in order to divest her title; notice to the husband alone would not affect the wife's interest.¹ Whether the wife's interest can be divested without joining the husband would depend upon the local law. Such joinder has been held to be proper.² But, where land is vested in the wife to her sole and separate use as if single, it is sufficient to make the wife alone a party.³ It has also been held that the husband may sue alone for consequential injuries to his real estate caused by a change of grade.⁴ It has been held that a homestead interest may be divested by

⁵ *Post*, § 349.

⁶ *Carr v. State*, 103 Ind. 548.

§ 321.

¹ *Hidden v. Davisson*, 51 Cal. 138; *Davis v. Charles River Branch R. R. Co.*, 11 Cush. 506; *Hawkins v. County Comrs.*, 2 Allen 254; *State v. Orange*, 32 N. J. L. 49; *State v. Easton & Amboy R. R. Co.*, 36 N. J. L. 181; *People v. Robinson*, 29 Barb. 77; compare *McIntyre v. Easton & Amboy R. R. Co.*, 26 N. J. Eq. 425.

² *Reed v. Hanover Branch R. R. Co.*, 105 Mass. 303.

§ 322.

¹ *Whitcher v. Benton*, 48 N. H. 157; *Watson v. Sewickley*, 91 Pa. S. 330; *Bixby v. Goss*, 54 Mich. 551; *Butis v. Geddes*, 54 Mich. 608; *Covey v. Probate Judge*, 56 Mich. 524.

² *East Tennessee etc. R. R. Co. v. Love*, 3 Head 63.

³ *State v. Hulick*, 33 N. J. L. 308.

⁴ *Hutchinson v. Parkersburg*, 25 W. Va. 226.

making the husband only a party, although he cannot dispose of the interest by contract without the wife's consent.⁵ The safest and best course in all cases would seem to be to join both husband and wife, for then the interests of both can be divested, both can have an opportunity to be heard, and the compensation can be apportioned between them as may be right and just.⁶

§ 323. Dower.—Dower may be considered with reference to its three stages, inchoate dower, dower after the death of the husband and before assignment, and dower after assignment. After assignment the widow is seized of a freehold estate in the premises assigned to her and stands upon the same footing as an owner in fee. She must be a party to proceedings and have an opportunity to be heard upon the question of compensation.¹ After the death of the husband, and before assignment, dower is a very peculiar interest. There is no seizin and no right of possession, but all the authorities agree that there is a vested interest which is beyond the control of the legislature..² It is a vested interest and a proprietary interest, and the owner should therefore be made a party and have notice.³ In regard to inchoate dower,

⁵ *County v. Lattemer*, 31 Minn. 239, 243; *Randall v. Texas Central Ry. Co.*, 63 Tex. 586.

⁶ *Dwiggins v. Denver*, 24 Ohio St. 629; *East Tennessee etc. R. R. Co. v. Love*, 3 Head 63.

§ 323.

¹ *Matter of William and Anthony Streets*, 19 Wend. 678.

² *2 Scribner on Dower*, chap. 2, sec. 3; 1 Wash. Real Prop. b. 1 c. vii. sec. vi, 2.

³ In *Todernier v. Aspinwall*, 43 Ills. 401, a contrary view is implied, so far as can be made out from the report. A bill was filed to enjoin the opening of a road through a

tract of land belonging to the estate of Frederick Kohlermeier, deceased. Proceedings had been had to establish the way, and an award was made to the "unknown heirs" of Kohlermeier. His widow had an unassigned right of dower in the land. No award was made to her, and no notice taken of her interest. The court said it was unnecessary to do so. It is said that her dower may be assigned in a part of the tract unaffected by the lay-out, or, if so assigned as to be affected by it, the fact that the heirs have received the compensation may be taken into account. It is plain that this reasoning would not apply to

the authorities are in conflict, both as to the nature of the interest and the power of the legislature over it. The weight of authority seems to be that it is competent for the legislature to modify or abolish it at pleasure;⁴ although there is also a strong dissent from this view.⁵ Scribner, in his work on Dower, after reviewing the cases, concludes as follows: "It has been already shown that inchoate dower is a valuable right, and regarded as such by the courts and the law. When the marriage takes place, it attaches at once upon all the lands of which the husband is then seized. It attaches also upon all the lands subsequently acquired by him, the instant that he is clothed with the title. By the common law, when lands are conveyed to the husband, the contingent interest of the wife is held to be impliedly embraced in the grant; and a provision that she shall not have dower is considered as repugnant thereto, and therefore void. In respect to the inchoate interest thus invested in the wife by virtue of the conveyance to the husband, she has been regarded as a purchaser, and as such entitled to the benefit of statutory privileges extended to alien purchasers. The right, when once fixed, is paramount to all subsequent titles derived through the husband. In several of the States it is protected upon sales made in legal proceedings in the lifetime of the husband. An agreement to release it forms a good consid-

a case where the entire tract was taken, which shows that it is altogether unsound.

⁴ *Barbour v. Barbour*, 46 Me. 9; *Weaver v. Gregg*, 6 Ohio St. 547; *Gwynne v. Cincinnati*, 3 Ohio 24; *Noel v. Ewing*, 9 Ind. 37; *Strong v. Clem*, 12 Ind. 37; *Wiseman v. Beckwith*, 90 Ind. 185; *Lucas v. Sawyer*, 17 Ia. 517; *Melizet's Appeal*, 17 Pa. S. 449; *Moore v. New York*, 4 Sandf. 456; S. C., 8 N. Y. 110; *Matter of Central Park Extension*, 16 Abb. Pr. 56, 68; *Morrison v. Rice*,

35 Minn. 436; *Hensen v. Moore*, 104 Ills. 403.

⁵ *Royston v. Royston*, 21 Ga. 161; *Johnston v. Vandyke*, 6 McLean, 422; *Wheeler v. Keitland*, 27 N. J. Eq. 534; *Morean v. Ditchemendy*, 18 Mo. 522; *Williams v. Courtney*, 77 Mo. 587; *Kelly v. Harrison*, 2 Johns. Cas. 29; *Jackson v. Edwards*, 22 Wend. 498, 513; S. C., *Ibid.* 519; *Lawrence v. Miller*, 1 Sandf. 516; S. C., 2 N. Y. 245; *Simar v. Canaday*, 53 N. Y. 298.

eration for an undertaking to pay money or convey lands to the wife. It constitutes an incumbrance for which the vendee may insist upon a proportionate deduction from the purchase money of the estate. Thus recognized and established as a valuable property interest, it would seem reasonable that it should receive the same protection against legislative encroachments as is extended to other rights of property. Legislation abolishing dower, or modifying it to the prejudice of the wife, should, it is believed, be held to operate prospectively only."⁶ In New York it has been expressly decided that the wife's inchoate right of dower was extinguished by a condemnation for public use, although she was not a party to the proceedings and the entire compensation was paid to the husband.⁷ The same doctrine has been announced in Ohio in a case where property was dedicated to public use by the husband.⁸ In New Jersey it has been held by the Court of Errors and Appeals that, while the wife's interest in the *land* may be extinguished by condemnation proceedings to which the husband alone is a party, yet her interest is in equity transferred to the damages awarded, and that she is entitled to an equitable proportion thereof.⁹ Not-

⁶2 Scribner on Dower, c. 1, § 318.

⁷ Moore v. New York, 4 Sandf. 456; S. C., 8 N. Y. 110. This was a proceeding for assignment of dower. The court by Gardiner, J., say: "In the case under consideration the land was taken against the consent of the husband, by an act of sovereignty, for the public benefit. The only person owning and representing the fee, was compensated by being paid its full value. The wife had no interest in the land, and the possibility which she did possess was incapable of being estimated with any degree of accuracy. Under these circumstances the legislature bad the

power, which I think they have rightfully exercised, to direct that the value of the entire fee should be paid to the husband of the appellant; and that the corporation by such payment, in pursuance of the statute, has acquired an indefeasible title to the premises. The judgment of the superior court should be affirmed."

⁸ Gwynne v. Cincinnati, 3 Ohio 24. In Weaver v. Gregg, 6 Ohio St. 547, the case of Moore v. New York, 8 N. Y. 110 is fully approved.

⁹ Wheeler v. Kirtland, 27 N. J. Eq. 534; see also French v. Lord, 69 Me. 537.

withstanding these decisions, we are inclined to be of the opinion that an inchoate right of dower is such an interest in land as is protected by the constitution from legislative infringement. In the New Jersey case just cited it is said that "while not technically an estate, it cannot, at this day, be denied that inchoate dower is a *valuable interest in land*."¹⁰ In a recent case in the Court of Appeals of New York, it is said that "it must be considered as settled in this State, notwithstanding Moore *v.* The Mayor, and some *dicta* in other cases, that, as between a wife and any other than the State, or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in land is a *subsisting and valuable interest which will be protected and preserved to her, and that she has a right of action to that end*." It was held that she could maintain an action for damages against one who had fraudulently procured a conveyance of real estate from herself and husband.¹¹ It is a well-recog-

¹⁰ Wheeler *v.* Kirtland, 27 N. J. Eq. at p. 535.

¹¹ Simar *v.* Canaday, 53 N. Y. 298, 303. In deciding the case the court say: "But, notwithstanding, there are authorities that the inchoate right of dower is a valuable right, and will be guarded and preserved to the wife by the judgments of the court. There are cases in which it has been held that the release of an inchoate right of dower is a good consideration in equity for an agreement by the husband with the wife, and she has been assisted in enforcing the same (Garlick *v.* Strong, 3 Page 410). A wife who executes a mortgage jointly with her husband, is nevertheless entitled to dower in the equity of redemption of which her husband is seized, notwithstanding the mortgage, which right is not affected in

equity unless she is made a party to the foreclosure. If omitted, she can come in at any time and redeem, notwithstanding a decree and sale in the foreclosure suit. Mills *v.* Van Voorhies, 20 N. Y. 412, where it was held that the existence of an inchoate right of dower in the equity of redemption of mortgaged premises, was a good objection to title by a vendee in an action against him for specific performance of his contract. In that case this strong expression is found: The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow. In Matthews *v.* Duryee, 4 Keys, 525, the inchoate right of a dower of a wife was held to attach to surplus moneys arising upon a sale on foreclosure of mortgage; a judgment in her favor for the value of her

nized maxim that the constitutional provisions for the protection of private property should receive a liberal construction in favor of the individual, and an interest which has been recognized in so many ways by the courts as valuable should not be considered beyond the pale of their protection. But, however this may be, it seems clear that an intent to interfere with the right or divest it without compensation should not be imputed to the legislature by implication. The intent ought to be found in language that is clear and unmistakable. Now, all eminent domain statutes require compensation to be made to the owners or persons interested in the property taken. This means the owners of any valuable interest therein,¹² and should be held to include the owners of inchoate right of dower. In *Moore v. New York*,¹³ already cited, the statute under which proceedings were had, required compensation to be made "to the respective owners, lessees, parties and persons respectively entitled unto or *interested in* the lands, tenements and hereditaments proposed to be appropriated to the use of the city." No general language could be more comprehensive than this, and it seems to us that it is doing violence to it to hold that it expresses an intent on the part of the legislature

dower in that fund was affirmed. There was strong dissent in that case, and *Moore v. Mayor etc. (supra)* was cited by the minority of the court with approval, though the dissent is not placed directly upon the ground that an inchoate right of dower is not an interest which will be protected and enforced. See also *Jackson v. Edwards* (7 Paige, 386; S. C. 22 Wend. 498). And in the Supreme Court are cases which have been acquiesced in, and cited with approval in this court. (*Denton v. Nanny*, 8 Barb. 618; *Vartie v. Un-*

derwood

derwood

derwood, 18 *id.* 561.) We think that it must be considered as settled in this State, notwithstanding *Moore v. The Mayor*, and some *dicta* in other cases, that, as between a wife and any other than the State or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest which will be protected and preserved to her, and that she has a right of action to that end."

¹² *Post*, § 335.

¹³ 8 N. Y. 110.

to deprive a wife of her inchoate right of dower in the property taken.

§ 324. Mortgagees.—On the question whether mortgagees are necessary parties to condemnation proceedings, the authorities are not only conflicting but very unsatisfactory.¹ The cases go almost entirely upon the language of the statutes, as though it was a matter entirely within the control of the legislature. It seems to us that a mortgagee stands upon higher ground, that his interest in the land and the rights secured to him by his mortgage are property which cannot be taken from him without notice and an opportunity to be heard. Where a right of way is taken through a farm it may be a matter of slight consequence. But, when an entire tract is taken which is mortgaged for all it is worth, and the compensation handed over to an insolvent

§ 324.

¹ *Cases holding or favoring the view that they are necessary parties:* South Park Comrs. v. Todd, 112 Ills. 379; Deisner v. Simpson, 72 Ind. 435; Severin v. Cole, 38 Ia. 463; Wilson v. European & North Am. Ry. Co., 67 Me. 358; Siman v. Rhodes, 24 Minn. 25; Stewart v. Raymond R. R. Co., 7 S. & M. 568; Michigan Air Line Ry. Co. v. Barnes, 40 Mich. 383; North Hudson County R. R. Co. v. Booraem, 28 N. J. Eq. 450; S. C. below, Booraem v. Wood, 27 N. J. Eq. 371; Platt v. Bright, 29 N. J. Eq. 128; Warwick Institute for Savings v. Providence, 12 R. I. 144; Hagar v. Brainard, 44 Vt. 294; Wade v. Hennessy, 55 Vt. 207; Adams v. St. Johnsbury & Lake Champlain R. R. Co., 57 Vt. 240; Kennedy v. Milwaukee & St. Paul Ry. Co., 22 Wis. 581; Aspinwall v. Chicago & Northwestern Ry. Co., 41 Wis. 474; Wooster v. Sugar River Valley R.

R. Co., 57 Wis. 311; Martin v. London, Chatham etc. Ry. Co., 1 L. R. Eq. Cas. 145; 1 Jones on Mortgs., sec. 681.

Cases holding or favoring the opposite view: Whiting v. New Haven, 45 Conn. 303; Cool v. Crommet, 18 Me. 250; Breed v. Eastern R. R. Co., 5 Gray, 470; Paine v. Woods, 108 Mass. 160; Vaugh v. Wetherell, 116 Mass. 138; Farnsworth v. Boston, 126 Mass. 1; Read v. Cambridge, 126 Mass. 427; Bancroft v. Cambridge, 126 Mass. 438; Welch v. Boston, 126 Mass. 442; Grand Rapids v. Grand Rapids & Indiana R. R. Co., 58 Mich. 641; Astor v. Hoyt, 5 Wend. 603; Hooker v. Martin, 10 Hun, 302; Home Ins. Co. v. Smith, 28 Hun, 296; Bank of Auburn v. Roberts, 44 N. Y. 192; 11 N. H. 293; President etc. of Schuylkill Navigation Co. v. Thoburn, 7 S. & R. 411; Keystone Bridge Co. v. Summers, 13 W. Va. 476.

mortgagor, it becomes a very serious matter.² This looks very much like depriving a man of his property without compensation and without due process of law. In our opinion a mortgagee is entitled to notice as a matter of right, and, if not made a party, his rights will remain unaffected. All the courts agree that a mortgagee in possession must have notice.³ Those courts which hold that the mortgage is divested without making the mortgagee a party also hold that the mortgage lien in equity follows the fund which is a substitute for the land and that the mortgagee may have it applied upon the mortgage debt,⁴ even though the debt is not due. And in those States where the mortgagee is held to be a necessary party, it is held that, where proceedings have been had to which he is not a party, his interest may be divested by a subsequent condemnation,⁵ and that the damages will be assessed as of the time of entry.⁶ A statute which requires all persons having an interest in lands to be made parties, has been held to include mortgagees even in States which hold that mortgagees are not entitled to notice as owners.⁷

§ 325. Judgment creditors and others holding liens under statutes.—In regard to judgment liens the authorities are uniformly to the effect that they may be divested without making the judgment creditors parties.¹ The grounds upon which these decisions are based are well stated in *Watson v.*

² *Severin v. Cole*, 38 Ia. 463.

wall *v. Chicago & Northwestern Ry. Co.*, 41 Wis. 474.

³ *Cool v. Crommet*, 13 Me. 250; *Parish v. Gilmanton*, 11 N. H. 293; *Parker etc. 36 N. H. 84*; *Ballard v. Ballard Vale Co.*, 5 Gray, 468.

⁶ *Ibid.*

⁴ *Farnsworth v. Boston*, 126 Mass. 1; *Danforth v. Suydam*, 4 N. Y. 66; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Hooker v. Martin*, 10 Hun, 302; *Astor v. Hoyt*, 5 Wend. 603; *Platt v. Bright*, 29 N. J. Eq. 128.

⁷ *Wilson v. European etc. Ry. Co.*, 67 Me. 358; *Michigan Air Line Ry. Co. v. Barnes*, 40 Mich. 383.

⁵ *Kennedy v. Milwaukee & St. Paul Ry. Co.*, 22 Wis. 581; *Aspin-*

§ 325.

¹ *Gimbel v. Stolte*, 59 Ind. 446; *Watson v. New York Central R. R. Co.*, 47 N. Y. 157, 162; *S. C., 1 Sheldon*, 159; *Bean v. Kulp*, 7 Phila. 650.

New York Central R. R. Co., which is the leading case upon the question: "A judgment creditor of an owner has no estate or proprietary interest in the land. He stands wholly upon the law, which gives him a remedy for the collection of his debt by a sale of the land under execution, in case sufficient personal property of the debtor should not be found. This remedy is not secured by contract, but is purely statutory, and in aid of it acts have been passed, from time to time, authorizing a sale of the land which the debtor owned at the time of the recovery or docketing of the judgment, or at any subsequent period, and making the judgment a lien upon the land. The duration of this lien and the mode of its enforcement and discharge are subjects which appertain to the laws for collection of debts; and the rules upon those subjects have been changed, from time to time, according to the will of the legislature. The power of the legislature to regulate those matters cannot be doubted. Acts have been passed shortening and lengthening the duration of the liens of existing judgments, and even providing for their extinguishment without any proceeding to which the judgment creditor was a party." * * * * * "It is clearly within the power of the legislature to abolish the lien of all judgments at any time before rights have become vested or estates acquired under them, and, placing real estate on the same footing as personal property, to confine the remedies of the creditor to the property held by the debtor at the time of issuing the execution.

"This would be no greater exercise of power than the abolition of the right of distress for rent, or of the lien of the landlord on property taken in execution, or of the right of imprisoning the debtor. Yet the validity of such laws has been fully recognized even where they affected existing claims or judgments. They do not take away property, or affect the obligation of contracts, but simply affect legal remedies. There can, therefore, be no doubt of the validity of a provision causing the lien of a judgment, not ripened

into a title by a sale, to be superseded by the taking of the land under proceedings in exercise of the right of eminent domain, on payment of compensation to the owner of the land.

“We think that the act of 1836 had that effect. It is claimed on the part of the appellant, that if the judgment creditor is not an owner, the act makes no provision for divesting his interest; and therefore the effect of the order of condemnation is to vest in the company the right to the land, subject to the lien of the judgment, in the same manner as if the company had taken by deed from the owners. But such a construction cannot be admitted.

“The object of the act was to delegate to the company the right of eminent domain, to the extent necessary to enable it effectually to secure its roadway, etc., in case it should fail to obtain it by contract with the owners. It provides for the appraisement, on notice to the owner or owners, of the value of the land taken, and of any further damages which the owners may sustain by the construction of the road, injury to buildings, etc. The whole amount of this appraisement is directed to be paid to the owners. There is no provision for assessing the value of the interest of the owners, subject to the lien of judgments, or for retaining any part of the value of the land as indemnity against such judgments. The whole value must be paid to the owners, or deposited in bank, and the owners are left to pay their own debts.

“The act then states what right the company shall obtain by virtue of such payment to the owners, and the order made thereupon. On the completion of the proceedings, the company is declared to be possessed of the land during its corporate existence, with the right to use the same for the purposes of the road.

“This declaration excludes the implication, that, after the owners have been compensated, the right of any other person to interfere with the possession or use of the land is reserved, or that, in order to retain such use, the company is bound to

satisfy liens of judgment creditors, after having been compelled to pay the whole value of the land to the owner."

In regard to other statutory liens we find no adjudications, but presume the same rule would be applied.

In regard to the correctness of these decisions reference is made to a subsequent section of this chapter.²

§ 326. Life tenants, lessees, and reversioners.—That life tenants,¹ lessees,² and reversioners³ are entitled to compensation has never been doubted, and they must be made parties in order to divest their interests. The duration of the lease is immaterial and parol leases from year to year are as much within the protection of the constitution as longer terms, evidenced by more formal contracts.⁴ Where prem-

² *Post*, § 341.

§ 326.

¹ *Bentonville R. R. Co. v. Baker*, 45 Ark. 252; *Howe v. Ray*, 110 Mass. 298; *Harrisburg v. Crangle*, 3 W. & S. 460; *Railroad Co. v. Boyer*, 13 Pa. S. 497; *Ross v. Elizabethtown etc. R. R. Co.*, 20 N. J. L. 230.

² *McCauley v. Brooks*, 16 Cal. 11; *Storm Lake v. Iowa Falls & Sioux City Ry. Co.*, 62 Ia. 218; *Baltimore & Ohio R. R. Co. v. Thompson*, 10 Md. 76; *Turnpike Road Co. v. Brosi*, 22 Pa. S. 29; *Brown v. Powell*, 25 Pa. S. 229; *North Penn. R. R. Co. v. Davis*, 26 Pa. S. 238; *Getz v. Phila. & Reading R. R. Co.*, 105 Pa. S. 547; *Penn. R. R. Co. v. Eby*, 107 Pa. S. 166; *Gilligan v. Providence*, 11 R. I. 258; *Colcough v. Nashville etc. R. R. Co.*, 2 Head, 171; *Telephone & Telegraph Co. v. Forke*, 2 Tex. App. Civil Cas. p. 318; *Lister v. Lobley*, 7 A. & E. 124; S. C., 34 E. C. L. R. 86; *Rhodes v. Clivesdale Drainage Comrs.*, 45 L. J. Com. Pleas 337,

861; *Rogers v. Dock Co.*, 34 L. J. Eq. 165.

³ *Bentonville R. R. Co. v. Baker*, 45 Ark. 252; *Lund v. New Bedford*, 121 Mass. 286; *Folley v. Passaic*, 26 N. J. Eq. 216; *Ross v. Elizabethtown etc. R. R. Co.*, 20 N. J. L. 230; *Harrisburgh v. Craugh*, 3 W. & S. 460.

⁴ *Gilligan v. Providence*, 11 R. L. 258; *Getz v. Phila. & Reading R. R. Co.*, 105 Pa. S. 547. A lease expired Dec. 15, 1883. The tenant owned the buildings with right of removal. Proceedings to condemn were commenced May 1, 1883; the tenant held out his term unmolested, and continued to hold and pay rent. It was held that he was not entitled to compensation, that he could have removed the buildings during the term, and that after the lease expired and while the petition was pending he could not acquire new rights in the premises as or against the petitioner. *Schreiber v. Chicago & Evanston R. R. Co.*, 115 Ills. 340;

ises were conveyed in fee, reserving a ground rent to the grantor and his heirs forever, it was held that the owner of the ground rent was not an *owner* within the statute nor a necessary party to proceedings, although he might in equity be entitled to have part of the damages impounded to meet the accruing rent.⁵ One railroad company leased to another the right to use a certain portion of its tracks for 999 years, the lessor company reserving its franchises and right to exercise its corporate powers and the general control, supervision and management of its line of road and the full and sole control of the management, use, location, improvement and repair of the same. It was held that the lessee company had not such an interest as entitled it to be made a party to proceedings by a third company to condemn a crossing, and that it could not enjoin such crossing until compensation was made.⁶

§ 327. Tenants in common and joint tenants.—The interest of a joint tenant or tenant in common cannot be divested without he is made a party. Notice to one tenant in common only is not sufficient.¹ The proper course would seem to be to join all in the same proceeding,² and some courts have held that all *must* be joined and that the omis-

see also Matter of Palmer etc., 9 A. & E., 463; S. C., 36 E. C. L. R. 253; *In re Marylebone Improvement Act*, L. R. 12 Eq. Cas. 389; S. C., 40 L. J. Eq. 697.

⁵ *Workman v. Mifflin*, 30 Pa. S. 362.

⁶ *Englewood Connecting Ry. Co. v. Chicago & Eastern Illinois R. R. Co.*, 117 Ills. 611; reversing S. C. in 17 Ills. App. 141.

§ 327.

¹ *Whitcher v. Benton*, 48 N. H. 157; *Railroad Co. v. Bucher*, 7 Watts, 33. One tenant in common

cannot bind his co-tenant by a waiver or agreement as to damages. *Merrill v. Berkshire*, 11 Pick. 269; but a tender to one of the damages awarded is good as a tender to all, *Dyckman v. New York*, 5 N. Y. 434.

² *State v. Fischer*, 26 N. J. L. 129; *Columbia etc. Bridge Co. v. Geise*, 34 N. J. L. 268; *Whitcher v. Benton*, 48 N. H. 157; *Dyckman v. New York*, 5 N. Y. 434; S. C. 7 Barb. 498; *Pittsburg etc. R. R. Co. v. Hall*, 25 Pa. S. 336; *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332.

sion of one tenant in common will be fatal to the proceedings.³ Much must necessarily depend upon local statutes.⁴ The common law doctrine in regard to tenants in common, joint tenants, etc., as parties, will be found fully discussed by Mr. Freeman in his work upon Cotenancy and Partition, to which the reader is referred.⁵

§ 328. Infants.—Infants should be brought in by personal service or by notice to their legally appointed guardians,¹ or a guardian *ad litem* should be appointed for them by the court.² This may be done by the court under its common law powers.³ In New York it has been held that it is the duty of the condemning party to see to it not only that a guardian *ad litem* is appointed but that he attends to his duty, and that a failure of the guardian to appear and defend for his ward rendered the proceedings void collaterally.⁴ Ordinarily the mode of proceeding in order to divest the title of infants is prescribed by statute, and in such case the statute must be strictly pursued.⁵

§ 329. Towns and public authorities as parties.—In New England, where highways are laid out on the petition of individuals, it is held that the town in which the road peti-

³ Morgan's Louisiana etc. R. R. Co., 1 McGloin, La. 232; Grand Rapids etc. R. R. Co. *v.* Alley, 34 Mich. 16; Same *v.* Same, *Ibid.* 18; Tucker *v.* Campbell, 36 Me. 346; Davis *v.* Stevens, 57 Me. 593; Webster *v.* Holland, 58 Me. 168; Phillips *v.* Sherman, 61 Me. 548; Merrill *v.* Berkshire, 11 Pick. 269.

⁴ Under Massachusetts statutes relating to flowage it was held, in the following case, that one tenant in common could maintain a complaint for flowage: Dwight *v.* County Comrs., 7 Cush. 533.

⁵ Freeman on Cotenancy etc. chap. xv.

§ 328.

¹ Neeld's Road, 1 Pa. S. 353; Missouri Pacific Ry. Co. *v.* Carter, 85 Mo. 448; Peavey *v.* Wolfborough, 37 N. H. 286.

² Jones' Heirs *v.* Barclay, 2 J. J. Marsh, 73; Missouri Pacific Ry. Co. *v.* Carter, 85 Mo. 448; Clarke *v.* Gilmanton, 12 N. H. 515; Hotchkiss *v.* Auburn & Rochester R. R. Co., 36 Barb. 600.

³ Clarke *v.* Gilmanton, 12 N. H. 515.

⁴ Hotchkiss *v.* Auburn & Rochester R. R. Co., 36 Barb. 600.

⁵ *Ibid.*

tioned for is to be laid out is a necessary party to the proceedings.¹ This is put on the ground that the burden of maintaining the road will be cast upon the town, and that the public, through the town, should have a voice in the matter. When property belonging to public corporations is taken for public use, they are entitled to compensation the same as individuals, and must be made parties to proceedings.² In Maine it has been held that a town may recover against a mill-owner for flooding a highway, in an action on the case,³ but that it cannot proceed under the statute in regard to mill-dams for such flowing.⁴

§ 330. Persons in possession of public lands.—Persons in possession of public lands without right have no interest in the land and are not entitled to any compensation by virtue of their possession, but may be for crops or improvements thereon.¹ But one who has taken steps to acquire title to public lands under the homestead or preëmption laws has a valuable vested right and is entitled to compensation and must be made a party.²

§ 331. Other rights and interests which must be considered.—Any person having a property interest in the land

§ 329.

¹ Gifford *v.* Norwich, 30 Conn. 35; Williams *et al.* Petitioners, 59 Me. 517; Commonwealth *v.* Chase, 2 Mass. 170; Same *v.* Coombs, 2 Mass. 489; Same *v.* Peters, 3 Mass. 229; Same *v.* Cambridge, 4 Mass. 627; Same *v.* Egremont, 6 Mass. 491; Brown *v.* Lowell, 8 Met. 172; Hinckley *et al.* Petitioners, 15 Pick. 447; Lanesborough *v.* County Comrs., 22 Pick. 278; Thetford *v.* Kilburn, 36 Vt. 179.

² In the Matter of Church Street, 49 Barb. 455; Fagan *v.* Chicago, 84 Ills. 227.

³ Monmouth *v.* Gardiner, 35 Me.

247.

⁴ Calais *v.* Dyer, 7 Me. 155; and see Cheshire *v.* Adams etc. Reservoir Co., 119 Mass. 356.

§ 330.

¹ California Northern R. R. Co. v. Gould, 21 Cal. 254; Doran *v.* Central Pacific R. R. Co., 24 Cal. 245; Western Pacific R. R. Co. *v.* Tevis, 41 Cal. 489; Rosa *v.* Missouri etc. Ry. Co., 18 Kan. 124; Knoth *v.* Barclay, 8 Col. 300; Allard *v.* Laban, 3 Martin, N. S. 293.

² Red River & Lake of the Woods R. R. Co. *v.* Sture, 32 Minn. 95, and cases cited in last note.

should be made a party.¹ A person in possession under a parol gift, who has lived on the property for fourteen years and made improvements on it, should be made a party.² So persons in adverse possession whose title might become absolute in time.³ If the title is doubtful, all persons claiming an interest should be made parties.⁴

§ 332. Claims or interests for which compensation need not be made.—One who has a license to hunt and fish on land has no interest entitling him to compensation.¹ So one who has been permitted to erect structures across a public highway cannot have compensation for a withdrawal or destruction of the privilege.²

§ 333. The proper plaintiff in condemnation proceedings.—Ordinarily no question can arise in this regard, the proceedings being usually carried on in the name of the person or corporation to whom the authority is given and in whom the title will become vested. Where a railroad is leased it has been held that proceedings may be carried on in the name of either lessor or lessee to condemn additional property.¹ In another case it was held that proceedings were rightly carried on in the name of the “Board of Water Commissioners of the City of Rochester,” to acquire land for water works, although the title would vest in the city of Rochester, the board having authority to secure the condemnation.² In a case in Missouri it is intimated that proceed-

§ 331.

¹ *Stoneham v. London, Brighton etc. Ry. Co.*, 7 L. R. Q. B. 1; *Lexington etc. Turnpike Road Co. v. McMurtry*, 3 B. Mon. 516.

² *Anderson v. Pemberton*, 89 Mo. 61.

³ *In re Jane Evans*, 42 L. J. ch. 357; *ex parte Winder*, L. R. 6 ch. div. 696.

⁴ *Bentonville R. R. Co. v. Stroud*, 45 Ark. 278.

§ 332.

¹ *Bird v. Great Eastern Ry. Co.*, 34 L. J. C. P. 366.

² *Shepard v. Third Municipality of New Orleans*, 6 Rob. La. 349.

§ 333.

¹ *Gottschalk v. Lincoln etc. R. R. Co.*, 14 Neb. 389.

² *Matter of Rochester Water Comrs.*, 66 N. Y. 413.

ings might be in the name of an agent of a railroad company.³ Where condemnation proceedings on behalf of the United States were to be had pursuant to the laws of the State, which provided that they should be in the name of the governor, it was held they were properly commenced in the name of the United States.⁴

§ 334. Proper parties where the initiative is in owner:

Mill acts.—In the foregoing sections it has been assumed that the proceedings were initiated and carried on in the name of the party seeking to appropriate the property. Where the initiative is given to the owner, the conditions are simply reversed. Those who would be the proper defendants in the one case become the proper plaintiff's in the other. The defendant would be the person or corporation who has appropriated or is seeking to appropriate the property.

Under mill acts. Most of the cases in which the initiative is given to the owner arise under the mill acts. Many of these cases have already been referred to in the preceding sections of this chapter. The proceedings under these acts, being purely statutory, must conform to the statute and can only be maintained as provided by the statute. The proper plaintiffs are the persons entitled to the damages as already explained. The proper defendant is the owner or occupant of the dam.¹ If the dam has been transferred before damages were assessed, the former owner is liable for damages up to the time of such transfer,² and the grantee for all subsequent damages.³ If the dam is transferred by the builder

³ *Hannibal etc. R. R. Co. v. Morton*, 27 Mo. 317. The proceedings were in the name of A. B., agent for the Hannibal R. R. Co. The objection seems to have been passed over as immaterial.

⁴ *United States v. Dumplin Island*, 1 Barb. 24.

§ 334.

¹ *Nelson v. Butterfield*, 21 Me. 220; *Davis v. Brigham*, 29 Me. 391; *Sampson v. Bradford*, 6 Cush. 303.

² *Charles v. Monson & Brimfield Manf. Co.*, 17 Pick. 70; *Bean v. Hinman*, 33 Me. 480.

³ *Holmes v. Drew*, 7 Pick. 141;

before any damage is done, he is not liable.⁴ A grantee of record who had given back a defeasance which was not recorded was held liable for flowage, though not in possession, and only a mortgagee as between the parties.⁵ Where a dam is maintained by a corporation for the use of several mills belonging to different parties who own the stock of the corporation, the proceeding must be against the corporation and not against the mill-owners.⁶

§ 335. Construction of statutes in regard to parties.—The word *owner* in statutes, when used to describe those to whom compensation should be made or who should be made parties to proceedings, has been held in a general way to include all persons having an interest in the land to be taken.¹ More particularly, the term *owner* has been held to include lessees, whether for years or from year to year,² tenants

Sutliff *v.* Johnson, 17 Neb. 575; Sabine *v.* Johnson, 35 Wis. 185.

⁴ Blunt *v.* Aiken, 15 Wend. 522.

⁵ Hennessey *v.* Andrews, 6 Cush. 170.

⁶ Norton *v.* Hodges, 100 Mass. 241; and see Watuppa Reservoir Co. *v.* Fall River, 134 Mass. 267.

§ 335.

¹ Board of Commissioners *v.* Labore, 37 Kan. 480; Baltimore & Ohio R. R. Co. *v.* Thompson, 10 Md. 76; Gerrard *v.* Omaha etc. R. R. Co., 14 Neb. 270; Colcough *v.* Nashville etc. R. R. Co., 2 Head, 171. In the case of Watson *v.* New York Central R. R. Co., 47 N. Y. 157, the words "owner or owners" were the only words used in the statute under consideration, to designate the parties entitled to compensation, and they are interpreted as follows: "The terms 'owner or

owners,' as used in these statutes, being intended to designate the parties entitled to the compensation which is substituted for the land taken, should be held to embrace all persons having estates in the land in possession, reversion or remainder. All persons having proprietary interests are entitled to compensation, for the aggregate of those interests constitute the ownership or fee." p. 162.

² Baltimore & Ohio R. R. Co. *v.* Thompson, 10 Md. 76; Turnpike Road Co. *v.* Brosi, 22 Pa. S. 29; Brown *v.* Powell, 25 Pa. S. 229; North Penn. R. R. Co. *v.* Davis, 26 Pa. S. 238; Pennsylvania R. R. Co. *v.* Eby, 107 Pa. S. 166; Gilligan *v.* Providence, 11 R. I. 258; Colcough *v.* Nashville etc. R. R. Co., 2 Head, 171; Lester *v.* Lobley, 7 A. & E. 124; S. C., 34 E. C. L. R. 86.

for life,³ mortgagees,⁴ vendees in possession,⁵ and the owner of a ground rent.⁶ When used in connection with more comprehensive words, as "owners and persons interested," it has been held to mean the owner of any legal estate.⁷ The words, "persons interested," or their equivalent, are often used in such statutes, and have been construed as follows in New Jersey: "Under the more comprehensive expression of persons interested, are included not only the person in whom is vested the legal title which the company proposes to acquire, as indicated by their application, but also other individuals having some independent right or interest therein, not amounting to an actual legal estate, such as an easement of a right of way, inchoate rights of dower, or courtesy, or encumbrances, such as by judgments or mortgages, which are charges or liens on the legal estate. The object attained in making the latter class of individuals parties to the proceedings, is that their interests may be extinguished by payment out of the money awarded or compensated for under the provisions of the general statute, which authorizes the court into which the money may be paid, to make allowance out of the fund in satisfaction of such interest."⁸ "Persons interested" would undoubtedly include mortgagees.⁹ Where notice is required to "any person owning improved land," it will include a railroad company.¹⁰ Where notice was required to be given to the

³ *Harrisburgh v. Crangle*, 3 W. & S. 460; *Railroad Co. v. Boyer*, 13 Pa. S. 497.

⁴ *Severin v. Cole*, 38 Ia. 463; *Dodge v. Omaha & Southwestern R. R. Co.*, 20 Neb. 276; *Wade v. Hennessy*, 55 Vt. 207. The same word has also been held not to include mortgagee. *Parish v. Gilman*, 11 N. H. 293.

⁵ *Smith v. Ferris*, 6 Hun, 553.

⁶ *Workman v. Mifflin*, 30 Pa. S. 362.

⁷ *McIntyre v. Easton & Amboy R. R. Co.*, 26 N. J. Eq. 425; *State v. Easton & Amboy R. R. Co.*, 36 N. J. L. 181.

⁸ *State v. Easton & Amboy R. R. Co.*, 36 N. J. L. 181, 184.

⁹ *Wilson v. European etc. Ry. Co.*, 67 Me. 358; *Michigan Air Line Ry. Co. v. Barnes*, 40 Mich. 383.

¹⁰ *Road in Lancaster City*, 68 Pa. S. 396.

“owner, occupant or agent” of land, notice to either was held sufficient to bind the land.¹¹

§ 336. Joinder of parties.—The question of the joinder of parties has already been alluded to in considering the interests of joint tenants and tenants in common.¹ In general it may be said that this is a matter of statutory regulation, it being competent for the legislature to provide for a separate proceeding for each separate interest, or a joint proceeding for all. It may also provide for a separate proceeding for each tract or parcel, or permit any number of distinct tracts or parcels to be included in one proceeding. It follows, therefore, that recourse must be had to the statute in determining the proper course in regard to joinder. If the statute is silent on the subject, or its language doubtful, the courts favor a construction which permits the joinder in one proceeding of all parties in interest.² Thus it has been held that the lessor and lessee,³ tenant for life and remainder man,⁴ vendor and vendee where the contract is executory,⁵ mortgagor and mortgagee and trustee and *cestui que trust*⁶ were properly joined in the same proceeding. Where the

¹¹ *Porter v. Stout*, 73 Ind. 3.

§ 336.

¹ *Ante*, § 327.

² *Hot Springs R. R. Co. v. Tyler*, 36 Ark. 205; *Evergreen Cemetery Assn. v. Blecher*, 53 Conn. 551; *Hill v. Baker*, 28 Me. 9; *Davis v. Stevens*, 57 Me. 593; *Webster v. Holland*, 58 Me. 168; *Goodwin v. Gibbs*, 70 Me. 243; Proprietors of Locks & Canals *v. Nashua & Lowell R. R. Co.*, 10 *Cush.* 385; *Ashby v. Eastern R. R. Co.*, 5 *Met.* 368; *Reed v. Hanover Branch R. R. Co.*, 105 Mass. 303; *McKee v. St. Louis*, 17 Mo. 184; *Troy etc. R. R. Co. v. Cleveland*, 6 *How. Pr.* 238; *Schuylkill Navigation Co. v. Farr*, 4 *W. & S.* 362; *Railroad v. Boyer*, 13 *Pa. S.*

497; *Getz v. Philadelphia & Reading R. R. Co.*, 105 Pa. S. 547; *Colcough v. Nashville etc. R. R. Co.*, 2 Head, 171; *Rand v. Townshend*, 26 *Vt.* 670. But all need not be joined. *Matter of the Village of Middletown*, 82 N. Y. 196.

³ *Getz v. Phila. & Reading R. R. Co.*, 105 Pa. S. 547; *Colcough v. Nashville etc. R. R. Co.*, 2 Head, 171.

⁴ *Railroad Co. v. Boyer*, 13 *Pa. S.* 497.

⁵ *Proprietors of Locks & Canals v. Nashua & Lowell R. R. Co.*, 10 *Cush.* 385.

⁶ *Reed v. Hanover Branch R. R. Co.*, 105 Mass. 303; *Schuylkill Navigation Co. v. Farr*, 4 *W. & S.* 362.

owner of land joins with another in erecting and carrying on a mill thereon they may join in a suit for damages to the mill by a railroad.⁷ Where two persons, each owning in severalty a mill, join in erecting one dam for the use of both mills, they are properly joined in a complaint for flowage.⁸ Where A maintained a dam across the north channel of the Fox River, and B a dam across the south channel, and flowage of the same land was caused by both, it was held that the complaint must be against each separately, and that the joinder of A and B in one suit was improper.⁹ So it was held that the owners of two ferries on the Delaware River, one chartered by New Jersey from one side, and the other by Pennsylvania from the other side, and operated jointly, could not join in a suit for damages by a bridge.¹⁰ Where a statute provided that "any number of owners, residents in the same county or circuit, may be joined in one petition," it was held equivalent to prohibiting the joinder of those who did not reside in the same county or circuit.¹¹

§ 337. New parties, misjoinder, etc.—Modern practice favors such amendments as will render the proceedings effectual. New parties may be added,¹ and the proceedings discontinued as to improper parties.² But, where leave was asked to make new parties on the eve of trial, and their interest was not made to appear, it was held that the request was properly refused.³

§ 338. Death of a party, or change of title pending proceedings.—If the owner dies pending proceedings, the same

⁷ *Hot Springs R. R. Co. v. Tyler*,
36 Ark. 205.

§ 337.

¹ *Matter of New York, Lackawanna etc. R. R. Co.*, 26 Hun, 194; *Wood v. Comrs. of Bridges*, 123 Mass. 394.

⁸ *Goodwin v. Gibbs*, 70 Me. 243.

² *Fitch v. Stevens*, 2 Met. 505; *Missouri Pacific Ry. Co. v. Carter*, 85 Mo. 448.

⁹ *Lull v. Fox & Wisconsin Improvement Co.*, 19 Wis. 100.

³ *Chicago, St. Louis & Western R. R. Co. v. Gates*, 120 Ills. 86.

¹⁰ *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39.

¹¹ *Quincy etc. R. R. Co. v. Kellogg*, 54 Mo. 334.

should be revived in the name of the heirs and not of the personal representatives.¹ In those States in which it is held that title passes by virtue of a location made or other acts done, the reviver should be in the name of the personal representatives.² When notice was given of proceedings to open a highway, and four days before the time specified one of the owners died, the lay-out was sustained, though no further notice was given and no one appeared in behalf of the heirs or the estate.³ Where the owner conveys, pending proceedings, the grantee takes subject to the proceedings,⁴ but may, by a proper application, be substituted as a party in place of the grantor.⁵ Where a street was opened over the lands of J. L., and an assessment of damages confirmed to him on March 3, 1883, and on March 20, 1883, he conveyed the premises to C. L., it was held that the damages did not pass by the deed, and that C. L. had no standing to prosecute an appeal.⁶

§ 339. Effect of omitting a necessary party.—If a necessary party is omitted, the proceedings will be nugatory as to such party.¹

§ 338.

¹ *Peoria etc. Ry. Co. v. Rice*, 75 Ills. 329; *Satterfield Admx. v. Crow*, 8 B. Mon. 553; *Ballon v. Ballon*, 78 N. Y. 325; *Valley Ry. Co. v. Bohm, Admr.*, 29 Ohio St. 633; *Hale v. Burwell*, 2 Patt. & Heath (Va.) 603.

² *Upper Appomattox Co. v. Hardings*, 11 Gratt. 1; *Darling's Admr. v. Blackstone Manf. Co.*, 16 Gray, 187.

³ *Taylor v. County Comrs.*, 18 Pick. 309.

⁴ *Plumer v. Wausau Boom Co.*, 49 Wis. 449.

⁵ *Bean v. Warner*, 38 N. H. 247; *Carli v. Stillwater & St. Paul R. R. Co.*, 16 Minn. 260; *Curran v. Shattuck*, 24 Cal. 427; *Roberts v. Williams*, 15 Ark. 43. Where an owner,

being plaintiff in a proceeding under a mill act, parted with his title pending proceedings, it was held he might still recover damages sustained up to the time of conveying his title. *Turner v. Whitehouse*, 68 Me. 221.

⁶ *Losch's Appeal*, 109 Pa. S. 72.

§ 339.

¹ *Columbus & Western Ry. Co. v. Witherow*, 82 Ala. 190; *Smith v. Chicago etc. R. R. Co.*, 67 Ills. 191; *Lane v. Miller*, 17 Ind. 58; *Garmoe v. Sturgeon*, 65 Ia. 147; *Sanders v. McCracken*, Hardin (Ky.) 266; *Detroit etc. R. R. Co. v. Detroit*, 49 Mich. 47; *State v. Easton & Amboy R. R. Co.*, 36 N. J. L. 181; *Hagar v. Brainard*, 44 Vt. 294.

§ 340. What constitutes making a person a party?—This question must be answered by a reference to local statutes. Whatever formality the statute requires in this respect must be complied with unless waived. The essential element, however, is notice, and what is sufficient and reasonable notice will be considered in a future chapter.¹

§ 341. General conclusions and principles in regard to parties.—The examination which has now been given to the authorities on the subject of parties to proceedings, justifies what we said at the outset, viz: that the authorities are not only conflicting but *very unsatisfactory*. They do not reason from sound premises. The plenary power of the legislature over the subject is practically assumed in all the cases. They treat the matter as one of statutory construction merely. The policy of favoring public works in the early history of the country inspired decisions which, though acquiesced in at the time, involved doctrines that are destructive of some of the most valuable rights and interests which pertain to private property. In view of the condition of the authorities, we shall venture to give our own conclusions upon the subject of parties and the proper canons to be applied in construing constitutions in that respect.

First. The constitutional provisions which in substance declare that private property shall not be taken for public use without just compensation, and that no person shall be deprived of his property without due process of law, should be liberally construed for the protection of private rights.

Second. The word “property,” therefore, in these provisions should be held to include every valuable right and interest which a person can have in or appurtenant to land.

Third. Due process of law requires that the owner of any such right or interest should have a reasonable opportunity to be heard upon the question of compensation before he can be deprived thereof for public use.¹ •

§ 340.

¹ Post, chap. xv.

§ 341.

¹ Post, § 365.

Fourth. This is a matter of constitutional right, and not dependent upon the will of the legislature.²

Fifth. Statutes should be so construed, if possible, as to harmonize with the constitution, and, consequently, words descriptive of parties to proceedings or of the persons entitled to compensation or notice should be held to include the owner of any such right or interest as above indicated. Thus, the word *owner* may always be so construed without any violence whatever to its ordinary meaning, and we do not call to mind the language of any statute which is incapable of such construction.

Sixth. The intent to deprive a person of a right or interest created by law, and whose continuance is dependent upon the will of the legislature, if any such there be, should never be imputed to the legislature unless *expressly* declared or *necessarily implied*; and it is never *necessarily implied* if the language admits of *any other possible construction*. Thus, if we suppose a judgment lien to be such an interest, as has been held by some courts,³ it is much more reasonable and consonant with right and justice to hold that the judgment creditor is an owner within the statute, than to hold that the legislature intended to abolish the judgment lien of the one man whose property happened to be taken for public use, while it left all other judgment liens in force.

² *Post*, §§ 363-369.

³ *Ante*, § 325.

CHAPTER XIV.

OF THE PETITION, COMPLAINT OR OTHER FORM OF APPLICATION.

§ 342. Scope of the chapter.—The proceedings to condemn property for public use are ordinarily instituted by an application in writing to the officer or tribunal whose jurisdiction is to be invoked. The form of this application is necessarily dependent upon local statutes, which not only vary in the different States, but vary in the same State with respect to different classes of improvements, and are constantly undergoing changes with respect to the same kinds of public uses. In a matter which is subject to so much variation, and which is entirely within the discretion of the legislature, it would be useless to look for any general principles underlying the subject. We have in this chapter, therefore, simply brought together such of the decisions of the various States relating to the petition or application as seem to us to have any interest beyond the boundaries of the States to which they respectively belong.

§ 343. When a petition is necessary.—If the statute requires a petition, it is indispensable to jurisdiction.¹ And, even where it is not required in express terms, it is usually held to be the only proper mode of making the application.² In Virginia it has been held that the application to build a dam might be *ore tenus*, the statute not requiring it to be

§ 343.

¹ *State v. Berry*, 12 Ia. 58; *Olyphant v. Commissioners of Atkinson County*, 18 Kan. 386; *Commonwealth v. Peters*, 3 Mass. 229; *People v. Judge of Recorder's Court*, 40 Mich. 64; *State v. Otoe Co.*, 6 Neb. 129; *Wiggin v. Exeter*, 13 N.

H. 304; *Hayward v. Charlestown*, 34 N. H. 23; *Clement v. Burns*, 43 N. H. 609; *Bennett v. Cutler*, 44 N. H. 69; *State v. Morse*, 50 N. H. 98.

² *Commonwealth v. Combs*, 2 Mass. 489; *Koop v. Forman*, 31 Mich. 144; *Vail v. Morris & Essex R. R. Co.*, 21 N. J. L. 189.

in writing.³ In Tennessee, under a similar statute, it was held that a written application was not indispensable, but would be the better practice.⁴

§ 344. When not necessary.—In some of the States, where it is held that compensation need not precede the taking, authority is conferred upon officers and boards to take property for highways and other purposes, giving the owners the right to apply within a certain time for an assessment of compensation and damages. In such cases such officers or boards can act of their own motion, if the statute does not require a petition.¹

§ 345. Addressing, signing, verifying and filing.—The petition should be addressed to the court or tribunal having jurisdiction to act in the matter. If a petition is actually presented to and acted upon by the proper tribunal, informalities in the address are not usually regarded. Thus, a statute provided that a petition for a highway should run to the board of supervisors. A petition which was addressed to the county auditor, who was clerk of the board, was held sufficient to give jurisdiction.¹ In another case a petition was addressed to the mayor and aldermen and common council of the city of Worcester, when it should have been addressed to the mayor and aldermen only. It was acted upon by the mayor and aldermen without objection. It was held sufficient.² It was also held that the objection was one which must be made in the first instance, or it was waived. Unless otherwise expressly required, a petition signed in the name of the petitioner by his attorney is sufficient.³ The same

³ *Mead v. Haynes*, 3 Randolph, 335; *McCarthy v. Whalen*, 19 Hun, 33; *Whitworth v. Pucket*, 2 Gratt. 503. 531.

§ 345.

⁴ *Hawkins v. Justices of Trousdale County*, 12 Lea, 351.

¹ *State v. Barlow*, 61 Ia. 572.

² *Worcester v. Keith*, 5 Allen, 17.

§ 344.

³ *Gammel v. Potter*, 2 Ia. 562;

¹ *Howard v. Hutchinson*, 10 Me. 448

Harvey v. Lloyd, 3 Pa. S. 331;

rule holds good when the petitioner is a corporation.⁴ The petition need not be verified unless the statute requires it.⁵ If required by statute, the same rules would apply as in other cases, in determining what is a sufficient and proper verification.⁶ Consenting to the appointment of commissioners or going to trial on the merits, will be a waiver of any objection to the verification.⁷ Where the statute required the petition of a railroad company to be verified by an officer of the company, a verification by a general agent to purchase lands for the company was held sufficient.⁸

If the statute requires the petition to be filed within a certain specified time, as thirty days before the term of court, a failure to comply will be fatal to the proceedings.⁹

§ 346. When the signers must include a certain proportion of the property involved, or of the owners thereof.—This is not an infrequent requirement, in case of laying out or extending highways and streets, or of constructing works for the drainage or improvement of land. There is no question but what the statute must be complied with in such cases,¹ but questions frequently arise as to what is a compliance. A statute permitted the proprietors of meadow and swamp land, “*or the greater part of them in interest,*” to petition for their improvement. The italics was held to mean the greatest interest *in value*, not in *territorial area*.² A statute that the owners of property may petition “for the

Sharett's Road, 8 Pa. S. 89. In the last two cases the statute required a petition *by the owner*, and a petition signed in the owner's name by his attorney was held good. But see Shafferstown Road, 3 Watts, 475, which seems to be *contra*.

⁴ Skinner v. Lake View Avenue Co., 57 Ills. 151; Tucker v. Erie etc. R. R. Co., 27 Pa. S. 281.

⁵ Gammel v. Potter, 2 Ia. 562.

⁶ A certificate of a notary in these words, “Sworn and sub-

scribed, 13th, 1883,” was held sufficient, Updergraff v. Palmer, 107 Ind. 181.

⁷ Matter of New York etc. R. R. Co., 33 Hun, 148; Matter of Boston etc. Ry. Co., 79 N. Y. 64.

⁸ Matter of New York etc. R. R. Co., 33 Hun, 148.

⁹ Road Case, 6 Phila. 143.

§ 346.

¹ Richman v. Board of Supervisors, 70 Ia. 627.

² Henry v. Thomas, 119 Mass. 583.

opening, widening or straightening of a street or streets through their property and through other real property adjacent thereto," was held to mean that *some* of the signers must own property *through* which the street would extend.³ A statute provided that the trustees of a village on the petition of a majority of the persons owning lots on a street might extend the street. It was held the trustees might act on the application of a majority of the lot owners on the original street.⁴ Where a petition by the owners of a majority of the frontage on a street is required, the signatures of the officers of a corporation not duly authorized, or of executors, administrators or agents of estates, or of one tenant in common, cannot be counted.⁵ The owners of a private way abutting on the street must be included.⁶ If, after some have signed, the petition is changed without their privity, it is void as to them, and if they are necessary to make up the required majority there is no jurisdiction.⁷ The petition should show on its face that it is signed by the requisite number or majority.⁸ Where the common council could not permit a horse railroad to be laid on a street without a majority in interest of the owners of property on the street consented, it was held the decision of the council was not conclusive.⁹ It has been held in Indiana that signers may withdraw their names before the petition is acted upon.¹⁰ A petition good on its face has been held to give jurisdiction so as to make the finding of the tribunal that it was properly signed, conclusive in a collateral proceeding.¹¹

§ 347. When required to be signed by a certain class of persons.—In the matter of laying out highways, drains and

³ *New Orleans v. Sohr*, 16 La. An. 393. but see *St. Louis v. Gleason*, 15 Mo. App. 25.

⁴ *People v. Port Jervis*, 100 N. Y. 283. ⁹ *Roberts v. Boston*, 19 Ohio St. 78.

⁵ *Mulligan v. Smith*, 59 Cal. 206. ¹⁰ *Black v. Campbell*, 112 Ind. 122.

⁶ *State v. Orange*, 32 N. J. L. 49. ¹¹ *Ely v. Board of Comrs.* 112 Ind. 361.

⁷ *Graves v. Otis*, 2 Hill, 466.

⁸ *Sharp v. Johnson*, 4 Hill, 92; 361.

the like, it is common to require a petition signed by a certain number of freeholders, householders, legal voters, or persons of similar description, who reside in the vicinity of the proposed improvement. When so required, a petition signed by the requisite number having the prescribed qualifications is jurisdictional.¹ By some courts it is held that this must appear upon the face of the petition itself.² Others hold that it need not so appear, but may be shown at the proper stage in the proceedings.³ Again, some courts hold that the fact that the petition is signed by the requisite number of persons having the prescribed qualifications must appear somewhere upon the face of the record, or the proceedings will be void,⁴ even when called in question collaterally.⁵ Other courts hold the contrary.⁶ The fact that the signers

§ 347.

¹ Bradford *v.* Cole, 8 Fla. 263; Warne *v.* Baker, 35 Ills. 382; S. C., 24 Ills. 351; Forsyth *v.* Kreuter, 100 Ind. 27; Commissioners of Wabaunsee Co. *v.* Muhlenbacker, 18 Kan. 129; Shaffer *v.* Weech, 34 Kan. 595; Whiteford *v.* Probate Judge, 53 Mich. 130; Frost *v.* Leatherman, 55 Mich. 33; Blize *v.* Castlio, 8 Mo. App. 290; Jefferson County *v.* Cowan, 54 Mo. 234; Whitely *v.* Platte Co., 73 Mo. 30; Zimmerman *v.* Snowden, 88 Mo. 218; Doody *v.* Vaughn, 7 Neb. 28; Matter of Highway, 3 N. J. L. 242; Road in Sussex and Morris, 13 N. J. L. 157; Hewes *v.* Andover, 16 Vt. 510; Howe *v.* Jamaica, 19 Vt. 607; Williams *v.* Homes, 2 Wis. 129; Damp *v.* Dane, 29 Wis. 419.

² Whiteford *v.* Probate Judge, 53 Mich. 130; Frost *v.* Leatherman, 55 Mich. 33; Matter of Highway, 3 N. J. L. 242; Road in Sussex and Morris, 13 N. J. L. 157; Hewes *v.* Andover, 16 Vt. 510; Howe *v.* Ja-

maica, 19 Vt. 607. In the last case it was held the petition could be amended so as to show the requisite facts in this respect.

³ Keyes *v.* Tait, 19 Ia. 123; Browne *v.* McCord, 20 Ind. 270; Washington Ice Co. *v.* Lay, 103 Ind. 48; Willis *v.* Sproule, 13 Kan. 257; Snoddy *v.* County of Pettis, 45 Mo. 361; Austin *v.* Allen, 6 Wis. 134.

⁴ Commissioners of Wabaunsee Co. *v.* Muhlenbacker, 18 Kan. 129; Blize *v.* Castlio, 8 Mo. App. 290; Jefferson County *v.* Cowan, 54 Mo. 234; Whitely *v.* Platte Co., 73 Mo. 30.

⁵ Doody *v.* Vaughn, 7 Neb. 28; Zimmerman *v.* Snowden, 88 Mo. 218.

⁶ Keyes *v.* Tait, 19 Ia. 123; Robinson *v.* Rippey, 111 Ind. 112; Snoddy *v.* County of Pettis, 45 Mo. 361. The last case appears to be overruled by later decisions. See last note.

described themselves as having the necessary qualifications was held to be *prima facie* evidence of the fact in Wisconsin,⁷ while in New Jersey it has been held that the allegation of the fact in the petition was not sufficient without proof.⁸ Without attempting to reconcile the authorities, we think the better practice is to have the facts in question appear on the face of the petition itself. But we also think that they need not necessarily so appear, but that it may be shown by proper proof that the signers possess the qualifications required. This should be done before the tribunal is called upon to assume jurisdiction and to act.

A petition for a highway extending into two or more counties was required to be signed by twenty legal voters resident in the said counties. It was held they might all reside in the same county.⁹ Where a petition for a highway was required to be signed by twelve legal voters residing within three miles of the highway, it was held that they must also reside within the town in which the lay-out was to be.¹⁰ Where it is to be signed by freeholders resident in the town, they must have freeholds in the town.¹¹ Bachelors with house and servants have been held to be householders within such statutes.¹² After jurisdiction has once attached by presenting a petition duly signed, the withdrawal of one or more, whereby the number remaining is reduced below that required by law, does not defeat jurisdiction.¹³ In Ohio it was held that the objection that the petitioners were not freeholders came too late on appeal.¹⁴ The finding of county commissioners that the signers were freedolders was held conclusive in Indiana, unless objection was made before the

⁷ State *v.* Nelson, 57 Wis. 147.

Meserole, 10 Wend. 122.

⁸ Matter of Highway, 3 N. J. L. 242.

¹² Kamer *v.* Clatsop Co., 6 Or. 238.

⁹ State *v.* McDonald, 28 Minn. 445.

¹³ Little *v.* Thompson, 24 Ind.

¹⁰ Warne *v.* Baker, 35 Ills. 382; S. C., 24 Ills. 351.

146; Grinnel *v.* Adams, 34 Ohio St. 44.

¹¹ Damp *v.* Dane, 29 Wis. 419; Commissioners of Highways *v.*

¹⁴ Matter of Wells Co. Road, 7 Ohio St. 16.

appointment of viewers.¹⁵ Where the face of the petition shows, and the order of court recites, that the signers possess the necessary qualifications, it is sufficient collaterally.¹⁶ A statute provided that the county commissioners, being satisfied that the petitioners are responsible, should proceed. It was held that the record need not show that they were satisfied.¹⁷

§ 348. General requisites as to form and substance.—The petition should comply with the statute in all respects, and should contain all the facts necessary to give jurisdiction.¹ But a substantial compliance with statutes is sufficient.² Mere verbal criticisms are not favored.³ But where the statute required the petition to state “that in the opinion of the petitioners *public interests required* that the improvements asked for should be made,” a petition stating that, “in the opinion of the petitioners, the improvement asked for should be made,” was held to be fatally defective.⁴ The allegations of the petition should be certain and positive.⁵

¹⁵ Forsyth v. Kreuter, 100 Ind. 27.

¹⁶ Dougherty v. Brown, 91 Mo. 26.

¹⁷ Cyr v. Dufour, 68 Me. 492.

§ 348.

10 Minn. 30; St. Louis v. Frank, 9 Mo. App. 579; *In re Merchant Street*, 9 Phila. 590; Church Road, 5 W. & S. 200; Burgess v. Georgia, 11 Vt. 134; Martin v. Beverley, 5 Call, 444; Waller v. McConnell, 19 Wis. 417; but see Matter of Marsh, 10 Hun, 49.

² Indianapolis etc., R. R. Co. v. Christian, 93 Ind. 360; Shields v. McMahan, 101 Ind. 591; Heick v. Voight, 110 Ind. 279; McCallister v. Shney, 24 Ia. 362; State v. Pitman, 38 Ia. 252; Stevens v. Board of Supervisors, 41 Ia. 341; Townsend v. Chicago & Alton R. R. Co., 91 Ill. 545; Byron v. Blount, 97 Ills. 62.

³ Raymond v. County Comrs., 63 Me. 112.

⁴ *In re Grove St.*, 61 Cal. 488.

⁵ Hays v. Campbell, 17 Ind. 430.

But where allegations were followed by the phrase "as we believe," they were held to be sufficiently positive.⁶ If the statute requires the petition to contain a particular statement, its omission will be fatal.⁷ Where the initiative is given the owner, less strictness is required of him than where the proceeding is adverse to the owner.⁸

§ 349. Statement of parties, owners and persons interested.

—Statutes quite generally require the petition to give the names of the owners, occupants or persons interested in the property to be condemned. The decisions are not uniform as to the construction and effect of such provisions. The proper course is to comply with the statute, and a failure to do so would undoubtedly render the petition demurrable,¹ and could be taken advantage of at any stage in the proceedings.² It is held that the defect may be cured by amendment,³ even after verdict.⁴ Owners should be described by their proper names, and not as the heirs of a person.⁵ Where the statute required the petition to state the names of owners and occupants, a petition giving the names of owners only was held sufficient to give jurisdiction.⁶ The names and residences of owners, with a description of the property of each, may properly be given in schedules attached to the petition.⁷ A general description of persons as owners, agents or occupants, without designating to which class each belonged, was held good.⁸ If the statute requires the names

⁶ *Thayer v. Burger*, 100 Ind. 262.

⁴ *Russell v. Turner*, 62 Me. 496.

⁷ *Powers v. Irish*, 23 Mich. 429.

⁵ *Hughes v. Sellers*, 34 Ind. 337.

⁸ *Martinsville & Franklin R. R. Co. v. Bridges*, 6 Ind. 400.

But in a collateral proceeding a petition was held sufficient to give jurisdiction which described owners as "Bryant Heirs." *Miller v. Porter*, 71 Ind. 521; and see *Carr v. State*, 103 Ind. 548.

§ 349.

' *Martin v. Franklin Co.* 62 Me. 455.

⁶ *Milholen v. Thomas*, 7 Ind. 165.

² *Honenstine v. Vaughan*, 7 Bl'ckf. 520; *Hughes v. Sellers*, 34 Ind. 337; *Matter of Flatbush Ave.*, 1 Barb. 286; *People v. Whitney's Point*, 32 Hun, 508.

⁷ *Matter of Commissioners of Washington Park*, 52 N. Y. 131.

³ *Milholin v. Thomas*, 7 Ind. 165.

⁸ *Meyers v. Brown*, 55 Ind. 596.

of owners to be stated if known, reasonable diligence must be used to ascertain the names.⁹ Including one as joint owner who is not such is immaterial if the true owners are named.¹⁰ If the statute does not require the names of owners to be given in the petition, it need not be done.¹¹

Where the statute required the petition to be in the name of the people, and it was in the name of certain persons as commissioners, the proceedings were held to be void.¹²

§ 350. Description of the property taken, or of the location of the improvement.—Much depends in this respect upon the powers of the tribunal whose jurisdiction is to be invoked by the petition, as well as upon the requirements of the statute in the particular case. The provisions of the statute in regard to a description of the property taken, or of the location of the improvement, must be substantially complied with, or the petition will be insufficient.¹ If only a general description is required by statute, no more can be required by the courts.² Where the particular location of the improvement is to be determined, not by the petitioners, but by the tribunal to which the petition is addressed, or by persons appointed by that tribunal, then it is apparent that only a general description of the location can be given in the petition. This is frequently the case in the matter of establishing country roads, and also of drains and ditches. In such cases a general description of the route or location is all that can be given, and that is sufficient.³ The termini should be

⁹ *Harbeck v. Toledo*, 11 Ohio St. 219.

² *Corey v. Swagger*, 74 Ind. 211; *Wright v. Wilson*, 95 Ind. 408

¹⁰ *Boyd v. Negley*, 40 Pa. S. 377.

³ *Commonwealth v. County Commissioners*, 8 Pick. 343; *Westport v. County Comrs.*, 9 Allen, 204; *Matter of Public Road*, 4 N. J. L. 31;

¹¹ *Watkins v. Pickering*, 92 Ind. 332.

State v. Shreve, 4 N. J. L. 297; *State v. Northrup*, 18 N. J. L. 271;

¹² *Stanford v. Worn*, 27 Cal. 171.

Wiggin v. Exeter, 13 N. H. 304; *Sumner v. County Comrs.*, 37 Me.

§ 350.

¹ *Matter of New York Central & Harlem River R. R. Co.*, 70 N. Y. 191; *People v. Taylor*, 34 Barb. 481.

112.

definitely given,⁴ and the location should be given with sufficient definiteness to enable notice to be given to the owners of property to be affected.⁵

If the location of the improvement or the property to be taken is determined by the petitioners and the tribunal has no authority to fix or change the location, but only to assess the compensation and perfect title to the property for the purpose intended, then the petition should describe the property or location with sufficient definiteness to enable one skilled in such matters to locate it on the ground.⁶ That is certain which can be made certain by means of the description or references contained in the petition.⁷ The petition should show that the property is within the jurisdiction.⁸

In complaints for flowage a general description of the property flowed or damaged is usually all that is required.⁹

§ 351. Descriptions held sufficient.—Describing a terminus as a point on an existing highway one and a half rods northeasterly from a marked tree standing near the intersection of said way with another road;¹ describing a road as

⁴ *Bryan v. Moore*, 81 Ind. 9; *Pembroke v. County Comrs.*, 12 *Cush.* 351; *Matter of Highway*, 16 N. J. L. 391.

⁵ *Pembroke v. County Comrs.*, 12 *Cush.* 351.

⁶ *Clift v. Brown*, 95 Ind. 53; *McDonald v. Wilson*, 59 Ind. 54; *Rising Sun & Hartford Turnpike v. Hamilton*, 50 Ind. 580; *Prescott v. Curtes*, 42 Me. 64; *Spofford v. Bucksport etc. R. R. Co.*, 66 Me. 26; *Paine v. Woods*, 108 Mass. 160; *Mansfield etc. R. R. Co. v. Clark*, 23 Mich. 519; *Wilkin v. First Division of etc.*, 16 Minn. 271; *Quincy etc. R. R. Co. v. Kellogg*, 54 Mo. 334; *Turnpike Co. v. American etc. News Co.*, 43 N. J. L. 381; *Jackson v. Rankin*, 67 Wis. 285. In the fol-

lowing case it is said the width of the road need not be stated in the petition when the statute does not require it. *Watson v. Crowsore*, 93 Ind. 230.

⁷ *Miller v. Porter*, 71 Ind. 521; *Quincy etc. R. R. Co. v. Kellogg*, 54 Mo. 334.

⁸ *Parkhurst v. Vanderveer*, 48 N. J. L. 80; *Scheff v. Upper Conn. River & Lake Imp. Co.*, 57 N. H. 110; *Collins v. Rupe*, 109 Ind. 310.

⁹ *Commonwealth v. Ellis*, 11 Mass. 462; *Lake v Loysen*, 66 Wis. 424; *Folmar v. Folmar*, 71 Ala. 136.

§ 351.

¹ *Wentworth v. Milton*, 46 N. H. 448.

“beginning at the terminus of the new road now building in Newfield to Balch Mills, thence in a western direction to the New Hampshire line;”² also as commencing “at a stake in the east side of” a certain road, and extending through lands of A B “to the northwesterly corner of lands belonging to the applicant and there to end;”³ describing a private way by reference to an existing private way long traveled and well known;⁴ describing the termini of a highway as at or near a definite monument.⁵ Though the petition does not give the county, State or meridian, yet if it gives the section, township and range, and it is fairly inferrable from the petition that the property is in the county where the petition is presented, it will be sufficient.⁶ A description of a private way as being from the petitioner’s dwelling to a designated public road, is good.⁷

§ 352. Descriptions held insufficient.—Describing the beginning of a highway as near the corner between the N. W. and N. E. quarters of a certain section, without designating which corner,¹ or *at the State line* in a certain section,² or at a point on a highway south of and adjacent to a certain railroad;³ describing the course of a highway or ditch as “thence bearing southerly to avoid Flat Creek and keeping on the most favorable ground, running easterly and northerly in and through the land of A one hundred yards to the section line,”⁴ or “thence northwest fourteen rods with an angle

¹ *Acton v. York County*, 77 Me. 128.

² *Biddle v. Dancer*, 20 N. J. L. 633.

³ *Satterly v. Winne*, 101 N. Y. 218.

⁴ *State v. Northrup*, 18 N. J. L. 271; *Smith v. Conway*, 17 N. H. 586; *In re Road in Sterrett Township*, 114 Pa. St. 627; but see *Bryant v. County Comrs.*, 79 Me. 128.

⁵ *Casey v. Kilgore*, 14 Kan. 478;

Sutherland v. Holmes, 78 Mo. 399; *Collins v. Rupe*, 109 Ind. 340.

⁶ *Road Case*, 4 Yates, 514; *Case of Road*, 9 S. & R. 35; *Westport v. County Comrs.*, 9 Allen, 203.

§ 352.

¹ *Farmer v. Pauley*, 50 Ind. 583.

² *Shute v. Decker*, 51 Ind. 241.

³ *McDonald v. Wilson*, 59 Ind. 54.

⁴ *Scraper v. Piper*, 59 Ind. 158.

of about ten degrees,"⁵ or "thence southerly to intersect the county road near the foot of Nevil's Hill near the south line of A's land claim,"⁶ or "thence southerly to the C River to low water mark,"⁷ or "extending diagonally through said tract of land from a point near the northeast corner to a point near the southwest corner,"⁸ or "thence east on the line of lands of B and D by the most feasible route eighty rods, thence north or south as in your (Drainage Commissioners') estimation seems most proper for outlet into Rocky River."⁹ Describing a drain as a line is too indefinite.¹⁰ So where the ditch was described as a line and the dimensions were given as twelve feet wide at the top, two feet at the bottom and five feet deep with a regular slope, the position of the ditch with reference to the line not being specified.¹¹ A petition which describes three different surveys and locations of a railroad, but does not designate which one it desires to condemn, is a nullity.¹² The use of the word *about*, in connection with distances, was held to make the description bad.¹³ A petition describing a road as "leading from New Sweden to Fort Kent by the most direct and feasible route, commencing in New Sweden, at the terminus of the county road and running through townships 16 R. 3, 16 R. 4, 17 R. 5, 17 R. 6, Frenchville and Fort Kent, and passing between Cross Lake and Mud Lake," was held too indefinite to give jurisdiction.¹⁴ A description of a railroad right of way as commencing "on the east line" of a certain section and running across the

⁵ Smith *v.* Weldon, 73 Ind. 454.

¹⁰ Mathias *v.* Drainage Comr., 49

⁶ Johns *v.* Marion County, 4 Or.

Mich. 465.

46; see Canyonville & Galesville Road Co. *v.* Douglas County, 5 Or. 280.

¹¹ Bennett *v.* Drain Comr., 56 Mich. 634.

⁷ Clement *v.* Burnes, 43 N. H. 609.

¹² G. etc. R. R. Co. *v.* Mud Creek etc. Co., 1 Tex. App. Civil Cas., p. 169; S. P., Fort Worth & Denver City Ry. Co. *v.* Hogsett, *Ibid.*, p. 200.

⁸ Indianapolis etc. R. R. Co. *v.* Newson, 54 Ind. 121.

¹³ Midland Ry. Co. *v.* Smith, 109 Ind. 488.

⁹ Null *v.* Zierle, 52 Mich. 540; S. P., Frost *v.* Leatherman, 55 Mich. 33.

¹⁴ Hayford *v.* County Comrs., 78 Me. 153.

same, being fifty feet on each side of the center line of the road as shown by the map and survey and as staked out across the section, the map and survey not being attached to the petition, was held insufficient.¹

§ 353. Stating the purpose of the taking.—The petition should show the use or purpose for which the property is desired, and that it is within the statutory powers conferred.¹ It should show a clear right to condemn the property described. Accordingly, it must not only show that the property is wanted for a public use, but also that it is for a use that is within the particular statute under which the proceedings are had. Where the petition is for a private road, it must show that it is such a road, as to its termini and necessity, as the statute permits to be laid out.² A petition for a cemetery should show that the privilege of interment is open to the public, as a cemetery may be private as well as public.³ A petition was as follows: “The undersigned ask that the highway (describing it) be opened for travel as required by law.” Under this petition the board of supervisors went on and laid out the highway described. It was held that the petition was not to have a highway established and that it gave no jurisdiction for that purpose, and the proceedings under it were held void.⁴

§ 354. Stating the necessity for the taking.—Where the power to lay out highways was limited to such as were of “common convenience or necessity,” it was held the petition

¹ Toledo, Ann Arbor & Northern Michigan R. R. Co. v. Munson, 57 Mich. 42.

§ 353.

¹ Bottoms v. Brewer, 54 Ala. 288; Railway Co. v. Bohn, 34 Ohio S. 114; Randolph v. Comrs. of Highways, 8 Ills. App. 128; Matter of New York Central etc. R. R. Co., 5 Hun, 86.

² Powell v. Hitchner, 32 N. J. L. 211; Owings v. Worthington, 10 G. & J. 283; but see Carpenter v. Sims, 3 Leigh, 675.

³ Evergreen Cemetery Association v. Beecher, 53 Conn. 551.

⁴ Curtis v. Pocahontas County, 72 Ia. 151.

must either allege that the road petitioned for was of common convenience or necessity, or state facts from which this might be inferred.¹ A statute required that a petition for a ditch should set forth the necessity therefor; held sufficient to state that it would be conducive to the public health, convenience and welfare, and of public benefit and utility.² If the constitution limits the taking for certain purposes, or for any purpose to cases of necessity, the necessity must appear from the petition.³

§ 355. Statement of title.—Where the petition is by the owner of property taken or damaged, it should show the petitioner's title or interest in the property for which compensation is claimed.¹ In petitions by the party condemning, it is usual, and generally required, that the names of the owners or persons interested in the property described should be given. Such allegations do not conclude the defendant, who may show his real interest, if different from that stated in the petition.² The effect of such allegations as an estoppel upon the petitioner is treated in a subsequent chapter.³

§ 356. Stating the nature of the injury or damage.—In petitions or cross-petitions by the owner to obtain compensation under statutes for damage to property not taken, it is not generally considered necessary to state the nature of the

§ 354.

¹ *Lockwood v. Gregory*, 4 Day, 407; *Windsor v. Field*, 1 Conn. 279; *S. P., Leath v. Summers*, 3 Iredell Law, 108.

² *Drisner v. Simpson*, 72 Ind. 435; *Corey v. Swagger*, 74 Ind. 211.

³ *Grand Rapids etc. R. R. Co. v. Van Driels*, 24 Mich. 409; *Ayres v. Richards*, 38 Mich. 214; *Colville v. Judy*, 73 Mo. 651; *Barr v. Flynn*, 20 Mo. App. 383. Same where the

requirement was statutory instead of constitutional. *Helena v. Harvey*, 6 Mon. 114.

§ 355.

¹ *Nelson v. Butterfield*, 21 Me. 220; *Schoff v. Upper Conn. River etc. Co.*, 57 N. H. 110; *Faville v. Greene*, 12 Wis. 11.

² *Brisbine v. St. Paul & Sioux City R. R. Co.*, 23 Minn. 114.

³ See *post*, § 441.

damage specifically,¹ though it would undoubtedly be better practice to do so.²

§ 357. Must show inability to agree.—¹ When the statute permits a resort to compulsory powers only after a failure to agree, the inability to agree must be alleged in the petition.² A general allegation in the language of the statute is held to be sufficient, without setting forth what has been done.³ In some States the omission may be cured by amendment.⁴

§ 358. Showing neglect or refusal of some other tribunal to make the improvement.—As has already been shown, some of the New England States provide that, in case of the neglect or refusal of the town authorities to lay out a highway, application may be made to another tribunal to do so.¹ In such cases the second petition must show the neglect or refusal of the town authorities, or it will be insufficient to give jurisdiction.² Where the second application must be made within a year, the petition must show that it is within the time.³ It is said to be sufficient to state the neglect or refusal generally

§ 356.

¹ *Lake v. Loysen*, 66 Wis. 424; *Drury v. Midland R. R. Co.*, 127 Mass. 571.

² *Lake v. Loysen*, 56 Wis. 424; *Union Canal Co. v. O'Brien*, 4 Rawle, 358. In the last case it was held necessary to set forth the nature of the damage.

§ 357.

¹ See *ante*, § 304.

² *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323; *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Pa. S. 100; *O'Hara v. Penna. R. R. Co.*, 25 Pa. S. 445; *Darlington v. United States*, 82 Pa. S. 382; *Matter of Lockport & Buffalo R. R. Co.*, 77 N. Y. 557.

³ *Hannibal & St. Joseph R. R. Co. v. Muder*, 49 Mo. 165; *Matter*

of Suburban Rapid Transit Co., 38 Hun, 553; *S. C.*, 16 Abb. N.C., 152; *United States v. Oregon Ry. etc. Co.*, 9 Sawyer, 61.

⁴ *Pennsylvania R. R. Co. v. Porter*, 29 Pa. S. 165.

§ 358.

¹ *Ante*, § 309.

² *Waterbury v. Darien*, 8 Conn. 161; *Threat v. Middletown*, 8 Conn. 243; *Plainfield v. Packer*, 11 Conn. 576; *Southington v. Clark*, 13 Conn. 370; *Torrington v. Nash*, 17 Conn. 197; *Guilford v. County Comrs.*, 40 Me. 296; *Scarborough v. Comrs.* 41 Me. 604; *Goodwin v. County Comrs.*, 60 Me. 328; *Patten's Petition*, 16 N. H. 277; *Dinsmore v. Auburn*, 26 N. H. 356.

³ *Bethel v. County Comrs.*, 42 Me. 478.

in the language of the statute.⁴ The omission may be taken advantage of at any stage of the proceedings.⁵ Whether it can be cured by amendment must depend upon local statutes. The decisions are against the right to amend, especially after report or verdict.⁶

§ 359. Joinder of improvements.—This is a question which does not appear to have arisen except in case of highways. It is held that an application to establish two highways or alleys cannot be included in one petition, even though they are connected together.¹ The objection, however, is not jurisdictional, but one of form only, like duplicity in pleading, and hence does not render the proceedings void collaterally.² Where the petition, order and return were for two ditches, but the proceedings as to each were kept distinct, and there was jurisdiction to establish one and not the other, the proceedings were held good as to the one and bad as to the other.³ A proceeding to lay out one road and to vacate another cannot be joined.⁴ But a statute may be such as to permit this to be done.⁵ The laying out of a road and vacating so much of an old road as was embraced within the new location was held proper in the same proceedings.⁶ A street cannot be widened, graded and graveled in one proceeding,⁷ unless permitted by statute.

§ 360. Cross petition.—The practice of filing a cross petition for any purpose does not appear to obtain, except in

⁴ True *v.* Freeman, 64 Me. 573.

S. 354; In *Matter of Highway*, 7 N.

⁵ Cases cited in next to last note. J. L. 37, there is a *dictum* to the contrary; and see Warner *v.* County of Franklin, 131 Mass. 348.

⁶ Waterbury *v.* Darien, 8 Conn. 161; Goodwin *v.* County Comrs., 60 Me. 328; Dinsmore *v.* Auburn, 26 N. H. 356. But see Patten's Petition, 16 N. H. 277.

² Hardy *v.* Keene, 54 N. H. 449.

§ 359.

¹ Weckler *v.* Chicago, 61 Ills. 142; State *v.* Oliver, 24 N. J. L. 129; State *v.* West Hoboken, 37 N. J. L. 77; Baker *v.* Ashland, 50 N. H. 27; *In re Beech & Page Streets*, 91 Pa.

³ In the Matter of the petition of Jacobs *et al.*, 3 Harr. Del. 321.

⁴ Geddes *v.* Rice, 24 Ohio St. 60.

⁵ Anderson *v.* Wood, 80 Ills. 15.

⁶ State *v.* Bergers, 21 N. J. L. 342.

⁷ Mendenhall *v.* Clugish, 84 Ind.

94.

Illinois. In that State it is provided by statute that any person claiming an interest in property taken or damaged by the proposed work and not made a party may intervene and file a cross petition, setting forth his claims, and thereupon his rights shall be fully considered and determined.¹ Under this statute it has been held that a defendant may file a cross petition and obtain damages to property not described in the petition, and that this is the only way such damages can be assessed in the one proceeding.² Where part of a lot or tract only is taken, a cross petition is not necessary in order to obtain damages to the part not taken.³ In one case an answer describing land and claiming damages for injury thereto was held to answer the purpose of a cross petition.⁴

§ 361. Amendments.—The question of the right or power to amend the petition depends upon various considerations: the nature of the tribunal before which the petition is pending, the statutes applicable to the particular case, the nature of the amendment proposed to be made, and the stage of the proceedings at which the amendment is moved. The practice of allowing amendments is one which should find favor with the courts, since it saves time and expense, both to the public and to the parties interested.¹ We shall refer to the decisions without attempting to lay down any general rules. Amendments have been allowed so as to show that the signers were freeholders, as required by statute,² by in-

§ 360.

¹ R. S. chap. 47, § 11.² Mix *v.* La Fayette etc. Ry. Co., 67 Ills. 319; Jones *v.* Chicago etc. R. R. Co., 68 Ills. 380; Galena etc. R. R. Co. *v.* Birkbeck, 70 Ills. 208; Peoria etc. R. R. Co. *v.* Sawyer, 71 Ills. 361; Johnson *v.* Freeport etc. Ry. Co., 111 Ills. 413; S. C., 116 Ills. 521.³ Bloomington *v.* Miller, 84 Ills.621; Illinois etc. R. R. Co. *v.* Mayrand, 93 Ills. 591.⁴ Chicago & Iowa R. R. Co. *v.* Hopkins, 90 Ills. 316.

§ 361.

¹ Pennsylvania R. R. Co. *v.* Lutheran Congregation, 53 Pa. S. 445; Windham *v.* Litchfield, 22 Conn. 226.² Howe *v.* Jamaica, 19 Vt. 607.

serting the residence of the different owners,³ by inserting an allegation that a ditch would be conducive to health and of public utility, though essential to give jurisdiction,⁴ changing the description of a highway asked for, though on appeal, so as to conform to the way actually laid out and evidently intended to be asked for,⁵ by inserting an allegation of inability to agree,⁶ or refusal of selectmen to lay out the way petitioned for,⁷ by striking out the words "sitting as a court of chancery" in the address to the court,⁸ by increasing the amount of damages claimed,⁹ by inserting or correcting allegations as to ownership.¹⁰ Amendments cannot be made by a sheriff at the hearing before him and a jury on the assessment of damages.¹¹

§ 362. Waiver of defects in the petition.—Formal objections to the petition are waived by going to a hearing on the merits or taking any step which impliedly admits its sufficiency.¹ But jurisdictional defects cannot be waived, and may be taken advantage of at any stage of the proceedings.²

³ Matter of Rochester, Hornellsville etc. Ry. Co., 45 Hun, 126.

¹¹ Perry v. Sherborn, 11 Cush. 388; see also on amendments Midland Ry. Co. v. Smith, 109 Ind. 488; Webster v. Bridgwater, 63 N. H. 296.

⁴ Coolman v. Fleming, 82 Ind. 117.

§ 362.

⁵ Young v. Laconia, 59 N. H. 534.

¹ Sowle v. Cisner, 56 Ind. 276; Hughes v. Sellers, 34 Ind. 337; Palmer v. Highway Comr., 49 Mich. 45; Bachelor v. New Hampton, 60 N. H. 207.

⁶ Pennsylvania R. R. Co. v. Porter, 29 Pa. S. 165.

² Prior sections of this chapter; and see Forsyth v. Kreuter, 100 Ind. 27.

⁷ Patten's Petition, 16 N. H. 277.

⁸ Husted v. Greenwich, 11 Conn. 383.

⁹ Pennsylvania etc. R. R. Co. v. Bunnell, 81 Pa. S. 414.

¹⁰ Russell v. Turner, 62 Me. 496; Kemp v. Smith, 7 Ind. 471; Hedrick v. Hedrick, 55 Ind. 78.

CHAPTER XV.

NOTICE OF PROCEEDINGS.

I. *Constitutional Requirements.*

§ 363. **Cases holding that notice need not be given.**—There are but three States in which it has been held or intimated, so far as we are aware, that it is competent for the legislature to provide for the taking of property and fixing the compensation to be paid, without notice to the parties interested in the property, of any of the proceedings by which it is accomplished. These are Illinois, Maryland and Mississippi. In the Illinois case¹ the statute provided that, in case of lands belonging to *femmes covert*, persons under age, *non compos mentis*, or out of the State, the compensation should be ascertained by three commissioners to be appointed by the governor upon the application of the company, and should be paid to the owners respectively by the company when lawfully demanded. The act made no provision for any notice of any kind to the classes of persons mentioned. The suit was trespass by Johnson, and the company justified under proceedings in accordance with the statute whereby Johnson's damages were assessed at one dollar. The court sustained the proceedings. In deciding the case the court say: “Nor do we see any conflict between that section (the statute referred to) and the eighth section, article thirteen, of our constitution, which declares ‘that no free-man shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled or in any manner deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.’ This clause does

§ 363.

¹ *Johnson v. Joliet & Chicago R. R. Co.*, 23 Ills. 202.

not apply, and has never been made to apply, to cases of this description. This is a case clearly within the eleventh section of article thirteen (the eminent domain provision), which we have cited and commented on. It is a proceeding in the exercise of the right of eminent domain by the State to advance the public necessity and supply a want. We have no doubt the legislature in the exercise of this right can, without notice of any kind, on an emergency of which they are to judge, take a man's property for public use by making compensation, and prescribe the mode by which this compensation shall be ascertained.”²

The Maryland case³ was a proceeding to condemn land for railroad purposes. The doctrine of the court may be gathered from the following extract from its opinion in the case: “It is next objected that the appellant had no notice of the application for a new inquisition and no opportunity to be heard against the petition and motion for it, and it is contended that without such notice the order directing it was passed without lawful authority. Here again the statute furnishes a complete answer to the objection. It does not require any notice to be given to the land-owner, either of the original application to the magistrate, or of that to the court for a new inquisition when the first has been set aside. *However important notice in such cases may be, it is sufficient for the question we are now considering, that the law makers have not made it a prerequisite to the validity of the proceedings.* It is probable the legislature thought the construction of such works of public interest ought not to be

²This case, though not referred to, is virtually overruled, by the decision in Rich *v.* Chicago, 59 Ills. 286, in which it is held that, in providing for ascertaining the compensation, the legislature must address itself to the judiciary. Again, in Chicago & Alton R. R. Co. *v.* Smith, 78 Ills. 96, 99, the same court says:

“It is a rule of general application, that a party cannot be deprived of his rights without having notice and an opportunity to be heard.” Compare Peoria etc. Ry. Co. *v.* Warner, 61 Ills. 52.

³George's Creek Coal Co. *v.* New Central Coal Co., 40 Md. 425, 437.

delayed by the necessity of giving notice to parties not *sui juris*, and non-residents of the county where the lands to be condemned were situated, and that the requirement of a previous attempt to purchase from resident owners *sui juris*, and failure to agree, was sufficient notice to them that the company would proceed to have their lands condemned. But we need not speculate as to what was the motive of the legislature in omitting the requirement of notice in such cases; *they have passed a law which confers jurisdiction upon the courts to pass orders like this without notice.*"

The doctrine in the Mississippi case⁴ is that the proceeding to condemn property is a proceeding *in rem*, and that the acts done by way of marking out and fixing the location are constructive notice to all the world.⁵

⁴Stewart v. Board of Police, 25 Miss. 479, 482; New Orleans etc. R. R. Co. v. Hemphill, 35 Miss. 17.

⁵In Stewart v. Board of Police the court say: "We consider the proceedings of the boards of police in this State, condemning lands to be used as public highways, strictly proceedings *in rem*, and that the orders made by them in relation thereto, are to be governed by the rules and principles applicable to such cases.

"Such was evidently the intention of the legislature, as it has not made any provision on the subject of notice, nor directed any manner in which it shall be given. The whole community is vitally interested in the efficient exercise, by the boards of police, of the jurisdiction on the subject of roads conferred upon those tribunals by the constitution and laws. The jurisdiction conferred upon them is of a peculiar character, in which every citizen is interested. The

subject-matter on which they act, is of a public nature, independent of private parties. The judgments rendered by them act upon the thing itself, which is condemned to the use of the public, and we believe the public interests imperatively require that the orders made by them, when made pursuant to the statutes, should conclude the whole world, whether actual notice was given or not to the parties interested in the premises. It is manifest, that actual notice could not be given in many instances, and it cannot be presumed that the boards of police could know, in all cases, in whom the title was vested to every tract of land in the county necessary to be condemned for public roads, and under such circumstances to declare that these orders of condemnation without this notice are not valid and obligatory, would produce a degree of public inconvenience which nothing would justify, unless the rules

The statute which was upheld in the case first cited from Mississippi provided for laying out public roads by commissioners appointed by the board of police, who were required to report their doings to the board. If the board confirmed a lay-out, all persons claiming damages were required to apply therefor at the next meeting of the board, and yet the statute provided for no notice whatever of any of the proceedings to the persons who would be entitled to damages. A more arbitrary statute could hardly be imagined.

An early case in Pennsylvania,⁶ and another in Wisconsin, may seem to favor the same doctrine, but the former is obscurely reported, and the latter decided on other grounds, and in both States the contrary doctrine is most firmly established by subsequent cases.

§ 364. Cases holding that notice must be given.—The great weight of authority is in favor of the doctrine that before a man can be deprived of his property for public use he must have notice and an opportunity to protect his rights.¹

of law demanded it. But we do not believe such to be the law. On the contrary, we believe the present case strictly a proceeding *in rem*, in which the order of the court is conclusive whether the party had notice of the proceeding or not.

“As before remarked, in the admiralty and exchequer courts, the seizure of the thing on which the judgment is to operate, is considered constructive notice to every party in interest to come forward and make known their claims. So in the present case, the action of the jury, pursuant to the statute, in going upon the premises, and examining, reviewing, marking and laying out the road, is sufficient constructive notice to every party interested in the land, of the proceed-

ings of the court on the subject. In almost every case, if there was a tenant in possession of the land, the action of the jury in laying out the route would give actual notice to him of the proceedings.”

⁶ Road from App's Tavern, 17 S. & R. 388.

§ 364.

¹ Koppikus *v.* State Capitol Comrs., 16 Cal. 248; Mulligan *v.* Smith, 59 Cal. 206; Lawless *v.* Reese, 4 Bibb, 309; Walker *v.* Corn, 3 A. K. Marshall, 167; Fletcher's Heirs *v.* Fugate, 3 J. J. Marshall, 631; Tracey *v.* Elizabethtown etc. R. R. Co., 80 Ky. 259; Commonwealth *v.* Chase, 2 Mass. 170; Same *v.* Coombs, 2 Mass. 489; Same *v.* Peters, 3 Mass. 229; Same *v.* Cambridge, 4 Mass. 627; Hinckley *et al.*

The Supreme Court of Pennsylvania puts the matter very tersely and forcibly as follows: "The law abhors all *ex parte* proceedings without notice. Notice in this case to the owners of property was absolutely necessary. To take a man's property and assess his damages without notice of it, is repugnant to every principle of justice, and such a proceeding is utterly void."² The Supreme Court of Missouri, in one of the cases cited, says: "The constitution may not require notice to be given of the taking of private property for public use, yet when the legislature prescribes a mode by which private property may be taken for such purpose, we will, out of respect to it, suppose that it did not contemplate a violation of that rule, recognized and enforced in all civil governments, that no one shall be injuriously affected in his rights by a judgment or decree resulting from a proceeding of which he had no notice and against which he

Petitioners, 15 Pick. 447; Harlow v. Pike, 3 Me. 438; Howard v. Hutchinson, 10 Me. 335; Atlantic & St. Lawrence R. R. Co. v Cumberland County Comrs., 51 Me. 36; Williams *et al.* Petitioners, 59 Me. 517; Swan v. Williams, 2 Mich. 427; Strachan v. Brown, 39 Mich. 168; Whiteford Township v. Probate Judge, 53 Mich. 130; Langford v. County Comrs., 16 Minn. 375; Groce v. Zumwalt, 4 Mo. 567; Boonville v. Ormrod's Admr., 26 Mo. 193; Dickey v. Tennison, 27 Mo. 373; Jamison v. Springfield, 53 Mo. 224; Zimmerman v. Snowden, 88 Mo. 218; State v. Reed, 38 N. H. 59; Vantilburgh v. Shann, 24 N. J. L. 740; State v. Trenton, 36 N. J. L. 499; People v. Tallman, 36 Barb. 222; Savage, C. J., in Owners of Ground v. Albany, 15 Wend. 374, 376; Earl, J., in Stewart v. Palmer, 74 N. Y. 183, 190; Sawyer v. Ham-

ilton, 1 Murphy N. C. 253; Gamble v. McCrady, 75 N. C. 509; Zimmerman v. Canfield, 42 Ohio St. 463; Need's Road, 1 Pa. S. 353; Reitenbaugh v. Chester Valley R. R. Co., 21 Pa. S. 100; Rutherford's Case, 72 Pa. S. 82; Road in South Abington, 109 Pa. S. 118; Anderson v. Turbeville, 6 Coldw. 150; Thetford v. Kilburn, 36 Vt. 179; Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co., 17 W. Va. 812; Seifert v. Brooks, 34 Wis. 443; State v. Fond du Lac, 42 Wis. 287; Chesapeake & Ohio Canal Co. v. Union Bank, 4 Cranch, C. C. 75; Burns v. Multoomah Ry. Co., 8 Sawyer, 543; Union Pacific Ry. Co. v. Leavenworth etc. Ry. Co., 29 Fed. R. 728; United States v. Jones, 109 U. S. 513; Wurts v. Hoagland, 114 U. S. 606.

² Neeld's Road, 1 Pa. S. 353.

could make no defense. Nothing would so much impair that just self-respect arising from the ownership of property fairly acquired, as the reflection that it is subject to be defeated by others without notice to the possessor. The times require that courts should be zealous in carrying out that great aim of government—the defence of men and their children in the enjoyment of property acquired by their diligence, toil and labor. No man can cherish a warm affection for a government that suffers others, without notice and behind his back, to seize and appropriate his property on occasions justified by no emergency.”³ Similar expressions will be found in most of the cases cited.

§ 365. “Due process of law” requires notice.—The argument put forth in some of the cases cited in the first section of this chapter, that the constitutional prohibition against depriving a citizen of his property without due process of law does not apply to the exercise of the eminent domain power, is wholly without foundation. The provision that private property shall not be taken for public use without just compensation, is simply an *additional* guaranty. The one provision is not exclusive of the other. Both may stand together, and both have full effect and operation in every case of the exercise of the eminent domain power. The one prevents the property of the citizen being taken under that power for any purpose except a public use, and then only upon making just compensation; while the other prevents his property being taken even for public use *without due process of law*. What then is due process of law? Without attempting to answer this question by a general definition, it is sufficient for the present inquiry to say, that all the authorities agree that due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree can be passed affecting his right to liberty or

³ *Boonville v. Ormond's Admr.*, 26 Mo. 193, 195.

property.¹ "This provision is the most important guaranty of personal rights to be found in the Federal or State constitutions. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do or authorize to be done. '*Due process of law,*' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceedings be judicial, administrative, or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."² In some of the cases cited in the first section it is said that the proceeding to condemn property for public use is a proceeding *in rem*, and that consequently notice to the owner is not necessary.³ This, however, is a mistake. Proceedings *in rem*, to be valid, require not only a seizure of the property by the court or its officers, but also *notice in some form to all persons interested therein*.⁴ "The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form.

§ 365.

¹ *Stuart v. Palmer*, 74 N. Y. 183; *Davidson v. New Orleans*, 96 U. S. 97; *Weiner v. Bunbury*, 30 Mich. 201; *Mulligan v. Smith*, 59 Cal. 206; *Eddy v. People*, 15 Ills. 386; *Chase v. Hatheway*, 14 Mass. 222.

² Earl, J., in *Stuart v. Palmer*, 74 N. Y. 183, 190.

³ See also *Howard v. State*, 47 Ark. 431.

⁴ *Cooley*, Const. Lims, 403; *Windsor v. McVeigh*, 93 U. S. 274; *Tracey v. Corse*, 58 N. Y. 143; *Woodruff v. Taylor*, 20 Vt. 65; *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. at p. 840, 841.

The manner of the notification is immaterial, but the notification itself is indispensable.”⁵

§ 366. What is sufficient as to the subject-matter of the notice?—Having settled that the owner of property is entitled to notice and an opportunity to be heard, before his property can be taken for public use, the questions arise, Of what steps and proceedings is he entitled to notice? Upon what questions is he entitled to a hearing? All questions relating to the exercise of the eminent domain power which are political in their nature and rest in the exclusive control and discretion of the legislature may be determined without notice to the owner of the property to be affected. Whether the particular work or improvement shall be made, or the particular property taken, are questions of this character, and the owner is not entitled to a hearing thereon as a matter of right.¹ In *Zimmerman v. Canfield*, the court say: “The commissioners, in determining this preliminary question of the necessity of appropriating lands for the purposes of a ditch, are called to the exercise of political and not judicial powers. It is a question rather of public policy than of private right. It is not upon the question of the appropriation of lands for public use, but upon that of compensation for lands so appropriated, that the owner is entitled, of right, to a hearing in court, and the verdict of a jury.” But, if the constitution permits the appropriation only after the necessity is found by a jury or other tribunal, then the owner is entitled to be heard before such tribunal upon such question, as a matter of right.²

Upon the question of just compensation all the authorities

⁵ Field, J., in *Windsor v. McVeigh*, 93 U. S. 274, 279. St. 463; *Anderson v. Turbeville*, 6 Coldw. 150; *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. 812.

§ 366.

¹ *Lent v. Tillson*, 72 Cal. 404; ² *Seifert v. Brooks*, 34 Wis. 443; *Preble v. Portland*, 45 Me. 241; *Baltimore & Ohio R. R. Co. v. People v. Smith*, 21 N. Y. 595; *Pittsburgh etc. R. R. Co.*, 17 W. *Zimmerman v. Canfield*, 42 Ohio Va. 812, syl. 7.

agree (except the cases referred to in the first section of this chapter) that the owner is entitled to be heard, as matter of right, and consequently that he is entitled to such notice as will give him an opportunity to be heard.³

In regard to the formation of the tribunal to ascertain the just compensation, the authorities are conflicting as to whether the owner is entitled to notice thereof or not. It has been decided by the New York Court of Appeals that the owner is not entitled to such notice.⁴ This view also seems to be sanctioned in Pennsylvania⁵ and Virginia.⁶ On the contrary, the courts of a much larger number of the States have held that the owner is entitled to such notice as will enable him to participate in the selection or formation of the tribunal to assess his damages, in order that he may see that the persons selected or appointed to act are fair and impartial, and also that he may resist the application if he be so advised.⁷

³ See authorities cited in §§ 364, 365.

⁴ *Matter of the Village of Middletown*, 82 N. Y. 196. The court say: "It was objected that the act is unconstitutional, because it does not provide that notice of the application for the appointment of commissioners should be given to the land-owners or parties interested. It is undoubtedly true that the latter are entitled to such notice of the proceeding as enables them to appear and be heard, but it is not essential to the validity of the act, however proper and appropriate it might be, that they should have notice of the formation of the tribunal which is to determine the damages. The act provides for notice of the hearing, and it gives ample protection in that regard to the rights of parties. If opportunity to appear and be heard is

secured, it is wholly within the power of the legislature to determine the form and time and manner of notice to be given."

⁵ *Zack v. Pennsylvania R. R. Co.*, 25 Pa. S. 394.

⁶ *Hunter v. Matthews*, 1 Rob. (Va.) 468; see also *Chesapeake & Ohio Canal Co. v. Union Bank*, 4 Cranch, C. C. 75; *Weir v. St. Paul etc. R. R. Co.*, 18 Minn. 155; *Long Island R. R. Co. v. Bennett*, 10 Hun, 91; *United States v. Jones*, 109 U. S. 513, 519.

⁷ *Peoria etc. Ry. Co. v. Warner*, 61 Ills. 52; *Tracy v. Elizabethtown etc. R. R. Co.*, 80 Ky. 259; *Central Turnpike Corporation*, 7 Pick. 13; *Hinckley et al. Petitioners*, 15 Pick. 447; *Brown v. Lowell*, 8 Met. 172; *Porter v. County Comrs.*, 13 Met. 479; *Strachan v. Brown*, 39 Mich. 168; *Langford v. County Comrs.*, 16 Minn. 375; *People v. Tollman*,

As has already been shown in another chapter, the owner is entitled to a fair and impartial tribunal.⁸ The legislature may prescribe how the tribunal shall be formed; it may, perhaps, create a special tribunal to act generally in assessing damages in all, or in a certain class, of condemnation proceedings within a certain jurisdiction, but it cannot designate particular persons to assess the damages in a particular case.⁹ When, therefore, the damages are to be ascertained by a special jury, or by a special tribunal, such as commissioners, appraisers, etc., to be appointed for the particular case by a court, judge or other officer or board, upon the application of the State or those acting by its authority, the owner is entitled to notice of the application as matter of right. The contrary doctrine leads to this conclusion: that the whole matter is under the absolute control of the legislature, and it might designate a single person to act in a particular case, or authorize the party condemning to do the same thing.

The conclusion of the matter, then, is that, as to whether a particular work or improvement shall be made, and as to whether particular property shall be taken therefor, and as to how the tribunal to assess damages shall be formed or designated, the owner of the property to be affected need not be consulted. But, when that point in the proceedings is reached at which an application is made for the appointment of persons who are to compose the tribunal to assess the damages in the particular case, the owner of the property affected is entitled to notice, and is entitled to be heard upon such application, and before the tribunal so formed.

§ 367. What is sufficient as to the manner of giving notice?—In regard to the kind of notice which will satisfy the requirements of the constitution in proceedings to take

36 Barb. 222. Compare the New York cases cited in notes to this section. Gamble *v.* McCrady, 75 N. C. 509; Baltimore & Ohio R. R. Co. *v.* Pittsburgh etc. R. R. Co., 17 W. Va. 812; State *v.* Fond du Lac, 42 Wis. 287, 298. ⁸ *Ante*, § 313. ⁹ Langford *v.* County Comrs., 16 Minn. 375; *ante*, § 313.

land for public use, the authorities almost universally hold that notice by publication or by posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending.¹

§ 367.

¹ *Wilson v. Hatheway*, 42 Ia. 173; *McIntyre v. Marine*, 93 Ind. 193; *Baltimore etc. R. R. Co. v. North*, 103 Ind. 486; *Carr v. State*, 103 Ind. 548; *Indianapolis etc. Gravel Road Co. v. State*, 105 Ind. 37; *Missouri River etc. R. R. Co. v. Shepard*, 9 Kan. 647; *Harper v. Lexington etc. R. R. Co.*, 2 Dana, 227; *Methodist Church v. Baltimore*, 6 Gill, 391; *State v. Beeman*, 35 Me. 242; *Hildreth v. Lowell*, 11 Gray, 345; *Ayres v. Richards*, 38 Mich. 214; *St. Paul etc. Ry. Co. v. Minneapolis*, 35 Minn. 141; *State v. Trenton*, 36 N. J. L. 499; *Polly v. Saratoga etc. R. R. Co.*, 9 Barb. 499; *Owners of Ground v. Albany*, 15 Wend. 374; *McMicken v. Cincinnati*, 4 Ohio St. 394; *Beebe v. Scheidt*, 13 Ohio St. 406; *Cupp v. Comrs.*, 19 Ohio St. 173; *In re Road in Sterritt Township*, 114 Pa. S. 627; *Baltimore etc. R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. 812, 839, syl. 5. The grounds upon which these cases go is well put in *Cupp v. Comrs.*, 19 Ohio St. 173, 182, from which we quote as follows: "Is this act in conflict with the constitutional provision referred to? That provision guarantees to the public the right to take the land, and to the owner the right to a compensation, to be paid or secured before the land is taken. One of these rights is just as sacred as the other, and neither is more sacred than any form of right to land, or to compensation therefor. Nothing is better estab-

lished as law, than that such rights may be affected, and lost to the owner, by a proceeding *in rem*, and upon merely constructive notice. The law of all such proceedings rests in the necessity of the case, and in no instance, perhaps, is that necessity more apparent than in the construction of public roads, and other improvements of like nature. Without the aid of some such proceeding the construction of roads and ditches would be next to impracticable. A similar proceeding is provided, and a like provision as to the waiver of claims is made, in the law for the establishment of roads. (S. & C. 1286, sec. 8.) Some such provision of law seems indispensable. The owner of land necessary to be used for a road or ditch may be absent or unknown. The title may be in dispute. The legal title may be in one, and the equitable title in another. One may have the present estate, and another the reversion or remainder. The owner may make a secret conveyance, on purpose to evade the law. Without the power to proceed in some such form against the *land itself*, the right guaranteed to the public by this provision of the constitution, to take the land for public uses, would be of little avail. In the construction of such improvements of any considerable length, personal notice, if at all practicable, would be attended with great inconvenience and uncertainty. It was

The same authorities hold, that, unless required by statute, the notice need not name the owners or persons interested in the land sought to be condemned, but that it is sufficient if the notice describes the land, and indicates the nature of the proceeding and specifies the time when, and the place where, the persons interested must appear to protect their rights.² In regard to the manner or time of posting or publishing the notice in order to satisfy the requirements of the constitution, no definite rule is laid down by the authorities. Any

the duty of the legislature to provide some reasonable means for securing, both to the public and to the owner of land, these rights so guaranteed by the constitution. To require in such cases personal notice to the owners, would in our judgment be quite as unreasonable as to require that owners of lands should, as was said in the case of *Miller v. Graham* (17 Ohio St. 1), maintain some kind of an agency in the vicinity of the lands through which they may be informed of proceedings affecting them. They are presumed to know of the existence of this act, and therefore to have notice that their lands are liable at any time, upon four weeks publication of notice to that effect, to be taken for the use of a ditch, and that their non-claim will be taken and held as a waiver of all right to compensation or damages. There is no greater hardship in this implied waiver, after notification beforehand that silence will be taken for consent, than there is in the analogous cases of creditors of a bankrupt or insolvent, or of claimants upon any fund in the hands of a court for distribution, whose failure to present their claims is made to work a forfeiture

of the same. Nor is the necessity for such implication any the greater in the latter cases than in the former. A principal element in the determination by the commissioners, as to the expediency of constructing a road or ditch, is the amount of its cost, and that amount should, if practicable, be ascertained before the day fixed for the determination. The whole proceeding is substantially *in rem*. Jurisdiction over the person of the parties is not necessary. The act in question relates to and affects only the remedy, and not the rights of the parties, and is therefore within the general scope of legislative power. The constitutional provision referred to does not take away that power. It defines and guarantees the *right* of the party to his land, or to a sure and adequate compensation therefor. The *remedy*—the proceeding by which that right is to be affected—is still left to legislative discretion. We fail, therefore, to see wherein the act in question violates the constitution."

² See, particularly, *McIntyre v. Marine*, 93 Ind. 193; *Indianapolis etc. Gravel Road Co. v. State*, 105 Ind. 37; *McMicken v. Cincinnati*, 4 Ohio St. 394.

statutory provision in this respect which did not savor of bad faith would probably be upheld. It ought to be so published as to render it reasonably probable that it will come to the knowledge of those interested.³

While the weight of authority is thus so decidedly in favor of the rule that constructive service is sufficient to satisfy the constitutional requirement as to due process of law, the courts of California, Michigan and Wisconsin have recently decided that there must be personal service upon owners who reside within the jurisdiction of the tribunal where the proceedings are had.⁴ "In so important a matter as depriving a citizen of his property, every act or step in its nature final should only be done or taken after personal notice to him, where such notice can be given."⁵ It seems to us that there is much reason and justice in this view. It being conceded that due process of law requires notice, and the form and manner of notice not being specified, it follows that it must be *reasonable* notice. *Reasonable* notice depends upon the nature of the proceeding and the circumstances of the case. Railroads must be built and other public works constructed, and the acquisition of property for these purposes must not be rendered so intricate or difficult as to make it impracticable. On the other hand, it is to be borne in mind that the security of private property is more important than the construction of any particular railroad, or highway or other work. To give personal notice to all would be impossible, and such a requirement would therefore be unreasonable. Non-residents cannot be reached, and the names of the owners are sometimes incapable of being ascertained, either because the title is in dispute or because their interests are secret. On the other hand, the names of the occupants of the property

³ See 'Matter of the Empire City Bank, 18 N. Y. 199, 215.

⁴ Mulligan v. Smith, 59 Cal. 206; Kundinger v. Saginaw, 59 Mich. 355; State v. Fond du Lac, 42 Wis.

287. But see Lent v. Tillson, 72 Cal. 404, which comes to us too late for extended comment.

⁵ State v. Fond du Lac, 42 Wis. 287, 299.

can always be readily obtained, and they can be easily reached. So the names of those whose interests are matter of public record in the county where the land is situated may be easily ascertained, and also the fact whether they reside in the county or not. Occupants of the property, therefore, and persons whose interests are matter of record and who reside in the county, may readily be given personal notice. In view of the readiness with which this may be done, and that property may be condemned without any previous occupation or seizure of it whereby the occupants would be notified, and that, too, under general laws which give no indication of the particular property to be taken, and the hardship of compelling resident owners at their peril to keep a look out for advertisements in all the newspapers of a county, it seems to us *reasonable* to require personal notice to occupants and persons whose interests are matter of record, and who reside in the county.⁶ And personal notice, being reasonable in such cases, should be held to be required by the constitution. We do not think that the requirement of personal notice goes beyond this. Persons residing beyond the jurisdiction of the tribunal in which the proceedings are had may be concluded by constructive notice. But, with respect to such persons, the mere publication of a notice that at a certain time and place application will be made to condemn certain property for a certain use, would not alone be reasonable notice. Either there should be actual notice to the occupants of the premises, who presumably will notify the owners if non-residents, or notice by mail in all cases where the names and residences of the owners can be ascertained.

§ 368. Giving notice where not required by statute.—
It has been repeatedly adjudicated that notice must be given, *whether required by statute or not.*¹ Some of these

⁶ *Kundinger v. Saginaw*, 59 Mich. 355; and see Statute of Iowa; *State v. Chicago, Burlington & Quincy R. R. Co.*, 68 Ia. 135.

§ 368.

¹ *Peoria & Rock Island Ry. Co. v. Warner*, 61 Ills. 52; *Tracy v. Elizabethtown etc. R. R. Co.*, 80

cases proceed upon the principle that, "where a statute authorizes a legal proceeding against any one, and does not expressly provide for notice to be given, it is implied that an opportunity shall be afforded him to appear in defense of his rights, unless the contrary clearly appears."² By far the greater proportion of the cases, however, proceed upon the principle of implying a requirement to give notice from the provisions of the statute itself. Thus the obligation to give notice has been held to be implied by a provision in the statute requiring a previous effort to agree,³ or giving the right to appeal,⁴ or authorizing the owner to strike off

Ky. 259; Commonwealth *v.* Peters, 3 Mass. 229; Hinckley, *et al.* Petitioners, 15 Pick. 447; Harlow *v.* Pike, 3 Me. 438; Howard *v.* Hutchinson, 10 Me. 335; Williams *et al.* Petitioners, 59 Me. 517; Swan *v.* Williams, 2 Mich. 427; Ayres *v.* Richards, 38 Mich. 214; Strachan *v.* Brown, 39 Mich. 168; Whiteford *v.* Probate Judge, 53 Mich. 130; Booneville *v.* Ormrod's Admr., 26 Mo. 193; Dickey *v.* Tennison, 27 Mo. 373; Vantilburgh *v.* Shann, 24 N. J. L. 740; State *v.* Trenton, 36 N. J. L. 499; Commissioners of Highways *v.* Claw, 15 Johns. 537; Eddy *v.* People, 15 Ills. 386; Chase *v.* Hatheway, 14 Mass. 222; Cooper *v.* Board of Works, 108 Eng. Com. Law, 181; State *v.* Newark, 25 N. J. L. 399, 411; State *v.* Jersey City, 24 N. J. L. 662, 666; State *v.* Trenton, 36 N. J. L. 499. So the supreme court of Michigan says: "Such notice is always necessary where it is sought to deprive the citizen of his property; and if the notice is not expressly provided for in the law itself, it is in all such cases necessarily implied, and the failure to give such notice rendered the proceedings, if otherwise regular, null and void." Whiteford *v.* Probate Judge, 53 Mich. 130, 133.

² Tracy *v.* Elizabethtown etc. R. R. Co., 80 Ky. 259; Williams *et al.* Petitioners, 59 Me. 517; Hinckley *et al.* Petitioners, 15 Pick. 447; Booneville *v.* Ormrod's Admr. 26 Mo. 193.

³ Tracy *v.* Elizabethtown etc. R. R. Co., 80 Ky. 259; Dickey *v.* Tennison, 27 Mo. 373.

⁴ Baltimore etc. R. R. Co. *v.* Pittsburgh etc. Ry. Co., 17 W. Va. 812, 835, citing Bostwick *v.* Isbell, 41

jurors or show cause against the confirmation of the inquisition.⁵

It seems to us that these cases go too far in the direction of judicial legislation. If the statue prescribes no notice, what notice is to be given? Some of the cases say it must be a notice prescribed by an order or rule of the court,⁶ others that it is left to the court to see that *proper* notice is given,⁷ and still others adopt by analogy the provisions of similar statutes,⁸ but the majority do not attempt to define what the notice should be. The difficulties of the position are well expressed by the Supreme Court of Illinois in a case already cited: "But it may be asked, how can a court prescribe a notice, its form and mode of service, in such cases? Should a court require a notice, what other notice known to the common law is there than personal notice? Constructive notice by publication is the creature of the statute, and courts cannot make law. Had the legislature in this case prescribed the ordinary notice by posting or publishing in a newspaper, which the owner might never see, it will be perceived that his condition would be precisely as it is now, in case he should show he did not receive actual notice; and though such constructive notice, in a great majority of cases, would not reach a non-resident, yet all will admit he would be bound by it. Having power then, by the common law to require notice, and no other than personal notice coming up to its requirements, the object and purposes of the law would be defeated in every case where the owner was non-resident—he living in India or Greenland. The legislature deemed it safe to repose the power to appoint commissioners where it was confided, having a due regard to the interests of non-resident proprietors. We cannot understand by what authority courts shall say,

⁵ *Swan v. Williams*, 2 Mich. 427.

Harlow v. Pike, 3 Me. 438. But if

⁶ *Rutherford's Case*, 72 Pa. S. 82.

none of the eminent domain stat-

⁷ *Swan v. Williams*, 2 Mich. 427.

utes provided for notice, this prin-

⁸ *Ayres v. Richards*, 38 Mich. 214;

ple would fail.

in cases of this kind, where the State is exercising its right of eminent domain, and notice cannot be given, notice shall be given, when the law does not say so, or how they can require any other than personal notice, if they go to legislating and require notice. The thing is impracticable."⁹

It seems to us that it is just as incumbent upon the legislature to provide for notice as to provide for compensation. Both are conditions to the exercise of the power. It is conceded that a law which purports to authorize the taking of property for public use, but makes no provision for compensation, is nugatory.¹⁰ Why may not the obligation to make compensation be implied and enforced by the courts as well as the obligation to give notice? There is really but one logical and consistent position in the matter, and that is that a statute that does not provide for notice is invalid.¹¹

II. *Statutory Requirements.*

§ 369. **The notice required by statute is jurisdictional and must be given.**—When notice is required by statute, it must be given in strict conformity to the statute. As already observed, the legislature may refuse to exercise or delegate

⁹ *Johnson v. Joliet & Chicago R. R. Co.*, 23 Ills. 202, 206.

¹⁰ *Post*, § 452.

¹¹ *State v. Fond du Lac*, 42 Wis. 287; *Seifert v. Brooks*, 34 Wis. 443. Dissenting opinions of Cooley, C. J., Sherwood, J., and Campbell, J., in *Whiteford v. Probate Judge*, 53 Mich. 130; *Quære in Ayres v. Richards*, 38 Mich. 214. Dissenting opinion of Bartley, J., in *Kramer v. Cleveland & Pittsburgh R. R. Co.*, 5 Ohio St. p. 165, who says (p. 167): "It is no answer to this, to say that, in this particular case notice was given to the plaintiff and he appeared before the appraisers. The statute neither required nor author-

ized any such notice for appearance, nor did it authorize the plaintiff to be heard by himself or counsel. *The question, however, is not what the parties actually did outside of the authority of the statute, but whether the statute prescribed a lawful and constitutional mode for divesting the plaintiff of his property, and transferring it to the defendant. If it did not I humbly conceive the constitutional deficiencies of it cannot be supplied by the extrinsic proceedings in the appropriation, and thus give to an unconstitutional enactment the force and validity of law.*"

the power, and it can accordingly annex such conditions to its exercise as it sees fit. These conditions must be strictly complied with, or no valid appropriation can be effected. A failure, therefore, to give the notice required, is a fatal error, which, if not waived by an appearance or otherwise, may not only be taken advantage of at any stage of the proceedings to arrest or set them aside,¹ but also renders the proceedings absolutely void, even when called in question collaterally.²

§ 369.

¹ Commissioners of Talladega Co. *v.* Thompson, 15 Ala. 134; Barnett *v.* State, 15 Ala. 829; Stanford *v.* Worn, 27 Cal. 171; Corley *v.* Kennedy, 28 Ills. 143; Commissioners *v.* Harper, 38 Ills. 103; Peabody *v.* Sweet, 3 Ind. 514; Little *v.* Thompson, 24 Ind. 146; Wright *v.* Wilson, 95 Ind. 408; Crawford *v.* Comrs. of Elk Co., 32 Kan. 555; New *v.* Ewing, 1 A. K. Marshall, 55; Walker *v.* Corn, 3 A. K. Marshall, 167; Crawford *v.* Snowden, 3 Littell, 228; Jones' Heirs *v.* Barclay, 2 J. J. Marshall, 73; Fletcher's Heirs *v.* Fugate, 3 J. J. Marshall, 631; Shackelford's Heirs *v.* Coffey, 4 J. J. Marshall, 40; Case *v.* Meyers, 6 Dana, 330; Rout *v.* Mountjoy, 3 B. Mon. 300; Morgan's Louisiana etc. R. R. Co. *v.* Bourdier, 1 McGloin, 232; Ware *v.* County Comrs., 38 Me. 492; Southard *v.* Ricker, 43 Me. 575; Coleman *v.* Andrews, 48 Me. 562; Commonwealth *v.* Metcalf, 2 Mass. 118; Same *v.* Chase, 2 Mass. 170; Same *v.* Sheldon, 3 Mass. 188; Same *v.* Hall, 8 Pick. 440; Stone *v.* Boston, 2 Met. 220; Osborne *v.* Detroit, 32 Mich. 282; Dickinson *v.* Van Wormer, 39 Mich. 141; Same *v.* Highway Comrs. 41 Mich. 638; Bixby *v.* Goss, 54 Mich. 551; Bettis *v.* Geddes, 54 Mich. 608;

Corey *v.* Probate Judge, 56 Mich. 524; Brazee *v.* Raymond, 59 Mich. 548; Simon *v.* Rhoades, 24 Minn. 25; State *v.* Otoe Co., 6 Neb. 129; State *v.* Orange, 32 N. J. L. 49; Matter of New York etc. R. R. Co., 62 Barb. 85; Norton *v.* Walkill Valley R. R. Co., 63 Barb. 77; People *v.* Kinskern, 54 N. Y. 52; Thompson *v.* Multnomah Co., 2 Or. 34; Frovert *v.* Finfrock, 43 Ohio S. 335; Reitenbaugh *v.* Chester Valley R. R. Co., 21 Pa. S. 100; Road in Lancaster etc. City, 68 Pa. S. 396; Appeal of Central R. R. Co., 102 Pa. S. 38; Private Road etc., 112 Pa. S. 183; Commissioners *v.* Murray, 1 Rich. L. 335; Bernard *v.* Brewer, 2 Wash. Va. 76.

² Curran *v.* Shattuck, 24 Cal. 427; State *v.* Anderson, 39 Ia. 274; Barnes *v.* Fox, 61 Ia. 18; Commissioners of Leavenworth County *v.* Espen, 12 Kan. 531; Prentiss *v.* Parks, 65 Me. 559; Leavitt *v.* Eastman, 77 Me. 117; School District *v.* Copeland, 2 Gray, 414; Prescott *v.* Patterson, 44 Mich. 525; Lobman *v.* St. Paul etc. R. R. Co., 18 Minn. 174; Zimmerman *v.* Snowden, 88 Mo. 218; State *v.* Otoe Co., 6 Neb. 129; Doody *v.* Vaughn, 7 Neb. 28; Hull *v.* Chicago, Burlington & Quincy R. R. Co., 21 Neb. 371; People *v.* Robertson, 17 How. Pr. 74;

§ 370. **Meaning of “reasonable notice” in statutes.**—Some statutes have provided in general language for the giving of *reasonable notice* of proceedings without specifying the form or manner of notice.¹ Under such statutes it has been held that notice by publication² or by mail³ was sufficient; and, in respect to time, that seven days’ notice to those residing within the jurisdiction was reasonable.⁴

§ 371. **Form of the notice generally.**—The requirements of the different statutes are so various that no general rules can be laid down as to what the notice should contain, further than that it must comply substantially with the statute.¹ A statute required the notice to recite the substance of the petition. It was held that the substance was that “which will give the owner information that steps are being taken to have commissioners appointed to assess damages to his land.” The notice stated the time and place at which the company would make application to a judge of court to appoint commissioners to view the property and assess the damages the respondent would sustain by the establishment of a railroad over his land, location of which was particularly described. It did not purport to recite the petition,

Terpening *v.* Smith, 46 Barb. 208; Cruger *v.* Hudson River R. R. Co., 12 N. Y. 190; People *ex rel.* Johnson *v.* Whitney’s Point, 32 Hun, 508; Sessions *v.* Crunkilton, 20 Ohio St. 349. The cases of Howard *v.* State, 47 Ark. 431, and Kidder *v.* Jennison, 21 Vt. 108, present the only exceptions to the rule.

§ 370.

¹ If the legislature must provide for notice, it would seem questionable whether such statutes could be sustained.

² Freetown *v.* County Comrs., 9 Pick. 46.

³ Crane *v.* Camp, 12 Conn. 463.

⁴ Trustees of Belfast Academy *v.* Salmund, 11 Me. 109.

§ 371.

1 Wovessey *v.* Board of Supervisors, 32 Ia. 130; Abbott *v.* Board of Supervisors, 36 Ia. 354; Jones *v.* Portland, 57 Me. 42; Sutherland *v.* Holmes, 78 Mo. 399; Matter of Mount Pleasant Ave., 10 R. I. 320; and cases cited in § 369.

but it was held sufficient.² Unless required it is not necessary to serve a copy of the petition.³

§ 372. Specifying time and place.—Where the statute requires the notice to specify the time and place when and where the proposed action will be taken or proceedings had, an omission of either will be fatal.¹ Describing the place of meeting of commissioners as in a certain village, without designating any particular place in the village, is too indefinite.²

§ 373. Signing.—A notice without any signature is a nullity.¹ A statute required supervisors “to make out a notice” of the time and place of their meeting, etc. It was held they need not sign the notice themselves, but that it was sufficient if they caused it to be made and signed by their clerk.² In another case the statute required a committee to lay out a highway, *to cause* certain notice to be given. It was held that all need not sign the notice, and a notice which was given by the direction of the chairman, and to which his name only was signed, as chairman, was held good.³ So, where notice was required to be given by the petitioners for a highway, it was held that a notice signed by one only was good.⁴ But in another case, where the statute required the applicants to give notice, it was held that the notice

² *Quincy & Palmyra R. R. Co. v. Taylor*, 43 Mo. 35.

Minn. 174; *In re Johnson*, 49 N. J. L. 381.

§ 373.

³ *Cox v. Buie*, 12 Iredel L. 139.

§ 372.

¹ *Logansport v. Pollard*, 50 Ind. 151; *Municipality No. 1*, 8 La. An. 377; *Corporation v. Manhattan Co.*, 1 Caines Rep. 507.

² *Commissioners of Oran v. Hoblit*, 19 Ills. App. 259; *Minneapolis & St. Louis Ry. Co. v. Kanne*, 32

Road Notices, 4 Harr. Del. 324. In *Wright v. Wells*, 29 Ind. 354, and *Daugherty v. Brown*, 91 Mo. 26, that a notice need not be signed when not required by statute.

² *Williams v. Mitchell*, 49 Wis. 284.

³ *Parish v. Gilmarton*, 11 N. H. 293.

⁴ *Kemp v. Smith*, 7 Ind. 471.

must be signed by all the applicants the same as the petition.⁵

§ 374. Describing the property taken.—If the statute does not require a description of the property taken to be contained in the notice, it is held that no particular description is necessary.¹ A notice that part of a person's land on C street between certain other streets would be taken for the purpose of widening C street pursuant to a certain ordinance was held sufficient, and that persons wanting more definite information could go to the ordinance;² also a notice which described the property as now occupied by the New Jersey Railroad Company as the location of its track.³ A notice describing certain property as unimproved was held sufficient to give jurisdiction.⁴ If the statute requires a particular description of the property to be given, it must be complied with.⁵

§ 375. Stating the nature or purpose of the proposed action.—A statute required that, where an application was made for a highway, the supervisors should give notice of the time and place where they would meet to decide upon such application. A notice that they would meet *to make an examination and survey of the proposed road,*¹ or *to take into consideration the application,*² was held bad. A statute which requires notice “of the intention of the selectmen to lay out or alter” a highway is not complied with by a notice that the selectmen will meet to view the route, hear the persons interested, and, if they adjudge that the prayer of the peti-

⁵ *State v. Otoe County*, 6 Neb. 120.

³ *Coster v. New Jersey R. R. Co.*, 23 N. J. L. 227.

§ 374.

⁴ *Snyder v. Trumppour*, 38 N. Y. 355.

¹ *Wilkin v. First Division etc.*, 16 Minn. 271; *Doughty v. Somerville etc. R. R. Co.*, 21 N. J. L. 442.

⁵ *Matter of Orange Street*, 50 How. Pr. 244.

² *State v. Plainfield*, 41 N. J. L. 138.

³ *Austin v. Allen*, 6 Wis. 134.
² *Babb v. Carver*, 7 Wis. 124.

tion ought to be granted, then they will proceed to lay out the road, etc.³ The notice required by the statute is to be given after the determination to lay out the road has been made. In all the cases cited the proceedings were held void in trespass.⁴

§ 376. Describing the location or improvement.—The width of a proposed road need not be specified in a notice, if not required by statute.¹ A misdescription in the notice of the location of a ditch is fatal to the proceedings.² It is held that the notice should state definitely the *termini* of a proposed highway, even though not expressly required by statute.³ A statute required a notice to state particularly the *termini* and course of the proposed change of a highway. A notice that the road would run northerly from one point to another over the most practicable route was held to be fatally defective.⁴ Where the statute required the notice to state the nature and extent of the proposed improvement, it was held sufficient to state that it was for opening a street from A street to B street.⁵ Under the same statute it was held that the nature and extent of the improvement must be described in the notice, and that it was not sufficient to refer to a map on file in a public office.⁶ Where the statute in reference to opening streets provided that no ordinance should be introduced for opening a street, etc., until public notice had been given of the intention to do so, *briefly describing the improvement*, etc., a notice of an intention “to order and cause L street, from its present northern terminus to M street, to be laid out and opened,” was held too indefinite, as it did

¹ Fitchburg R. R. Co. v. Fitchburg, 121 Mass. 132. and see also Toppin's Petition, 24 N. H. 43.

² See also Specht v. Detroit, 20 Mich. 168.

§ 376.

⁴ Potter v. Ames, 43 Cal. 75.

⁵ Opening Albany Street, 6 Abb. Pr. 273.

¹ State v. Shreve, 4 N. J. L. 297.

² Miller v. Graham, 17 Ohio St. 1.

³ Matter of Highway, 16 N. J. L. 391; State v. Green, 18 N. J. L. 179;

⁶ Matter of Comrs. of Central Park, 51 Barb. 277. Compare State v. Plainfield, 41 N. J. L. 135; also § 374, *ante*.

not give the direction or point of intersection with M street.⁷ The notice in a road case should show that the proposed road is within the proper jurisdiction.⁸

§ 377. Meaning of the terms, "owners," "occupants," etc.

—Where the statute requires notice to certain persons or classes of persons, as to the owners, occupants, persons interested, etc., it should be addressed to each of said persons by name in order to be binding.¹ Persons may be described by the initials of their first names.² "Actual occupants" means persons who actually reside on the land. Thus, where a statute required personal notice to "actual occupants" and notice by publication to all others, it was held the owner who had the key to a vacant house on the property but lived elsewhere was not an *actual occupant* thereof.³ A railroad company had a deed "of a spring and use of water." It constructed a subterranean reservoir, and laid pipes, all of which were concealed from view in a pasture over which a highway was laid out. It was held not to be an occupant within the statute.⁴ Notice was required to be served upon the owner or *holder* of the land. A notice served on an overseer, who resided on a farm and carried it on for the owner who resided abroad, was held good.⁵ One notified as an occupant must defend for whatever interest he has.⁶ The meaning and construction of the word owners in such statutes is discussed in the chapter on parties.⁷ Where the statute

⁷ *State v. Elizabeth*, 32 N. J. L. 357. held void collaterally as to the persons not named.

⁸ *Parkhurst v. Vandeveer*, 48 N. J. L. 80.

§.377.

¹ *Chicago & Alton R. R. Co. v. Smith*, 78 Ills. 96; *Birge v. Chicago, Mil. & St. P. Ry. Co.*, 65 Ia. 440; *Warwick Institution for Savings v. Providence*, 12 R. I. 144. In all these cases the proceedings were

² *Miller v. Porter*, 71 Ind. 521.

³ *Hunt v. Smith*, 9 Kan. 137.

⁴ *People v. Supervisors*, 36 How. Pr. 544.

⁵ *Petition of James Kinney*, 5 Harr. 18.

⁶ *McIntyre v. Eaton & Amboy R. R. Co.*, 26 N. J. Eq. 425.

⁷ *Ante*, § 335; see also *Hildreth v. Lowell*, 11 Gray, 345.

requires notice to the owner or his agent, if residing in the county, and notice is served on one as agent, there must be proof of such agency in order to give jurisdiction.⁸ Notice to the *tenant of the freehold* was held to mean the tenant in possession appearing as the visible owner.⁹ Where the statute required notice to the "occupant or owners of the lands to be appraised," it was held that notice must be given to both occupants *and* owners.¹⁰

§ 378. Serving, publishing, posting, etc.—These matters are of course, governed by the statute. Where the statute directs notice to be *served personally*, it may be served by reading.¹ Petitioners for a highway were required to "cause a certified copy of the petition to be given to the town officers." It was held the copy might be served by one of the petitioners.² Notice may be served by the petitioner, if not otherwise provided in the statute.³ If the statute requires notice to be mailed to non-residents whose addresses are known, and the residence is correctly stated in the petition and notice is mailed to a different place, it will be void.⁴

Service by posting notices can never be made unless provided for by statute, and then the statute should be strictly followed. Proof should always be made that the posting has been done as required.⁵

The same is true in regard to notice by publication. The statute must be complied with, or the proceedings cannot be sustained.⁶ A requirement of publication for three consecutive weeks is satisfied by publication once each week.⁷

⁸ Commissioners of Chase County *v.* Carter, 30 Kan. 581.

³ Ross *v.* Elizabethtown etc. R. R. Co. 20 N. J. L. 230.

⁹ Supervisors of Culpeper *v.* Gorrell, 20 Gratt. 484.

⁴ Morgan *v.* Chicago & Northwestern Ry. Co., 36 Mich. 428.

¹⁰ Hagar *v.* Brainard, 44 Vt. 294.

⁵ Whitely *v.* Platte County, 73 Mo. 30; People *v.* La Grange, 2 Mich. 187.

¹ Green *v.* State, 56 Wis. 583.

⁶ Brush *v.* Detroit, 32 Mich. 43.

² McClure *v.* Groton, 50 N. H. 49; Sanborn *v.* Meredith, 58 N. H. 150.

⁷ Betts *v.* Williamsburgh, 15 Barb.

Notice was required to be published in two newspapers. It was held both must be in the English language.⁸ A publication begun in a daily and continued in a weekly, though both are of the same name and published in the same office, is insufficient.⁹ An advertising sheet, distributed gratuitously and containing nothing but advertisements is not a *newspaper*.¹⁰ A notice takes effect from its publication, and not from the date in the notice.¹¹ Where notice of the application for the appointment of commissioners was required to be given by publishing such notice daily for two weeks in the official paper and by personal service upon certain persons, at least ten days before the time when the application was to be made, it was held that the two weeks' publication must be completed ten days before the time.¹² The charter of Grand Rapids, in case of street improvements, required the council to pass a resolution describing the improvement and property to be taken, and designating a day on which they would apply to court for a jury to assess the damages, and to cause a copy of the resolution to be published for four successive weeks. It was held that, to make the publication effectual, the paper must be designated and the publication ordered by a resolution or ordinance of the council.¹³ Where notice is required to be left at the usual place of abode of a person, and he is out of town, and his place is vacant, and the notice is mailed to him and he receives it and returnus in time, it is sufficient.¹⁴ If a certain number of days' notice is required, a less number will render the notice ineffectual.¹⁵ If the time of service is not prescribed, service at any time before the appearance day will be good,

⁸ Road in Upper Hanover, 44 Pa. S. 277; Tyler *v.* Bowen, 1 Pitts. Pa. 225.

⁹ Hull *v.* Chicago, Burlington & Quincy R. R. Co., 21 Neb. 371.

¹⁰ Tyler *v.* Bowen, 1 Pitts. Pa. 225.

¹¹ Riche *v.* Bar Harbor Water Co., 75 Me. 91.

¹² Matter of Widening Carlton St. Buffalo, 16 Hun, 497.

¹³ Power's Appeal, 29 Mich. 504.

¹⁴ Ives *v.* East Haven, 48 Conn. 272.

¹⁵ Stanford *v.* Worn, 27 Cal. 171;

Rout *v.* Mountjoy, 3 B. Mon. 300.

and it will devolve upon the person served to show that it was not sufficient.¹⁶ Where proof of service of notice of the *filing* of the petition was required *to be filed with the petition*, it was held the service was properly made before the filing.¹⁷ Where a statute required notice of the preparing of a petition to open a road "at least ten days before the sitting of the court," it was held to mean ten days exclusive of the day of service and of the return day.¹⁸

§ 379. Waiver of notice by appearance or otherwise.— The object of notice being to give persons interested an opportunity to be present and protect their rights, it follows that a failure to give notice, or any irregularity in giving it, is waived, if the persons entitled to notice appear and take part in the proceedings in the matter or matters concerning which they are required to be notified. This position is supported by many authorities.¹ To be a waiver, the ap-

¹⁶ Muire v. Falconer, 10 Gratt. 12.

¹⁷ Gammell v. Potter, 2 Ia. 562. But see Hoag v. Denton, 20 Ia. 118, where it is held that the proof need not be filed at the same time as the petition.

¹⁸ Public Roads, 5 Harr. 174. To the same effect, People v. Highway Comrs., 38 Mich. 247.

§ 379.

¹ Burden v. Stein, 24 Ala. 130; Ives v. East Haven, 48 Conn. 272; Milam v. Sproul, 36 Ga. 393; Skinner v. Lake View Ave. Co. 57 Ills. 151; McManus v. McDonough, 107 Ills. 95; Board of Supervisors v. Magoon, 109 Ills. 142; Huston v. Clark, 112 Ills. 344; Milhollin v. Thomas, 7 Ind. 165; Smith v. Alexander, 24 Ind. 454; Coolman v. Fleming, 82 Ind. 117; Indiana, B. & W. Ry. Co. v. Allen, 100 Ind. 409; Washington Ice Co. v. Lay, 103 Ind. 48; Sunier v. Miller, 105 Ind. 393; Updegraff v. Palmer, 107 Ind. 181; Carr v. Boone, 108 Ind. 241; Ford v. Ford, 110 Ind. 89; Orton v. Tilden, 110 Ind. 131; Robinson v. Rippey, 111 Ind. 112; Commissioners v. Heed, 33 Kan. 34; Akin v. Commissioners, 36 Kan. 170; Stephen v. Commissioners, 36 Kan. 664; Commonwealth v. Westborough, 3 Mass. 406; Barre Turnpike Co. v. Appleton, 2 Pick. 430; Copeland v. Packard, 16 Pick. 217; Hancock v. Boston, 1 Met. 122; New Marlborough v. County Comrs., 9 Met. 423; East Saginaw etc. R. R. Co. v. Beulham, 28 Mich. 459; Dunning v. Township Drain Comr., 44 Mich. 518; Concord R. R. Co. v. Greeley, 17 N. H. 47; Petition of Guilford, 25 N. H. 124; Peavy v. Wolfborough, 37 N. H. 286; Boston & Maine R. R. Co. v. Folsom, 46 N. H. 64; Roberts v. Stark, 47 N. H. 223;

pearance must be such as secures to the person entitled to notice the same opportunity and the same benefit he would have had if legal notice had been given, and must be for some other purpose than merely to object for want of due notice.² Thus, where a person was entitled to notice of the *application* to court for a writ of *ad quod damnum*, in a mill case, but no notice was given, his appearance upon the return of the writ and contesting the inquisition was held not to be a waiver of the failure to give notice.³ Infants and persons *non compos* cannot waive notice.⁴ A report of commissioners to lay out a road, that certain owners of land taken, consent to the establishment of the road, cannot be received in lieu of the notice required by statute.⁵ Taking an appeal has been held to be equivalent to a general appearance, and to preclude the appellant from thereafter objecting for want of notice.⁶ Actual notice is not equivalent to legal notice. But the courts will not exercise discretionary powers in favor of persons who have

Dyckman *v.* New York, 5 N. Y. 484; People *v.* Burton, 65 N. Y. 452; Little *v.* May, 3 Hawks, N. C. 599; Cambria Street, 75 Pa. S. 357; Tingley *v.* Providence, 9 R. I. 388; Onken *v.* Riley, 65 Tex. 468; Brock *v.* Barnet, 57 Vt. 172; Coleman *v.* Moody, 4 H. & M. Va. 1; Pitzer *v.* Williams, 2 Rob. Va. 241; Muire *v.* Falconer, 10 Gratt. 12; Great Falls Manf. Co. *v.* Attorney General, 124 U. S. 581; Corrigal *v.* London etc. Ry. Co., 5 M. & G. 219; S. C., 44 E. C. L. R. 123: Taylor *v.* Clemson, 11 Clark & F. 610; *contra*: Commissioners *v.* Murray, 1 Rich. L. 335; State *v.* Langer, 29 Wis. 68; Cruger *v.* Hudson River R. R. Co., 12 N. Y. 190: is not opposed to the text.

² State *v.* Jersey City, 25 N. J. L. 309.

³ Bernard *v.* Brewer, 2 Wash. Va. 76. To the same effect, Hinckley, *et al.* Petitioners, 15 Pick. 447. But if, on the return of the inquisition, the court had jurisdiction to quash the writ on the same grounds upon which it might have denied the application, then an appearance to contest the inquisition ought to be held a waiver of defective notice.

⁴ Kansas City etc. R. R. Co. *v.* Campbell, 62 Mo. 585.

⁵ Crawford *v.* Snowden, 3 Litt. (Ky.) 228; Roads, 2 T. B. Mon. 91.

⁶ Atchison etc. R. R. Co., *v.* Patch. 28 Kan. 470; Wood *v.* Wilson, 12 Ind. 657.

had actual notice and failed to appear, unless a plain injury has been sustained.⁷

§ 380. Who is bound or affected by a particular notice.—This is a matter which must necessarily depend upon local statutes. Where persons are entitled to individual notice, whether personal or constructive, only those are bound who are notified as required. Notice to the husband is not notice to the wife, and does not bind her.¹ So notice to the life tenant is not notice to the remainder man.² Notice to one in the occupation of property who is a trespasser does not affect the real owner.³ Where land belonged to a daughter for whom the father acted as agent, and he was notified as owner, and appeared, and took an active part in the proceedings, and formal notice to the father would have been sufficient under the statute, and no substantial injury appeared to have been done, the court refused to quash the proceedings on *certiorari* for want of notice to the daughter.⁴ Notice to the selectmen and town clerk of a town in their official capacity was held notice to the town.⁵ Notice to a special agent of a company was held not to bind the company.⁶

§ 381. The proof of notice.—As to how proof of notice should be made, or what will be sufficient evidence of notice, will depend upon the statute applicable to the case. If the statute prescribes any particular form or manner of making proof of notice, that method must be pursued. In the absence of any statutory requirement, proof may be made in any mode by which it is customary to establish such facts.¹

⁷ *Summer v. County Comrs.* 37 Me. 112; *Rutland v. County Comrs.*, 20 Pick. 71; *Peters v. Griffee*, 108 Ind. 121.

§ 380.

¹ *Whitcher v. Benton*, 48 N. H. 157.; *Watson v. Sewickley*, 91 Pa. S. 380.

² *Chicago & Alton R. R. Co. v. Smith*, 78 Ills. 96.

⁸ *Dunlap v. Toledo etc. Ry. Co.*, 46 Mich. 190.

⁴ *Pickford v. Lynn*, 98 Mass. 491.

⁵ *Whittredge v. Concord*, 36 N. H. 530.

⁶ *Memphis, K. & C. Ry. Co. v. Parsons Town Co.*, 26 Kan. 503.

§ 381.

¹ *Parish v. Gilmanton*, 11 N. H. 293.

If service is made by an officer, his return would be competent; if by any other person it may be shown by the affidavit of such person,² or by oral evidence.

The *proof* of notice should in all cases state the particular facts or manner of service or of giving notice, in order that the court or other tribunal may determine whether it is sufficient.³ Thus an affidavit that affiant served a notice on a railroad company, without stating how it was served, is insufficient.⁴ So, where notices are required to be posted in a number of public places, the proof of posting should specify the places, in order that the court may judge of their publicity.⁵ Service may be made and proved by an interested party, if not prohibited.⁶ If the proof of service is not required to be in writing, an affidavit of service may be aided by parol evidence.⁷ Where the statute required proof of service to be made by affidavit, and the affidavit filed for that purpose did not show legal notice, it was held that, after confirmation, a new affidavit showing regular notice could not be filed so as to validate the proceedings.⁸ But, where the only defect was the neglect of the officer to affix his *jurat* to the affidavit of service, and it appeared *aliunde* that the oath was duly administered at the proper time, the court allowed the officer to affix his *jurat* as of the proper date, although the report of the commissioners had been filed.⁹

§ 382. The record must show a compliance with the statute as to notice.—The record of proceedings should show that notice has been given according to law. Upon this point

² Wright *v.* Wells, 29 Ind. 354; State *v.* Otoe Co., 6 Neb. 129. Proof need not be made by affidavit unless required by statute. Carr *v.* Boone, 108 Ind. 241.

³ Appeal of Central R. R. Co., 102 Pa. S. 38, and numerous cases cited in this and the following sections.

⁴ *Ibid.*

⁵ Road in Sussex and Morris, 13

N. J. L. 157; State *v.* Otoe Co., 6 Neb. 129; but see Opening Albany Street, 6 Abb. Pr. 273, *special term*.

⁶ Matter of Highway, 15 N. J. L. 39.

⁷ Carr *v.* Fayette County, 37 Ia. 608.

⁸ Scott *v.* Bruckett, 89 Ind. 413.

⁹ Williams *v.* Stevenson, 103 Ind.

we believe all the authorities are agreed.¹ There is a difference of opinion, however, in regard to how this must be shown. Some courts hold that a recital that notice has been given as required by law is sufficient.² Others hold that the particular facts must be set forth so that it can be determined

§ 382.

¹ Commissioners of Talladega Co. *v.* Thompson, 15 Ala. 134; Barnett *v.* State, 15 Ala. 829; Commissioners *v.* Harper, 38 Ills. 103; Commissioners of Highways *v.* People, 2 Ills. App. 24; Peabody *v.* Sweet, 3 Ind. 514; State *v.* Berry, 12 Ia. 58; McCollister *v.* Schney, 24 Ia. 362; Everett *v.* Cedar Rapids etc. R. R. Co., 28 Ia. 417; Woolsey *v.* Board of Supervisors, 32 Ia. 130; Pagels *v.* Oaks, 64 Ia. 198; State *v.* Weimer, 64 Ia. 243; Lawless *v.* Reese, 4 Bibb (Ky.) 309; Shackelford's Heirs *v.* Coffey, 4 J. J. Marsh, 40; Cool *v.* Crommet, 13 Me. 250; Southard *v.* Ricker, 43 Me. 575; Coleman *v.* Andrews, 48 Me. 562; Names *v.* Comrs. of Highways, 30 Mich. 490; Moetter *v.* Comrs. of Highways, 39 Mich. 726; People *v.* Highway Comrs., 40 Mich. 165; People *v.* Ruthruff, 40 Mich. 175; Milton *v.* Wacker, 40 Mich. 229; Shue *v.* Highway Comrs., 41 Mich. 638; Prescott *v.* Patterson, 44 Mich. 525; Lampsen *v.* Drain Comr., 45 Mich. 150; Blodgett *v.* Whaley, 47 Mich. 469; Van Buskirk *v.* Harrod, 48 Mich. 258; Bennett *v.* Drain Comr., 56 Mich. 634; Brazee *v.* Raymond, 59 Mich. 548; Whitely *v.* Platte Co., 73 Mo. 30; Robinson *v.* Matherick, 5 Neb. 252; State *v.* Otoe Co., 6 Neb. 129; Doody *v.* Vaughan, 7 Neb. 28; Road in Sussex and Morris, 13 N. J. L. 157;

State *v.* Orange, 32 N. J. L. 49; Harbeck *v.* Toledo, 11 Ohio St. 219; Fravert *v.* Frinfrock, 43 Ohio St. 335; Thompson *v.* Multnomah Co., 2 Or. 34; Boyer's Road, 37 Pa. S. 257; Private Road, 112 Pa. S. 183; Bernard *v.* Brewer, 2 Wash. 76. See also cases cited in subsequent notes to this section. *Contra:* Road in South Abington, 109 Pa. S. 118.

² Huntington *v.* Birch, 12 Conn. 142; Shinkle *v.* Magill, 58 Ills. 422; Chicago, B. & Q. R. R. Co. *v.* Chamberlain, 84 Ills. 333; Wright *v.* Wells, 29 Ind. 354; Kissenger *v.* Hanselman, 33 Ind. 80; Muncey *v.* Joest, 74 Ind. 409; Carr *v.* State, 103 Ind. 548; McCollister *v.* Shney, 24 Ia. 362; State *v.* Prine, 25 Ia. 231; Everett *v.* Cedar Rapids etc. R. R. Co., 28 Ia. 417; Woolsey *v.* Board of Supervisors, 32 Ia. 130; Pagels *v.* Oaks, 64 Ia. 198; Venard *v.* Cross, 8 Kan. 248; Crawford *v.* Commissioners, 32 Kan. 555; State *v.* Lewis, 22 N. J. L. 564; Coster *v.* New Jersey R. R. Co., 23 N. J. L. 227; State *v.* Justice, 24 N. J. L. 413; Ferris *v.* Bramble, 5 Ohio St. 109; Keys *v.* Williamson, 31 Ohio St. 561; Fravert *v.* Frinfrock, 43 Ohio St. 335. In Harbeck *v.* Toledo, 11 Ohio St. 219, it was held that a recital of due notice in the order of the court was overcome by a defective notice appearing in the record.

from an inspection of the record whether the statute has been complied with.³

§ 383. Who may take advantage of want or defect of notice.—One person cannot avail himself of the failure to give notice to another.¹ Where proceedings for the establishment of a highway are void for want of notice as to the owner of a tract of land, a subsequent occupant of the land, who does not claim under such owner, cannot avail himself of such want of notice.²

§ 384. Notice of adjournments, and of other steps in the proceedings.—Where parties have had due notice of the meeting of the commissioners, or other tribunal, to act upon any matter, they are bound to take notice of adjournments.¹ But, where there is a failure to meet on the appointed day,²

³ *Barnett v. State*, 15 Ala. 829; Commissioners of Talladega Co. *v. Thompson*, 15 Ala. 134; *Molett v. Keenan*, 22 Ala. 484; *Lancaster v. Pope*, 1 Mass. 86; *Southard v. Ricker*, 43 Me. 575; *Burtiss v. Parks*, 65 Me. 559; *Leavitt v. Eastman*, 77 Me. 117; *People v. Highway Comrs.*, 14 Mich. 528; *Dupont v. Highway Comrs.*, 28 Mich. 362; *Purdy v. Martin*, 31 Mich. 455; *Detroit Sharpshooters' Assn. v. Highway Comrs.*, 34 Mich. 36; *People v. Burnap*, 38 Mich. 350; *People v. Township Board*, 38 Mich. 558; *Daniels v. Smith*, 38 Mich. 660; *Lane v. Burnap*, 39 Mich. 736; *Taylor v. Burnap*, 39 Mich. 739; *Willcheck v. Edwards*, 42 Mich. 105; *Nielson v. Wakefield*, 43 Mich. 434; *Wilder v. Hubbell*, 43 Mich. 487; *Wright v. Rowley*, 44 Mich. 557; *Bruzee v. Raymond*, 59 Mich. 548; *Whitely v. Platte Co.*, 73 Mo. 30;

State v. Otoe Co., 6 Neb. 129; *Road in Sussex and Morris*, 13 N. J. L. 157; *Samon v. Trenton*, 47 N. J. L. 489; *People v. Smith*, 7 Hun, 17; *Thompson v. Multnomah Co.*, 2 Or. 84; *State v. Officer*, 4 Or. 180; *Appeal of Central R. R. Co.*, 102 Pa. S. 38; *In re Road in Plum Creek Township*, 110 Pa. S. 544; *Private Road*, 112 Pa. S. 183.

§ 383.

¹ *Knox v. Epsom*, 56 N. H. 14; *Nichols v. Salem*, 14 Gray 490; *Ives v. East Haven*, 48 Conn. 272.

² *Commonwealth v. Weiner*, 3 Met. 445.

§ 384.

¹ *Masters v. McHolland*, 12 Kan. 17; *Inhabitants of new Salem, Petitioners*, 6 Pick. 470; *Commonwealth v. County Comrs.*, 8 Pick. 343.

² *Pegler v. Highway Comrs.*, 84 Mich. 359.

or the adjournment is not to a particular day, but subject to the call of one of their number,³ there should be a new notice. Where, after notice has been given of the meeting of commissioners, there is a change of commissioners in consequence of one declining to serve, a new notice should be given.⁴ So, where notice was required to be given of the time and place of the meeting of a jury to assess damages, and, after a jury had heard numerous witnesses and was about ready to report, one of them died, and a new juror was put in his place, it was held a new notice was necessary.⁵ Where the statute required notice of the time and place of appointing commissioners, which was given, and commissioners were appointed, one of whom refused to act, it was held that his place could be afterwards filled, without further notice.⁶ Parties once brought into court must take notice of all subsequent proceedings of the court, such as the quashing of a writ of *ad quod damnum* and issuing a new one,⁷ setting aside the appointment of commissioners and allowing the petition to be amended,⁸ and the like.⁹

§ 385. One entitled to notice is not bound, if not notified.

—This follows from what has already been said in the present chapter.¹ As a rule, the proceedings will be valid

³ *Memphis etc. Ry. Co. v. Parsons Town Co.*, 26 Kan. 503.

⁴ *State v. Plainfield*, 41 N. J. L. 138.

⁵ *Anderson v. St. Louis*, 47 Mo. 479.

⁶ *Matter of Broadway Widening*, 63 Barb. 572.

⁷ *Burnham v. Thompson*, 35 Ia. 421.

⁸ *St. Louis v. Gleason*, 15 Mo. App. 25.

⁹ See *Thorndike v. County Comrs.*, 117 Mass., 566. The following are

cases in which notice of certain steps in the proceedings was held necessary: *Matter of Exchange Alley*, 4 La. An. 4; *New Orleans etc. R. R. Co. v. Bougere*, 23 La. An. 803; *Commonwealth v. Cambridge*, 7 Mass. 158; *Shaffner v. St. Louis*, 31 Mo. 264.

§ 385.

¹ *Smith v. Chicago etc. R. R. Co.*, 67 Ills. 191; *Alcott v. Acheson*, 49 Ia. 569; *Bixby v. Goss*, 54 Mich. 551; *Bettis v. Geddes*, 54 Mich. 608;

as to those having notice, and invalid only as to those not notified.²

Corey *v.* Probate Judge, 56 Mich. 524; New Orleans etc. R. R. Co. *v.* Frederick, 46 Miss. 1; Moses *v.* St. Louis Sectional Dock Co., 84 Mo. 242; Large *v.* Philadelphia, 3 Phila. 382; Road in Lancaster City, 68 Pa. S. 396; Pettis *v.* Providence, 11 R. I. 372; Hagar *v.* Brainard, 44 Vt. 294.

² *Ante*, §§ 339, 380.

CHAPTER XVI.

OBJECTIONS TO THE APPLICATION.

§ 386. **General considerations.**—Having considered the parties to proceedings, the petition or application and the notice to be given, it is next in order to consider the action which may be taken upon the application itself. This will depend in all cases upon the statute upon which the proceedings are founded. The application may be to a court, or it may be to a judge, officer or board acting in a ministerial capacity. The statute may provide for the contesting of certain questions, such as the necessity for the proposed condemnation and the like, or it may be entirely silent on the subject. It is plain that the practice must vary greatly in different cases. As there is more or less similarity in statutes, so there is more or less general importance to be attached to the decisions interpreting such statutes. Great care must be taken, however, in the use of decisions in this connection, to interpret them in connection with the statutes to which they apply.

§ 387. **Where the application is to a ministerial officer or board.**—The powers and duties of such an officer in respect to such an application are so well and fully stated by the Supreme Court of Illinois in an early case that we shall quote extensively from the opinion. The suit was for a *mandamus* to compel a judge to appoint commissioners upon the application of a railroad company, to take land for railroad purposes. The court say: “The remaining objection urged is, that in determining whether such a case was made before him as required the appointment of commissioners, the circuit judge acted judicially, and in such a case we cannot grant a *mandamus* to require him to reverse his decision. Granting the assumption, and the conclusion legitimately

follows. We cannot by *mandamus* control the judicial action of any inferior tribunal. We can, in such a case, only set it in motion, and require it to act one way or the other, but without determining how it shall act. And so, too, where the inferior tribunal is vested with a discretion in the performance of a duty imposed by the law. We can only compel the performance of the duty, without controlling that discretion or saying how the duty shall be performed. Here the act to be performed by the circuit judge is strictly of a ministerial character, and so it was determined by this court, in the case of *The Illinois Central Railroad Company v. Rucker*, 14 Ills. 153, where a *mandamus*, in precisely such a case, was awarded by this court. When such a case is made as is required by the statute, the judge has no discretion whether he will appoint commissioners or not. It is his imperative duty to do so. Necessarily he must look to see whether such a case is presented as authorizes and requires him to act, and such is the case with every officer who is called upon to discharge a ministerial duty. The sheriff, before he makes a deed, must examine and determine whether there was a valid judgment, execution and sale under it. A clerk, before he issues an attachment or a writ of *capias*, must examine and see whether the affidavit, on which the application is made, is such as the law requires, and so with every other ministerial duty which any officer is required to perform, and although, in determining whether the act should be done, the officer may have to decide, in his own mind, important legal principles, as is often the case, yet that does not make such decision a judicial act, which can only be reviewed on appeal. Such is not the true test of the judicial character of an act. A distinction was attempted to be drawn between this and other similar duties, from the fact that the adverse party is required to be notified to appear before the judge, at the time of the application for the appointment of the commissioners, and hence it is inferred that he has a right to contest the right of the applicant to have the commission-

ers appointed. He may undoubtedly show, if he can, that such a case is not presented, as requires the judge to act at all, but the important and substantial purpose for which he is called there is, that he may be heard upon those matters in which the judge may properly exercise discretion; that he may see that none but fair and impartial men are appointed commissioners. Beyond this the law has vested no discretion in the officer which it has appointed to make the selection for the parties. If the officer applied to may refuse to appoint them in one case where the law has been complied with, he may in all cases, although never so clear a case is made out, and as the company has no redress but by *mandamus*, if his determination is held to be judicial, and not examinable on such an application, it is in the power of any of the various officers to whom his application may be made, to stop the progress of a railroad altogether. Such has never been the intention of the legislature.

"It is no answer to say that if one officer erroneously refuses to make the appointment, application may be made to another. Granting this to be so, and it is no more the duty of the last to appoint than it was of the first. And there is no more certainty that he will do so, and if there is no remedy against the first refusal, there can be none as to the last, and the party may be left without remedy. It is the duty of each to act when a proper case is made, requiring action. One officer might think that the company is asking too much ground for a depot, or that it has made an injudicious selection, and that a depot is not needed at the proposed place. Another might be of opinion that the road was injudiciously located, and require it to be changed, before he would appoint the commissioners to enable it to acquire the property. It is possible, it is true, that a company may abuse the trust reposed in it, and seek to acquire property not needed for the purpose of the road or its business, but if such objections were listened to, for the purposes of vesting in the various

ministerial officers, whose duty it is made to assist in acquiring the necessary property for the use of the road, the right to determine where the road shall be made, or where a depot shall be located, or how much land is wanted for a wood yard, or where a water tank shall be erected, a far greater evil would result than the one attempted to be avoided. The legislature had a very satisfactory assurance that the powers granted to these corporations would not be abused by coercing from the citizens more land than was necessary for the legitimate purposes of their roads. The land thus acquired, can only be held and used for specific purposes. They are not authorized to speculate and traffic in the land thus acquired, but can only hold it for the purpose of the railroad, and its business accommodations. With this limited right to hold land, it was not to be supposed that any company would be so blind to its own interest as to go to the expense of acquiring land which would be of no use to it. It would have been just as reasonable to have provided in the charter that the company should not throw away its money in any other useless and aimless mode. It is possible, it is true, that a company might, in disregard of its duty to itself, to the State and individuals, apply to condemn land which it did not need, and for purposes other than those authorized by the law. When such a case of bad faith, abuse of power and violation of duty occurs, the law will readily find a remedy adequate to the protection of both the public and private rights, but we can see no pretense of such a case here, it being established that the purpose for which this land is sought to be acquired is such as is authorized by the company. Had the judge been correct in his construction of the charter, that the company was not authorized to acquire land for the purpose for which this was sought, then a case had not been presented which required him to act at all, and he would have been justified, and it would have been his duty, to refuse to appoint commissioners. In pursuance of the

stipulation filed, a peremptory *mandamus* must be awarded.”¹ There are many similar decisions.²

In such cases the owners may appear and make objections, but such objections cannot be passed upon judicially; nor is it proper for the officer to consider any objections except such as go to the sufficiency of the papers upon which the application is made. The owner stands upon his legal rights, and may contest the validity of the condemnation when the attempt is made to dispossess him by virtue of the proceedings.

§ 388. Where the application is to a court.—As already observed, the questions which may be litigated upon the application will depend upon the statute. Where the statute permits an application to the court in a particular manner and upon certain conditions, the court necessarily has power to determine whether the conditions exist or have been complied with, and whether the application has been made in proper form. If the manner of determining these questions is pointed out in the statute, that method will control. Otherwise the court may adopt any of the usual modes of determining such questions. The adjudications upon such questions will be as binding as adjudications in any other cases, and the same questions cannot be again litigated between the same parties.

Where the application is to a court, the better practice clearly is that all objections which go to the right of the petitioner to maintain the proceedings should be determined before the assessment of damages is entered upon.¹ The

§ 387.

¹ Chicago, Burlington & Quincy R. R. Co. v. Wilson, 17 Ills. 128, 128-130.

tral R. R. Co. v. Rucker, 14 Ills. 353; Matter of Thirty-fourth Street R. R. Co., 37 Hun, 442; S. C. 102 N. Y. 343.

§ 388.

² See State v. Hudson Tunnel R. R. Co., 38 N. J. L. 17; aff., 38 N. J. L. 548; Carpenter v. County Comrs., 21 Pick. 258; Western R. R. Co. v. Dickson, 30 Wis. 389; Illinois Cen-

¹ Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co., 17 W. Va. 812, 847; Hadley v. Citizens' Savings Institution, 123 Mass. 301;

following sections treat of the various questions which may be thus raised and determined, and of the manner in which it may be done.

§ 389. Manner of raising objections apparent upon the face of the papers.—This is ordinarily done by motion to dismiss the petition or application.¹ If the petition is defective, a demurrer,² or exceptions in the nature of a demurrer,³ will be proper. The same benefit may be obtained by merely resisting the appointment of commissioners or the selection of a jury on the ground that the papers do not make a case for the exercise of the power.⁴ In any of these ways the questions whether the petition and notice are sufficient, whether the purpose contemplated is a public use, whether the power to condemn for the particular purpose has been delegated, and whether the act under which the proceedings are had is valid, may be raised and decided.

§ 390. Manner of raising other objections. Propriety of a plea or answer.—If the objection consists in the denial of some matter alleged in the petition, or in the existence of some extrinsic fact which constitutes a bar to the proceedings, the better practice is to make such objections in the form of a plea or answer to the petition.¹ The answer may

Crawford *v.* Rutland, 52 Vt. 412; South Carolina R. R. Co. *v.* Blake, 9 Rich. S. C. 228; Bent *v.* Brigham, 117 Mass. 307.

§ 389.

¹ South Chicago Ry. Co. *v.* Dix, 109 Ills. 237; Chicago & Northwestern R. R. Co. *v.* Chicago & Evanston R. R. Co., 112 Ills. 589; County Court *v.* Griswold, 58 Mo. 175.

² Lake Pleasanton Water Co. *v.* Contra Costa Water Co., 67 Cal. 659; Village of Byron *v.* Blount, 97 Ills. 62.

³ New Orleans etc. R. R. Co. *v.* Southern & Atlantic Tel. Co., 53 Ala. 211.

⁴ Matter of Marsh, 71 N. Y. 315; Olmsted *v.* Proprietors of the Morris Aqueduct Co., 46 N. J. L. 495; S. C., 47 N. J. L. 311; Matter of Application for Drainage etc. 35 N. J. L. 497.

§ 390.

¹ *By Answer:* Aurora & Cincinnati R. R. Co. *v.* Miller, 56 Ind. 88; Tracy *v.* Elizabethtown etc. R. R. Co., 80 Ky. 259; *In re St. Paul etc. Ry. Co.*, 34 Minn. 227; Matter of

take the form of an affidavit.² In Illinois, Iowa and Arkansas an answer or plea has been held to be unnecessary and improper.³ It seems to us, however, a much better practice to put objections into the form of a plea or answer. Definite issues can then be made and all preliminary questions can be settled before the question of damages is entered upon.

§ 391. Questioning the legal incorporation of the petitioner.—Where the application is by a corporation, its corporate existence may be denied,¹ and thereupon proof of incorporation must be made. It will be sufficient, however, for the petitioner to show that it is a corporation *de facto*.² In some cases it is held that the incorporation of the company must be shown at some stage of the proceedings, though not denied.³ Other cases hold a contrary doc-

Lockport & Buffalo R. R. Co., 77 N. G. 557; Matter of New York, Lackawana & Western Ry. Co., 35 Hun, 220; S. C., 99 N. Y. 12; South Carolina R. R. Co. v. Blake, 9 Rich. S. C. 238.

By Plea: Terry v. Waterbury, 35 Conn. 526; Hadley v. Citizens' Savings Institution, 123 Mass. 301; Crawford v. Rutland, 52 Vt. 412; Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co., 17 W. Va. 812.

² Matter of New York Central R. R. Co. 66 N. Y. 407.

³ Chicago & Iowa R. R. Co. v. Hopkins, 90 Ills. 316; Johnson v. Freeport etc. Ry. Co., 111 Ills. 413; Smith Jr. v. Chicago & Western Indiana R. R. Co., 105 Ills. 511; Bentonville R. R. Co. v. Stroud, 45 Ark. 278; Corbin v. Wisconsin etc. Ry. Co., 66 Ia. 269. See also West End Narrow Gauge R. R. Co. v. Almeroth, 13 Mo. Ap. 91; Union Pacific Ry. Co. v. Leavenworth etc. Ry. Co., 29 Fed. R. 728. In Village

of Byron v. Blount, 97 Ills. 62, 65, it is intimated that an answer would be proper.

§ 391.

¹ Matter of Staten Island Rapid Transit R. R. Co., 38 Hun, 381; Matter of Brooklyn etc. Ry. Co., 72 N. Y. 245; Miller v. Prairie du Chien & McGregor Ry. Co., 34 Wis. 533.

² Cincinnati etc. R. R. Co. v. Danville etc. R. R. Co., 75 Ills. 113; McAuley v. C. C. & I. C. Ry. Co., 83 Ills. 348; Peoria & P. N. Ry. Co. v. Peoria & F. Ry. Co., 105 Ills. 110; Chicago & Northwestern Ry. Co. v. Chicago & Evanston R. R. Co., 112 Ills. 589; Reisner v. Strong, 24 Kan. 410; National Docks Co. v. Central R. R. Co., 32 N. J. Eq. 755; S. C. below; Central R. R. Co. v. Pennsylvania R. R. Co., 31 N. J. Eq. 475; People v. County Court, 28 Hun, 14.

³ State v. Hudson Tunnel Co., 38 N. J. L. 17; S. C. 38 N. J. L. 548; Atlantic etc. R. R. Co. v. Sullivan, 5 Ohio St. 276; Atkinson v. Mari-

trine.⁴ An answer setting up that the petitioner was acting for another company and denying the legal incorporation of the latter company was held insufficient.⁵

Where a company was required to commence its road and expend ten per cent. of its capital in five years and complete its road within a certain other time or its corporate existence and powers should cease, and it had done neither, it was held that the statute executed itself, that no proceeding to forfeit its charter was necessary, and that consequently it could not condemn after the periods specified had elapsed.⁶

§ 392. Controverting a compliance with the conditions imposed by the statute.—If the statute imposes conditions to the exercise of the power, such as the inability to agree with the owner, the petition must allege a compliance with the statute,¹ and issue may be taken upon these allegations.² If the finding is against the petitioner the proceedings must be quashed.³

§ 393. The question of necessity.—The question of necessity in condemnation proceedings presents itself in various aspects. *First*, there is the question of exercising the power for the purpose proposed. This is purely for the legislature, as has been pointed out.¹ *Second*, the constitution or statute may require the question of the necessity of making a particular improvement or taking particular property to be passed upon in a particular manner. In such cases it is imperative that the necessity shall be ascertained as acquired by law.² *Third*, the question may arise under general grants

etta & Cin. R. R. Co., 15 Ohio St. 21; Powers *v.* Railway Co., 33 Ohio St. 429; Hopkins *v.* Kansas City etc. R. R. Co., 79 Mo. 98.

⁴ Ward *v.* Minnesota & Northwestern R. R. Co., 119 Ills. 287.

⁵ Aurora & Cinn. R. R. Co. *v.* Miller, 56 Ind. 88.

⁶ Matter of Brooklyn etc. Ry. Co., 72 N. Y. 245; S. C., 55 How. Pr. 14.

§ 392.

¹ *Ante*, § 304.

² Gilmer *v.* Lime Point, 19 Cal. 47; Matter of Lockport & Buffalo R. R. Co., 77 N. Y. 557.

³ *Ibid.*, and see *ante*, chap. xii.

§ 393.

¹ *Ante* § 238.

² Mansfield etc. R. R. Co. *v.* Clark, 23 Mich. 519; Grand Rap-

of power which expressly or by implication limit the right to so much property as may be necessary for the proposed purpose. If the legislature designates how much may be taken, the courts cannot interfere, except to prevent an abuse of the power. Thus, if a railroad company is authorized by law to take two acres for depot purposes, it may do so, although one acre might perhaps answer its purpose.³ But, when the statute does not designate the property to be taken, nor how much may be taken, then the necessity of taking particular property is a question for the courts, and, where the application to condemn is made directly to a court, the question should be raised and decided *in limine*.⁴ In Illinois it is held that the question must be determined from the petition itself,⁵ and that the owner's protection consists in the fact that the property can only

ids etc. R. R. Co. *v.* Van Driele, 24 Mich. 409; Arnold *v.* Decatur, 29 Mich. 77; Power's Appeal, 29 Mich. 504; Paul *v.* Detroit, 32 Mich. 108; Morgan's Appeal, 39 Mich. 675; McClary *v.* Hartwell, 25 Mich. 139; Horton *v.* Grand Haven, 24 Mich. 465; Doctor *v.* Hartman, 74 Ind. 221; Cushing *v.* Gay, 23 Me. 9; Spofford *v.* Buckaport etc. R. R. Co., 66 Me. 26; Commonwealth *v.* Egremont, 6 Mass. 491; Commissioners of Carmel *v.* Judges of Putnam, 7 Wend. 264; Squires *v.* Neenah, 24 Wis. 588.

³ Stockton & Darlington Ry. Co. *v.* Brown, 9 House of Lords, 246; Lund *v.* Midland Ry. Co., 34 L. J. Eq. 276.

⁴ People *v.* Blake, 19 Cal. 579; Spring Valley Water Works *v.* San Mateo Water Works, 64 Cal. 123; Reed *v.* Louisville Bridge Co., 8 Bush, Ky. 69; Tracey *v.* Elizabethtown etc. R. R. Co., 80 Ky. 259; New Orleans Ry. Co. *v.* Gay, 32

La. An. 471; *In re St. Paul & Northern Pacific Ry. Co.*, 34 Minn. 237; Olmsted *v.* Proprietors of the Morris Aqueduct Co., 46 N. J. L. 495; S. C., 47 N. J. L. 311; Rensselaer etc. R. R. Co. *v.* Davis, 43 N. Y. 137; Matter of New York Central R. R. Co., 66 N. Y. 407; Matter of New York Central & Harlem River R. R. Co., 77 N. Y. 248; Matter of New York, Lackawana & Western Ry. Co., 35 Hun, 220; S. C., 99 N. Y. 12; Carolina Central R. R. Co. *v.* Love, 81 N. C. 434; South Carolina R. R. Co. *v.* Blake, 9 Rich. S. C. 228; McWhirter *v.* Cockrell, 2 Head, 9; Baltimore & Ohio R. R. Co. *v.* Pittsburgh etc. R. R. Co., 17 W. Va. 812; Wisconsin Central R. R. Co. *v.* Cornell University, 52 Wis. 537.

⁵ Smith Jr. *v.* Chicago & Western Indiana R. R. Co., 105 Ills. 511; South Chicago Railway Co. *v.* Dix, 109 Ills. 237.

be used for the purposes specified. This would leave the question to be tried in a subsequent action for possession, which, without lessening the difficulty of deciding the question, greatly increases the expense and improperly casts the burden upon the owner. If the owner does not deny the necessity, it should be taken as admitted.⁶ If the necessity is denied, the burden is on the company to establish it. To warrant a denial of the application, it should appear that what is sought is clearly an abuse of power on the part of the petitioner,⁷ If the petitioner is acting in good faith and shows a reasonable necessity for the condemnation, in view of its present and future business, the application should be granted.⁸ If the object is to acquire lands for speculation, or to prevent competition, or for purposes collateral to those for which the petitioner is authorized to condemn property, then the application should be refused.⁹ If, upon a hearing, the court determines that the petitioner is seeking to condemn property which is not necessary or more than is necessary, the application should be denied *in toto*.¹⁰

§ 394. Former proceedings for the same purpose.—It is sometimes provided by statute that a decision refusing to lay out a highway shall be conclusive for a certain length of time. Former proceedings which have failed by reason of informalities are not within the statute.¹ The statute cannot

⁶ South Carolina R. R. Co. v. Blake, 9 Rich. S. C. 228.

N. J. L. 311; Sudd v. Malden Ry. Co., 6 Exch. 143.

⁷ South Chicago Ry. Co. v. Dix, 109 Ills. 237.

⁹ Rensselaer etc. R. R. Co. v. Davis, 43 N. Y. 137.

⁸ Matter of New York, Lackawana & Western Ry. Co., 35 Hun, 220; S. C., 99 N. Y. 12; Matter of New York Central & Harlem River R. R. Co., 77 N. Y. 248; Olmsted v. Proprietors of the Morris Aqueduct Co., 46 N. J. L. 495; S. C., 47

¹⁰ Central R. R. Co. v. Hudson Terminal R. R. Co., 46 N. J. L. 289. § 394.

¹ Sholty v. Dale Township, 63 Ills. 209; People v. Eggleston, 13 How. Pr. 123; Towamencin Road, 10 Pa. S. 195; Franconia Township Road, 78 Pa. S. 316.

be evaded by slight changes in the new application.² In the absence of such a statute, the authorities are conflicting as to the effect of former proceedings as a bar to a new application. In Connecticut it is held that the doctrine of *res adjudicata* applies as in other cases.³ Other courts hold the contrary.⁴ A former proceeding by different petitioners for the same road which was dismissed after the award of damages, was held not to be a bar.⁵ A former proceeding to have a highway established is no bar to a new proceeding to have an existing highway ascertained and described.⁶

As an improvement which is not necessary at one time may become so by reason of the change of circumstances, it would seem upon principle that, in the absence of any statute controlling the matter, a former application should not be a bar to a new one for the same improvement,⁷ unless brought so soon after the first that there could not presumably be any change of circumstances.⁸

§ 395. Other objections.—The courts cannot dictate the order in which the petitioner shall proceed to acquire property or rights. Hence a railroad company may condemn the right to lay its tracks in a street before obtaining the consent of the municipal authorities to occupy the street.¹ So it may condemn private property on the line selected in a city before it has obtained the consent of the city to cross intervening streets.²

² Matter of Highway, 3 N. J. L. 242; but see Road in Lower Salford, 25 Pa. S. 524.

³ Terry v. Waterbury, 35 Conn. 526.

⁴ Heick v. Wright, 110 Ind. 279; Cole v. County Comrs., 78 Me. 532; Pruyn v. Graham, 1 Wend. 370; People v. Jones, 63 N. Y. 306; Kamer v. Clatsop Co., 6 Or. 238.

⁵ Pagels v. Oaks, 64 Ia. 198.

⁶ Washington Ice Co. v. Lay, 103 Ind. 48.

⁷ Cole v. County Comrs., 78 Me. 532.

⁸ Petition of Howard, 28 N. H. 157; Whitcher v. Landaff, 48 N. H. 153.

§ 395.

¹ California Southern R. R. Co. v. Kimball, 61 Cal. 90.

² Chicago & Western Indiana R. R. Co. v. Dunbar, 100 Ills. 110. To the same effect, Matter of Gilbert Elevated R. R. Co., 70 N. Y. 361; Matter of Suburban Rapid Transit

§ 396. Defences where proceedings are instituted by the owner.—Where the initiative is given to the owner, the only object of the proceedings is to secure an assessment of damages. Any defence which goes to the right of the plaintiff to recover damages should be pleaded and determined by the court before a warrant is issued or order made for the tribunal to assess damages.¹ If the proceedings are instituted before the right to damages has accrued, they will be premature and may be quashed on motion.² As to when the right accrues will depend upon the statute.³ A release,⁴ a prescriptive right,⁵ or an award upon the same claim,⁶ are respectively good defences to a proceeding by the owner. It is held to be no defence to a claim for flowage that it is caused in part by a dam other than the defendant's.⁷ In a complaint for flowage the defendant may show a permanent abandonment of the dam complained of.⁸ A plea in bar is waived by a tender of damages.⁹ Where pleas are filed, the defendant is limited to the defences specified in the pleas.¹⁰ Where a city has occupied property for a sewer, it cannot, in a proceeding by the owner to have his damages assessed, set up irregularities in its own proceedings to establish the sewer.¹¹

Co., 38 Hun, 553; S. C., 16 Abb. (N. C.) 152.

§ 396.

¹ *Vanduser v. Comstock*, 3 Mass. 184; *Howard v. Proprietors of Locks and Canals*, 12 Cush. 259; *Wilmarth v. Knight*, 7 Gray, 294; *Darling, Admr. v. Blackstone Manf. Co.*, 16 Gray, 187; *Hadley v. Citizens' Savings Institution*, 123 Mass. 301; *Jones v. Clark*, 7 Jones Law, 418.

² *Emerson v. Reading*, 14 Vt. 279; *Tunbridge v. Tarbell*, 19 Vt. 453.

³ See *Marion etc. R. R. Co. v. Ward*, 9 Ind. 123.

⁴ *Fuller v. County Comrs. of* 387.

Plymouth, 15 Pick. 81; *Seymour v. Carter*, 2 Met. 520; *Crockett v. Boston*, 5 Cush. 182.

⁵ *Williams v. Nelson*, 23 Pick. 141; *Hadley v. Citizens' Savings Institution*, 123 Mass. 301.

⁶ *Brigham v. Holmes*, 14 Allen, 184; *Tunbridge v. Tarbell*, Jr. 19 Vt. 453.

⁷ *Arimond v. Green Bay & Miss. Canal Co.*, 35 Wis. 41.

⁸ *Blackwell v. Phinney*, 126 Mass. 458.

⁹ *Hosmer v. Warner*, 7 Gray, 186.

¹⁰ *Tyler v. Mather*, 9 Gray, 177.

¹¹ *Saunders v. Lowell*, 131 Mass.

§ 397. Practice in hearing objections.—There is a great diversity in the practice pursued by different courts in the hearing of objections to the application. It is the usual and better practice to dispose of such objections before entering upon the assessment of damages.¹ The burden is upon the petitioner to maintain the allegations of the petition which may be denied,² unless otherwise provided by statute.³ Such matters are sometimes heard upon affidavits,⁴ but the more satisfactory and regular way would seem to be to try questions of fact by legal evidence at the bar of the court or by reference, where that practice is permissible.⁵ The mode of trial is in the discretion of the court, which may refer questions of fact to a jury, if deemed expedient.⁶

§ 398. Amendments.—Objections to the petition or notice may in some cases be obviated by amendment.¹ These matters have already been treated in former chapters, to which reference is made.

§ 399. Waiver of objections by going to a hearing on the question of damages.—We have already had occasion to consider what objections to the petition and to the notice are

§ 397.

¹ South Carolina R. R. Co. v. Blake, 9 Rich. (S. C.) 228; Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co., 17 W. Va. 812.

² Tracy v. Elizabethtown etc. R. R. Co., 80 Ky. 259; St. Louis v. Frank, 9 Mo. Ap. 579; Wisconsin Central R. R. Co. v. Cornell University, 52 Wis. 537; Matter of New York Central R. R. Co., 66 N. Y. 407.

³ Petition of New York Bridge Co., 4 Hun, 635; Buffalo etc. R. R. Co. v. Reynolds, 6 How. Pr. 96. These cases hold that under the New York statute the burden is on the owner to controvert the peti-

tion, but are evidently overruled by the last case cited in the last note.

⁴ West End Narrow Gauge R. R. Co. v. Almeroth, 13 Mo. Ap. 91.

⁵ Matter of Suburban Rapid Transit Co., 38 Hun, 553; Petition of New York Bridge Co., 4 Hun, 635; Buffalo etc. R. R. Co. v. Reynolds, 6 How. Pr. 96.

⁶ Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co., 17 W. Va. 812.

§ 398.

¹ See Hedrick v. Hedrick, 55 Ind. 78; Chicago & Great Southern Ry. Co. v. Jones, 103 Ind. 386.

waived by an appearance and trial upon the merits.¹ Generally, objections which do not go to the jurisdiction are waived by such an appearance.² This, of course, is said of such proceedings as are had before a court which has jurisdiction to hear and determine such objections. The allegations of the petition, if not controverted by the owner in the first instance, should be taken as true.³ The owner should not be permitted to take his chance of a favorable result on the question of damages, and, if disappointed, to turn back to objections which should properly have been made before.⁴

§ 399.

¹ *Ante*, §§ 362, 379.

² *Horton v. Norwalk*, 45 Conn. 237; *Forsythe v. Kreuter*, 100 Ind. 27; *Township Board of Hackman*, 48 Mo. 243; *Harper v. Miller*, 4 Ired. Law, 34; *Carpenter v. Sims*, 3 Leigh, 674; *Mitchell v. Thornton*, 21 Gratt. 164; *Jeter v. Board*, 27 Gratt. 910.

³ *South Carolina R. R. Co. v. Blake*, 9 Rich. (S. C.) 228; *Matter of Opening Spuyten Duyvil Parkway*, 67 How. Pr. 341. See also *Field v. Vermont & Mass. R. R. Co.*, 4 Cush. 150.

⁴ *Harper v. Miller*, 4 Ired. Law, 34.

CHAPTER XVII.

SECURING THE TRIBUNAL TO ASSESS DAMAGES.

§ 400. **The case stated.**—Where the application is to a court and the damages are assessed by an ordinary jury, the jury is usually taken from the regular panel, the same as juries in other cases. In such cases the ordinary rules of practice apply. But, where the damages are assessed by commissioners, or by a special jury, various questions arise in regard to the appointment or selection of the tribunal which will now be considered. The statutes are so various that we shall attempt nothing more than to give the substance of the decisions.

§ 401. **The order or warrant.**—An order appointing viewers for the purpose of laying out a highway should give a general description of the road,¹ state the reasons which authorize it,² and require them to report the conveniences and inconveniences.³ Where the statute provides that the county court may order the laying out of a highway provided a majority of the justices are present, it applies to an order appointing a jury of view which will be void if made when less than a majority are present.⁴ In general the order or warrant to a jury or other tribunal should contain definite instructions as to their duties.⁵ But a substantial compliance with the statute is sufficient.⁶ Where the statute re-

§ 401.

¹ *Hubbard v. Wickliffe*, 2 A. K. Marsh. 503; *Same v. Same*, 1 Litt. 80; *Poston v. Terry*, 5 J. J. Marsh. 220; *Wood v. Campbell*, 14 B. Mon. 339; *Smith v. Trenton Delaware Falls Co.*, 17 N. J. L. 5.

² *Fletcher's Heirs v. Fugate*, 3 J. J. Marsh. 631.

³ *Weirston v. Waggoner*, 5 J. J. Marsh. 41.

⁴ *Ingram v. Wilson*, 4 Humph. 424.

⁵ *Heise v. Pennsylvania R. R. Co.*, 62 Pa. S. 67.

⁶ *Queen v. Lancaster & Preston Junction Ry. Co.*, 6 A. & E. N. S. 759; *S. C.*, 51 E. C. L. R. 757.

quired that the warrant to summon a jury should designate a day for them to meet upon the land, the omission of the day or the naming of several days is fatal.⁷ A statute provided that the warrant for a jury should be issued by county commissioners, and be made returnable to the supreme court. A warrant was issued returnable to the county commissioners, but was in fact returned to the supreme court. It was held to be void.⁸ In Massachusetts a warrant directing the sheriff to summon a jury according to law was held sufficient.⁹ An objection to the form of the warrant is waived by appearing before the jury and entering into an agreement as to damages.¹⁰

§ 402. The writ of ad quod damnum.—This is a common law writ, and has been a favorite mode of procedure in this country, especially in highway and mill cases. The writ should contain definite directions as to what the jury are to consider,¹ and should conform to any statutory provisions which may be applicable.² Either the order or the writ should specify the time and place of the meeting of the jury.³ Though directed to the sheriff, it may be executed by his deputy.⁴ The return may be amended even after the sheriff has gone out of office.⁵

§ 403. Some further points as to the appointment and summoning of commissioners, etc.—Where the statute required that the notice should specify the day when the application should be made to the court for the appointment of

⁷ Chesapeake & Ohio Canal Co. v. Key, 3 Cranch, C. C. 599.

² Troutman v. Barnes, 4 Met. (Ky.) 337.

⁸ Cassidy v. Kennebec & Portland R. R. Co., 45 Me. 263.

³ Shackleford's Heirs v. Coffey, 4 J. J. Marsh. 40; Troutman v. Barnes, 4 Met. (Ky.) 337.

⁹ Mitchell v. Bridgwater, 10 Cush. 411.

⁴ Wroe v. Harris, 2 Wash. 126; Gay v. Caldwell, Hardin (Ky.) 68; Stevens v. Duck River Navigation Co., 1 Sneed, 237; Tripp v. County Comrs., 2 Allen, 556.

¹⁰ Wilmarth v. Knight, 7 Gray, 294.

⁵ Gay v. Caldwell, Hardin (Ky.) 68.

§ 402.

¹ Epps v. Cralle, 1 Munford, 258.

commissioners, the court can only act on the day specified.¹ But, where the application is to be made at a certain session of the court, it was held that it might be made at any day of the session as well as on the first day.² Where the commissioners of highways were required to summon twelve freeholders to act in the matter of laying out a private road, it was held they could not delegate the power to a constable, but must act in person. But where a constable had summoned twelve men, and the commissioners requested them to act, it was held to be a substantial compliance with the statute.³ A town clerk is not disqualified to draw a jury because he is a brother of one of the petitioners.⁴ Where the statute required that, if the sheriff or *either* of his deputies was interested, the jury should be summoned by the coroner, and a jury was summoned by one deputy while another was interested, the proceedings were quashed.⁵ A statute provided that, in proceedings to assess damages for lands taken for a railroad, the company might name six persons and the owners six from whom the court should appoint five. It was held that only six could be named by all the owners included in one petition.⁶ Where the jury is to consist of twelve persons, it is not irregular to summon thirteen or fourteen, if only twelve are empaneled.⁷ A statute required that the damages should be assessed by five disinterested householders who should be "elected and compensated as may be prescribed by ordinance." In proceedings to lay out a street the commissioners were named and appointed in the ordinance which directed the laying out of the street, and for this reason the proceedings were held to be void.⁸ Where

§ 403.

¹ Adams *v.* Clarksburg, 23 W. Va. 203.

² Waterhouse *v.* County Commissioners, etc., 44 Me. 368.

³ People *v.* Commissioners of Greenbush, 24 Wend. 367.

⁴ People *v.* Dains, 38 Hun, 43.

⁵ Barre Turnpike Corporation *v.* Appleton, 2 Pick. 430.

⁶ Troy etc. R. R. Co. *v.* Cleveland, 6 How. Pr. 238.

⁷ Hosmer *v.* Warner, 15 Gray, 46; Fitchburg R. R. Co. *v.* Boston & Maine R. R. Co., 3 Cush. 58.

⁸ Union Pacific Ry. Co. *v.* Bur-

no record was made of the order appointing viewers, and two judges in vacation certified that the order had been made and authorizing the clerk to enter it, the proceedings were held bad.⁹ Where the clerk was required to deposit in a box the names of those selected and returned as jurors, *rejecting those of kin or interested in the land*, and then draw twelve, and the clerk put all the names in the box without first rejecting those of kin or interested, but none of these were drawn, it was held that the error was immaterial.¹⁰ The object of the law was to secure a fair jury.

§ 404. Mandamus to compel the appointment of commissioners.—Where a judge or other tribunal acting ministerially refuses to appoint commissioners or to order a jury, action may be compelled by mandamus if a proper showing is made.¹

§ 405. The qualifications of commissioners, jurors, etc.—Petitioners.—The applicants for an improvement are disqualified to act in any matter concerning the same, whether in deciding on its utility or assessing the damages.¹ This is especially true where the commissioners are required to be disinterested² or indifferent men.³

lington & Missouri Riv. R. R. Co.,
19 Neb. 386.

⁹ State Road from Howell's Mills,
6 Wharton, 352.

¹⁰ People v. Dolge, 45 Hun, 310.

§ 404.

¹ Illinois Central R. R. Co. v. Rucker, 14 Ills. 353; Chicago, B. & Q. R. R. Co. v. Wilson, 17 Ills. 123; Carpenter v. County Comrs., 21 Pick. 258; Western R. R. Co. v. Dickson, 30 Wis. 389; see also Matter of Thirty-fourth St. R. R. Co., 37 Hun, 442; S. C., 102 N. Y. 343.

§ 405.

¹ Public Road, 5 Harr. 242; Ex

parte Hinckley, 8 Me. 146; State v. Delesdernier, 11 Me. 473; People v. Potter, 36 Hun, 181; Radnor Road, 5 Binn. 612; Road from Mc-Claysburg, 4 S. & R. 200; Road at May Town, 4 Yeats, 479; Williams v. Mitchell, 49 Wis. 284.

² Epler v. Niman, 5 Ind. 459; Thompson v. Multnomah Co., 2 Or. 34.

³ Anthony v. South Kingstown, 13 R. I. 129. A contrary doctrine appears to have been held in People v. Dains, 38 Hun, 43; Buckley v. Drake, 41 Hun, 384, and White v. Coleman, 6 Gratt. 138.

Tax-Payers.—A tax-payer of a town or city which has to pay the expense of opening and maintaining a proposed road is generally held to be incompetent,⁴ though some courts hold the contrary.⁵ In Massachusetts a county commissioner is held not incompetent to act upon the question of common convenience and necessity of a proposed highway because he is a tax-payer in the town through which it passes.⁶ But this was afterwards changed by statute.⁷

Affinity.—A brother-in-law of a petitioner,⁸ or of an owner of land taken,⁹ and the brother of the mother of a petitioner,¹⁰ have been held to be disqualified. So also one whose sister-in-law, niece and nephew,¹¹ or whose son-in-law¹² owned land to be affected. But being related to a petitioner in the fourth degree,¹³ or to one who owns land in the vicinity but which is not taken,¹⁴ or to the trustee of a church which owned land taken,¹⁵ have been held not to disqualify.

Owners of land affected.—An owner of land taken is incompetent to act as commissioner.¹⁶ So is the owner of land liable to be assessed for benefits.¹⁷ An owner of land bene-

⁴ Petition of Nashua, 12 N. H. 425; Mitchell *v.* Holderness, 29 N. H. 523; Petition of New Boston, 49 N. H. 328; State *v.* Atkinson, 27 N. J. L. 420; Corporation *v.* Manhattan Co., 1 Caines Rep. 507; Gray *v.* Middletown, 56 Vt. 53.

⁵ Johnston *v.* Rankin, 70 N. C. 550; and see Bridgport *v.* Giddings, 43 Conn. 304.

⁶ Wilbraham *v.* County Comrs., 11 Pick. 322; Danvers *v.* County Comrs., 2 Met. 185; see also Parsell *v.* State, 30 N. J. L. 530.

⁷ Hall *v.* Thayer, 105 Mass. 219, 223.

⁸ Phillips *v.* Tucker, 3 Met. (Ky.) 69; Hilltown Road, 18 Pa. S. 233; Road in Allen Township, 18 Pa. S. 463.

⁹ Taylor *v.* County Comrs., 105 Mass. 225.

¹⁰ Clifford *et al.* Appellants, 59 Me. 262.

¹¹ High *v.* Big Creek Ditching Assn., 44 Ind. 356.

¹² Bradley *v.* Frankfort, 99 Ind. 417.

¹³ Chase *v.* Rutland, 47 Vt. 393.

¹⁴ Road *v.* Lower Windsor, 29 Pa. S. 18.

¹⁵ People *v.* Cline, 23 Barb. 197.

¹⁶ Daggy *v.* Green, 12 Ind. 303; State *v.* Delesdernier, 11 Me. 473; State *v.* Union, 37 N. J. L. 268. *Contra:* Matter of Southern Boulevard, 3 Abb. Pr. N. S. 447; People *v.* Landreth, 1 Hun, 544.

¹⁷ State *v.* Crane, 36 N. J. L. 394.

fited but not assessable was held to be not disqualified;¹⁸ nor is the trustee of a church which was assessed for benefits.¹⁹ Likewise one holding the legal title to lands taken, as a mere naked trustee.²⁰

Stockholders.—Stockholders in a corporation which is prosecuting the condemnation,²¹ or which owns the land sought to be condemned,²² are disqualified to act. One who has subscribed for stock, but has never paid anything and is in default, is not disqualified.²³ In a railroad condemnation an owner of stock in another railroad company which has already acquired its right of way, is competent.²⁴ A railroad cannot object because two of the commissioners were its own stockholders.²⁵

Miscellaneous points.—As to those who have already served in a former hearing or proceeding in the same matter, which has failed for some reason, some authorities hold that they are competent,²⁶ others that they are incompetent.²⁷ The latter would seem to be founded on the better reason, since such persons have virtually prejudged the case. Where the jurors were to be summoned from the three nearest towns to the land taken, and the owners of several parcels were joined, it was held sufficient if they were summoned from the three towns nearest any one parcel.²⁸ Where commissioners were to be selected from different wards as near as might be, it was held error to appoint five commissioners

¹⁸ Webster *v.* County of Washington, 26 Minn. 220.

¹⁹ People *v.* Syracuse, 63 N. Y. 291.

²⁰ Matter of South Seventh St., 48 Barb. 12.

²¹ Rock Island etc. R. R. Co. *v.* Lynch, 23 Ills. 645; Peninsular R. R. Co. *v.* Howard, 20 Mich. 18.

²² Friend Appellant, 53 Me. 387.

²³ Chesapeake & Ohio Canal Co. *v.* Binney, 4 Cranch, C. C. 68.

²⁴ People *v.* First Judge of Columbia, 2 Hill, 398.

²⁵ Strong *v.* Beloit & Madison R. R. Co., 16 Wis. 635.

²⁶ Cowan *v.* Glover, 3 A. K. Marsh. 356; Road in Chartier's Township, 34 Pa. S. 376.

²⁷ Folmar *v.* Folmar, 68 Ala. 120; Hunter *v.* Matthews, 12 Leigh, 228.

²⁸ Wyman *v.* Lexington & West Cambridge R. R. Co., 13 Met. 316; see also Road Case, 1 Brown, 210.

from three wards when there were six wards in the city.²⁹ Where the jury were all chosen from four towns, out of twenty-two in a county, the inhabitants of which were greatly interested in the improvement, it was held that they were unfairly selected, and that a challenge to the array should have been allowed.³⁰ So where they were all taken from one village in a proceeding by the village.³¹ Where commissioners are required to be freeholders, it is sufficient if they become such any time before their appointment.³² An heir of one who has directed his land to be sold was held to be a freeholder.³³ So a vendee in possession under a contract for a deed.³⁴ Where the statute makes it the duty of the court to appoint the surveyor of the town through which the proposed road runs, it must be done, though he has given an opinion as to the propriety of laying out the road.³⁵ The fact that a commissioner, after his appointment, was elected to the city council does not vitiate the report.³⁶ One who is exempt may act if he is not disqualified.³⁷ In a proceeding to assess damages for a change of grade, one who had a similar claim was held to be disqualified to act on the sheriff's jury.³⁸ Persons who are interested or active in promoting the work or improvement for which the condemnation is made are generally held to be disqualified from acting as jurors or commissioners.³⁹

In *State v. Crane*⁴⁰ it was held that the legislature was

²⁹ *State v. Elizabeth*, 32 N. J. L. 357.

³⁰ *Haslam v. Galena etc. R. R. Co.*, 64 Ills. 353.

³¹ *Houghton v. Huron Copper Co.*, 57 Mich. 547.

³² *New York, West Shore & Buffalo R. R. Co. v. Townsend*, 36 Hun, 630.

³³ *People v. Scott*, 8 Hun, 566.

³⁴ *New Orleans etc. R. R. Co. v. Hemphill*, 35 Miss. 17.

³⁵ *Matter of Highway*, 3 N. J. L. 504.

³⁶ *Matter of Twenty-sixth St.*, 12 Wend. 203.

³⁷ *Herman's Heirs v. Municipality No. Two*, 15 La. 597 (8 new ed. 397.)

³⁸ *Flagg v. Worcester*, 8 Cush. 69.

³⁹ *Michigan Air Line Ry. Co. v. Barnes*, 40 Mich. 383; *Kundinger v. Saginaw*, 59 Mich. 355; but see *Summerville v. Wimbish*, 7 Gratt. 205.

⁴⁰ 36 N. J. L. 394.

powerless to remove the disability occasioned by a direct pecuniary interest. The statute construed in that case provided that, "whenever heretofore or hereafter a majority of the commissioners of highways, signing any report, were, or shall be competent and disinterested, such report shall not be considered illegal in consequence of any disability on the part of the other commissioners." It was held that this did not validate a report signed by four commissioners, one of whom owned land to be assessed for benefits. In some cases it has been held proper to require a showing by affidavit that the persons whose appointment was desired possessed the qualifications required.⁴¹

§ 406. Whether the record should show that the commissioners, jurors, etc., possessed the qualifications required by law.—Upon this question the authorities are divided, some holding that the record must affirmatively show the fact,¹ others that it need not.² Without deciding between these two lines of decisions, it may properly be said that, in conducting proceedings of this character, the better practice is to have all such matters appear upon the face of the record.

§ 407. Waiver of objections to commissioners, jurors, etc.
—Objections to the competency of commissioners, etc., should

⁴¹ Matter of Houston St., 7 Hill, 175.

§ 406.

¹ Nichols *v.* Bridgport, 23 Conn. 189; Pond *v.* Milford, 35 Conn. 32; Bridgport *v.* Giddings, 43 Conn. 304; People *v.* Brighton, 20 Mich. 57; Mansfield etc. R. R. Co. *v.* Clark, 23 Mich. 519; Levee Commissioners *v.* Allen, 60 Miss. 93; White *v.* Memphis etc. R. R. Co., 64 Miss. 566; State *v.* Jersey City, 25 N. J. L. 309; Baldwin *v.* Calkins, 10 Wend. 167; United States *v.* Supervisors of Summit, 1 Pinney, 566; State *v.*

Bayonne, 35 N. J. L. 476; Northern Pacific Terminal Co. *v.* Portland, 14 Or. 24.

² Chicago, Burlington & Quincy R. R. Co. *v.* Chamberlain, 84 Ills. 333; Gay *v.* Caldwell, Hardin (Ky.) 68; Sutherland *v.* Holmes, 78 Mo. 399; Schuylkill Falls Road, 2 Binn. 250; Road from App's Farm, 17 S. & R. 388; see also Centreville & Abington Turnpike Co. *v.* Jarrett, 4 Ind. 213; Cage *v.* Tragar, 60 Miss. 563; Chesapeake & Ohio R. R. Co. *v.* Patton, 9 W. Va. 648.

be made at the earliest opportunity, or they will be waived.¹ A party who is present at the time of the selection of the tribunal, and makes no objection to the competency of any person selected or appointed, thereby waives any objection to their competency which was then known to him.² So, going into a hearing on the merits is a waiver of all objections then known and not made.³ So it has been held that, if a person objects to the report of commissioners, but not on the ground of their incompetency, he cannot afterwards object that they were not qualified.⁴ A party cannot object to commissioners whose names he has suggested,⁵ or to whose appointment he has agreed.⁶

§ 408. Vacancies, effect of, and how filled.—This is a matter which must necessarily depend so much upon local statutes that we shall simply state the decisions. In New York it is held that a power conferred upon three or more persons for a public purpose is not extinguished by the death of one, where no provision exists for the vacancy, but vests in the survivors.¹ It was accordingly held that, where one of three commissioners died after the assessment of damages for opening a street, and before the assessment of benefits,

§ 407.

¹ Bradley *v.* Frankfort, 99 Ind. 417; Burnham *v.* Goffstown, 50 N. H. 560; Crowell *v.* Londonderry, 63 N. H. 42; Hilltown Road, 18 Pa. S. 233; Road in Allen Township, 18 Pa. S. 463; State *v.* Nelson, 57 Wis. 147; State *v.* Wilson, 17 Wis. 687; Astor *v.* Mayor etc. of New York, 62 N. Y. 580.

² Ipswich *v.* County Commissioners of Essex, 10 Pick. 519; Hallock *v.* County of Franklin, 2 Met. 558; Smith *v.* School District No. 2, 40 Mich. 143; Supervisors of Dodridge Co. *v.* Stout, 9 W. Va. 703.

³ Walker *v.* Boston & Maine R. R. Co., 3 Cush. 1; Fitchburg R. R. Co. *v.* Same, 3 Cush. 58; Steele's Petition, 44 N. H. 220; Baldwin *v.* Calkins, 10 Wend. 167.

⁴ Commissioners' Court *v.* Bowie, 34 Ala. 461.

⁵ Matter of New York, West Shore & Buffalo R. R. Co., 35 Hun, 575; Roanoke City *v.* Berkowitz, 80 Va. 616.

⁶ People *v.* Taylor, 34 Barb. 481.

§ 408.

¹ People *v.* Palmer, 52 N. Y. 83; People *v.* Syracuse, 63 N. Y. 291.

the survivors could go on and assess the benefits.² On the other hand, in New Hampshire, it was held that two of a board of three road commissioners, the third being dead, could not act in the laying out of a highway, although a statute provided that "all words purporting to give a joint authority to three or more public officers shall be construed as giving such authority to a majority of them."³ It was said that the statute conferred the authority upon a majority of a full board. A statute of Wisconsin provided for summoning a jury of eighteen freeholders, and gave each party the right to strike off three, the remaining twelve to be sworn and to act. After six had been thus stricken off, one of the twelve said he was not a freeholder, and was excused, and thereupon one of the six was put in his place. Their assessment was held to be invalid for this reason.⁴ A statute of New Jersey provided that roads should be laid out by six of the surveyors of the county joined with six surveyors of the next county chosen for the townships nearest to the line of the road. One of the latter being sick, his place was filled from another township. If eight of the twelve agreed, it was sufficient. The report was signed by ten, including the one who was substituted. The proceedings were quashed on *ceteriorari*, the court holding that a proviso could not be put into a statute, the terms of which were plain and positive.⁵ Where the proceedings are under the supervision of a court which appoints or supervises the tribunal, it would seem proper that, if vacancies occur before the tribunal proceeds to act, it should proceed to fill such vacancies.⁶ If a vacancy occurs pending the proceedings before the tribunal, it cannot

² *People v. Syracuse*, 63 N.Y., 291.

⁵ *State v. Willingborough Road*,

³ *Palmer v. Conway*, 22 N.H.

1 N.J.L. 128.

144; *Wentworth v. Farmington*, 49 N.H. 119.

⁶ *McMullen v. State*, 105 Ind. 334; *Road in Little Britain*, 27 Pa.

⁴ *In re Detroit & Pontiac R.R. Co.*, 2 Doug. (Mich.) 367.

S. 69.

be filled and the case go on as though the new appointee had been in from the beginning.⁷

§ 409. Effect of the disagreement of special juries.— Where the court ordered the sheriff to summon a jury to assess the damages caused by opening a highway and the first jury summoned disagreed, it was held proper for the sheriff, without making any report or obtaining any new order, to summon another jury. The order was held to stand as authority to the sheriff until he had summoned a jury who assessed the damages.¹ In another case it was held that the sheriff could not summon a new jury without a new warrant, that the proper course was to make return of the disagreement and obtain a new order.² Under a petition for a re-review of a highway, the court appointed viewers who made an incomplete report. It was held proper to treat their action as a nullity, and to appoint new viewers under the same petition.³

§ 410. The presiding officer of special juries: his qualifications, duties, etc.— The presiding officer should be disinterested,¹ and should in all things conform to the statute.² Where a statute provided that the damages should be assessed by a jury, and that the county commissioners should appoint some one to preside over the jury whose duty it should be to keep order and administer oaths to the jury and the witnesses, it was held that he could not give instructions.³ But

⁷ *Gilkerson v. Scott*, 76 Ills. 509.

§ 409.

¹ *Hicks v. Foster*, 32 Ga. 414; see also *Road in Charlestown Township*, 2 Phila. 126.

² *Mendon v. County of Worcester*, 10 Pick. 235.

³ *Charleston Road*, 2 Grant's Cas. 467.

§ 410.

¹ *Merrill v. Berkshire*, 11 Pick.

269. A mayor of a city who owns land affected is not disqualified to act as presiding judge of the mayor's court for the assessment of damages, his duties being merely ministerial in the matter. *Mayor of Lexington v. Long*, 31 Mo. 369.

² *Bibb v. Mountjoy*, 2 Bibb, 1.

³ *McKenney v. County Comrs.*, 40 Me. 136.

a party who requests instructions cannot complain if they are against him. Where the proceedings are conducted partly by the sheriff and partly by the coroner, each should certify to the part which took place before him.⁴ Where it is the duty of the sheriff to certify the substance of any decision or instruction given by him when requested by any party, if no request is made no certificate need be given, and such decision or instruction cannot afterwards be proved by parol.⁵

⁴ Pittsfield & North Adams R. R.
Co. v. Foster, 1 Cush. 480.

⁵ Allen v. Androscoggin R. R. Co.,
60 Me. 494.

CHAPTER XVIII.

PROCEEDINGS BY AND BEFORE THE CONSTITUTED TRIBUNAL.

§ 411. The oath to be taken.—The first duty of commissioners and the like is to qualify themselves in the manner required by law. This usually consists in taking an oath prescribed by statute, the substance of which is that they will faithfully discharge their duties. All the authorities agree that the failure to take this oath in substantially the form prescribed by law renders all the proceedings invalid.¹ In *Lumsden v. Milwaukee*² it was held to be absolutely essential that the tribunal should act under the sanction of an oath, and that no valid proceedings could be had under a charter which did not require the jury of view to be sworn. A contrary conclusion is reached in *Bradstreet v. Erskine*,³ and this would seem to be the more correct view of the matter. All must be sworn, and the failure of one

§ 411.

¹ *Keenan v. Commissioners' Court*, 26 Ala. 568; *Frith v. Justices of the Inferior Court*, 30 Ga. 723; *Crossett v. Owens*, 110 Ills. 378; *Walters v. Houck*, 7 Ia. 72; *Grimes v. Doyle, Sneed (Ky.)*, 58; *Daviess v. County Court*, 1 Bibb, 453; *Elliot v. Lewis*, 1 A. K. Marsh. 514; *Thompson v. Crabb*, 6 J. J. Marsh. 222; *Breckenridge v. Ward*, 1 T. B. Mon. 57; *Harper v. Lexington & Ohio R. R. Co.*, 2 Dana, 227; *Spring v. Lowell*, 1 Mass. 422; *Bowler v. Drain Comr.*, 47 Mich. 154; *Matter of Public Road*, 4 N. J. L. 396; *State v. Lawrence*, 5 N. J. L. 850; *Fisher v. Allen*,

8 N. J. L. 301; *State v. Hutchinson*, 10 N. J. L. 242; *State v. Davis*, 13 N. J. L. 10; *State v. Barnes*, 13 N. J. L. 268; *State v. Ayres*, 15 N. J. L. 479; *State v. Hart*, 17 N. J. L. 185; *State v. Bayonne*, 35 N. J. L. 476; *People v. Conner*, 46 Barb. 333; *Bryson's Road*, 2 P. & W. 207; *Neff's Road*, 3 S. & R. 210; *Case of Broad Street Road*, 7 S. & R. 444; *Cambria Street*, 75 Pa. S. 357; *Douglass v. Rawlins*, 4 Hayward, Tenn. 111; *Lyman v. Burlington*, 22 Vt. 131; *Fisher v. Smith*, 5 Leigh, 611; *Bohlman v. Green Bay & Minn. Ry. Co.*, 40 Wis. 157.

² 8 Wis. 485.

³ 50 Me. 407.

or two to take the oath required has the same effect as though it was omitted by all.⁴

§ 412. The form and sufficiency of the oath.—If the form of the oath is prescribed, it should conform exactly to the statute, for then all doubt as to its sufficiency is removed. But slight variations which do not change the substance will be immaterial.¹ Where the oath to assess damages followed the statute, except the words “if any” were added after the word damages, it was held to be erroneous, but not to vitiate the proceedings collaterally.² Commissioners were required by statute to take an oath “fairly and impartially to execute the duties imposed upon them by this act.” The oath taken was “that they would fairly and impartially execute the duties imposed upon them by the above appointment, and make a just and true report according to the best of their skill and judgment.” This was held to be a substantial compliance with the statute.³ In another case viewers, before entering upon their duties, were required to be sworn “to perform the same impartially and according to the best of their judgment.” An oath “faithfully to discharge their duties,” was held to be insufficient, because less comprehensive than the oath required by law.⁴ But under the same statute it was held sufficient if they were sworn to perform their duties according to law.⁵ Again, an oath by commissioners in a railroad condemnation, to discharge their duties under the charter of the company to the best of their ability, was held insufficient, where the act required an oath to support the constitution of the United States and of the State and to

¹ Matter of Public Road, 4 N. J. L. 396; State *v.* Davis, 13 N. J. L. 10; State *v.* Ayres, 15 N. J. L. 479; State *v.* Hart, 17 N. J. L. 185; Case of Broad St. Road, 7 S. & R. 444.

§ 412.

² As where the person sworn was made to “declare” instead of

“promise.” Bassett *v.* Denn, 17 N. J. L. 432; and see Tide Water Canal Co. *v.* Archer, 9 G. & J. 479.

³ Hawkins *v.* Calloway, 88 Ills. 155.

⁴ State *v.* Trenton, 35 N. J. L. 485.

⁵ Cambria Street, 75 Pa. S. 357.

⁵ Paschall St., 81 Pa. S. 118.

faithfully discharge their duties to the best of their ability.⁶ In another case in the same State the statute required an oath that the commissioners should justly and impartially discharge their duties. The oath taken was to fairly and impartially hear the evidence, review the premises and to fairly and impartially decide. It was held to be insufficient, and the proceedings were quashed.⁷ These cases illustrate the necessity of a strict observance of the statute.⁸ If the form of the oath is not prescribed, but an oath is required, it may be in general language that the commissioners, etc., will faithfully and impartially perform the duties devolved upon them.⁹

An oath must be administered by one having authority, or it is no oath at all. Thus an oath administered by a city clerk *pro tem.*, no such officer being known to the law, is a nullity.¹⁰ An oath administered by an attorney by request and in the presence of one having authority, was held good.¹¹ An oath in blank is a nullity.¹² Where the name was written Byles in the body of the oath, but was correctly subscribed Boyles, it was held sufficient.¹³

Where the commissioners acted and made a report without being sworn, it was held that they might be sworn and make a new report.¹⁴ Where the first report is set aside and the matter referred to the same commissioners, they do not need to be sworn again.¹⁵

The oath need not be in writing unless required by statute.¹⁶

⁶ *Bohlman v. Green Bay & Minn. Ry. Co.*, 40 Wis. 157.

¹¹ *Road in Macungie Township*, 26 Pa. S. 221.

⁷ *State v. Hoetz*, 67 Wis. 84.

¹² *Matter of Highway*, 16 N. J. L. 391.

⁸ See also *Chapman v. Clark*, 49

¹³ *Hoagland v. Culvert*, 20 N. J. L. 387.

⁹ *Mich.* 305.

¹⁴ *Lyman v. Burlington*, 22 Vt. 131.

¹⁰ *Commonwealth v. Westborough*, 3 Mass. 406.

¹⁵ *Low v. Galena etc. R. R. Co.*, 18 Ills. 324.

¹⁰ *State v. Bayonne*, 35 N. J. L. 476; but see *Woolsey v. Board of Supervisors etc.* 32 Iowa, 130.

¹⁶ *Hays v. Parish*, 52 Ind. 133.

§ 413. What the record should show as to the oath taken.

—The record should show that the commissioners have been sworn as required by law.¹ Thus far there is no difference in the authorities. But, as to *how* this should be made to appear in the record, the decisions are at variance. Some cases hold that the mere recital that the commissioners were sworn according to law is sufficient.² Other cases hold that the facts should be stated which show a compliance with the law.³ The correct doctrine would seem to be that, where the proceedings are under the supervision of a court of record, and the tribunal is sworn at the bar of the court and a record of the fact made as part of the proceedings in the case, a simple recital that the oath was taken as required by law would be sufficient. But, where the only record of the oath is in the report of the commissioners themselves, or in the certificate of a sheriff, clerk or other ministerial officer, it ought to show what the oath was which was taken, and how it was administered, in order that it may appear from the facts detailed that the law has been complied with.⁴

§ 413.

¹ *Elliot v. Lewis*, 1 A. K. Marsh. 453; *Breckenridge v. Ward*, 1 T. B. Mon. 57; *Harper v. Lexington & Ohio R. R. Co.*, 2 Dana, 227; *Spring v. Lowell*, 1 Mass. 422; *Neff's Road*, 3 S. & R. 210; *Douglass v. Rawlins*, 4 *Haywood*, Tenn. 111; *Fisher v. Smith*, 5 *Leigh*, 611.

² *Long v. Commissioners' Court*, 18 Ala. 482; *Thompson v. Crabb*, 6 J. J. Marsh. 222; *Dollarhide v. Muscatine County*, 1 G. Green, 158; *Word v. Campbell*, 14 B. Mon. 339; *New Orleans etc. R. R. Co. v. Hemphill*, 35 Miss. 17; *Hannibal & St. Joseph R. R. Co. v. Morton*, 27 Mo. 317; *In re Road in East Donegal Township*, 90 Pa. S. 190; *Lyon v. Green Bay & Minn. Ry. Co.*, 42 Wis. 538.

³ *Keenan v. Commissioners' Court*, 26 Ala. 568; *Crossett v. Owens*, 110 Ills. 378; *Walters v. Houck*, 7 Ia. 72; *Bowler v. Drain Comr.*, 47 Mich. 154. In the Matter of Nicetown Lane, 11 Phila. 377; Case of *Greenleaf Court*, 4 Wharton, 514.

⁴ “A statutory proceeding affecting the rights of individuals must be strictly pursued, and where what has been done is to be certified by the persons executing such special authority or a record is to be made thereof and such certificate or record is to conclude the rights of parties, it must appear upon the certificate or record that everything was done which the statute required.” *State v. Van Geison*, 15 N. J. L. 339. Relief will not be

§ 414. Waiver of defective oath.—A failure to take the oath required, or any irregularity in taking it, may be waived. If the parties proceed to a hearing with knowledge of the omission or irregularity, it amounts to a waiver thereof.¹ If the oath is required to be filed, and is filed in the case, there is a presumption of notice of its contents which amounts to knowledge in fact.² Where there is an appeal from the award of viewers to a court and trial *de novo*, it is too late to object on appeal that the viewers were not sworn.³

§ 415. The time and place of meeting and of acting.—The commissioners must meet at the time and place appointed in the order or notice, or their proceedings will be invalid.¹ A statute which required commissioners to meet within ten days after the lapse of twenty days from the giving of certain notice, was held to be imperative.² A board of county commissioners which has power to fix the time within which viewers in a road case shall meet may extend the time.³ If they are required to complete their work and make report at a certain time, as by the next term of the court, their au-

granted in equity on the ground that the record does not show that the viewers were sworn. It should be averred that they were not sworn. *Parham v. Decatur County*, 9 Ga. 341.

§ 414.

¹ *Raymond v. County Comrs.*, 63 Me. 110; *Petition of Gilford*, 25 N. H. 124; *Wentworth v. Farmington*, 51 N. H. 128; *Rockford etc. R. R. Co. v. McKinley*, 64 Ills. 338.

² *Wentworth v. Farmington*, 51 N. H. 128. In *Raymond v. County Comrs.*, 63 Me. 110, it is said that, where parties go to a hearing, knowledge of the facts in regard to taking the oath will be presumed.

³ *Patton v. Clark*, 9 Yerg. 268.

§ 415.

¹ *Roberts v. Williams*, 13 Ark. 355; *Hobbs v. Board of Comrs.*, 103 Ind. 575; *State v. Horn*, 34 Kan. 556; *Barlow v. Highway Commissioners*, 59 Mich. 443; *State v. Scott*, 9 N. J. L. 17; *In re Johnson*, 49 N. J. L. 381; *New York & Long Branch R. R. Co. v. Copner*, 49 N. J. L. 555.

² *Commissioners v. Harper*, 38 Ills. 103; *Wood v. Commissioners*, 62 Ills. 391; *Commissioners v. Barry*, 66 Ills. 496. The first case distinguishes *Wells v. Hicks*, 27 Ills. 343.

³ *Black v. Thompson*, 107 Ind. 162.

thority will cease at the expiration of the time, and a report made subsequently is void.⁴

§ 416. Mode of procedure before the commissioners: Evidence, etc.—If the statute prescribes the mode of procedure, its provisions will, of course, govern. But, if the statute is silent on the subject, commissioners and similar bodies necessarily have power to regulate their own proceedings and decide upon the order of business before them.¹ They may determine the order of introducing testimony and who shall have the open and close.² They should proceed only at regular meetings at which all are present, or of which all have notice, which should be regularly adjourned if necessary.

The principal difficulty is in the manner of informing themselves concerning the matters to be decided. It has been held that, in the absence of a statutory provision to that effect, they have no right to hear witnesses.³ Other courts have held that it is optional with such bodies to hear evidence or not as they may choose,⁴ and that they may inform themselves of the facts by any accessible means of information.⁵ Again, other courts hold that it is their duty to hear testimony though the statute is silent on the subject.⁶

The parties are undoubtedly entitled to be heard,⁷ and to

⁴ Inhabitants of Windham Petitioners, 32 Me. 452; Metzler & Hugus's Road, 62 Pa. S. 151; Rutland *v.* Supervisors, 55 Wis. 664; Anderson *v.* Pemberton, 89 Mo. 61.

§ 416.

¹ Jones *v.* Goffstown, 39 N. H. 254.

² Albany Northern R. R. Co. *v.* Lansing, 16 Barb. 68.

³ Vanwickle *v.* Camden & Amboy R. R. Co., 14 N. J. L. 162; Coster *v.* New Jersey R. R. etc. Co., 24 N. J. L. 730; Clarksville etc. Turnpike Co. *v.* Atkinson, 1 Sneed, 426.

34

⁴ Matter of Rondout etc. R. R. Co. *v.* Dego, 5 Lans. 298; Pennsylvania R. R. Co. *v.* Keiffer, 22 Pa. S. 356; Lyman *v.* Burlington, 22 Vt. 131; St. Paul & Sioux City R. R. Co. *v.* Covell, 2 Dak. 483.

⁵ Inhabitants of Readington *v.* Dilley, 24 N. J. L. 209; Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 474; affd. 36 N. J. L. 537; Case of Spring Garden Street, 4 Rawle, 192.

⁶ Washington etc. R. R. Co. *v.* Switzer, 26 Gratt. 661.

⁷ Inhabitants of Readington *v.*

point out how the commissioners may obtain information as to the facts which they rely upon. If the statutes make no provision for sworn testimony, it is difficult to see how any can be heard, since an oath not authorized by law is an empty form. The commissioners should view the premises,⁸ and they may do this without notice and at any time during the proceedings.⁹ Where the statute provides for hearing evidence, the rulings of the commissioners in regard thereto are not to be scrutinized too closely or expected to conform to the rules which obtain in courts of law.¹⁰ Their award will not be disturbed on that ground, unless substantial injustice has been done.¹¹

§ 417. What questions may be considered.—This will depend largely upon the statute. Usually it is only the question of damages which is submitted to the commissioners or other tribunal.¹ But sometimes there is also submitted to them the question of necessity or public utility, and, it may be, the question of whether the improvement shall be made. They have no right to pass upon the regularity of their own appointment,² the corporate existence of the petitioner,³ or the right to make the improvement in question.⁴ They are

Dilley, 24 N. J. L. 209; *ante*, §§ 363–368.

⁸ *Western Pacific R. R. Co. v. Reed*, 35 Cal. 621; *Remy v. Municipality No. 2*, 12 La. An. 500; *Matter of Curtiss St., 1 Sheldon (N. Y.) 425*; *Matter of New York, Lackawanna & Western R. R. Co.*, 33 Hun, 148; *Inhabitants of Readington v. Dilley*, 24 N. J. L. 209.

⁹ *Matter of New York, Lackawanna & Western R. R. Co.*, 33 Hun, 148.

¹⁰ *Michigan Air Line Ry. Co. v. Barnes*, 44 Mich. 222; *Port Huron etc. Ry. Co. v. Voorhies*, 50 Mich. 506.

¹¹ *Ibid*, and *Petition of Landaff*,

34 N. H. 163. The following cases hold that only legal evidence should be heard, and that the consequence of receiving incompetent evidence will be the same as in other legal proceedings: *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *Rochester etc. R. R. Co. v. Budlong*, 6 How. Pr. 467.

§ 417.

¹ *De Buol v. Freeport etc. Ry. Co.*, 111 Ills. 499; *In re Byles*, 25 L. J. Ex. 58.

² *State v. Bailey*, 6 Wis. 291.

³ *Schroeder v. Detroit etc. Ry. Co.*, 44 Mich. 387.

⁴ *Forbes v. Delashmutt*, '8 Ia.

not in general authorized to pass upon questions of title,⁵ though they may award damages to particular persons where the title is not in issue.⁶

§ 418. Adjournments.—Usually either the statute or the order of appointment or warrant for summoning the special tribunal fixes the time and place of meeting. Sometimes it is left for the commissioners to fix the time and place and notify the parties interested thereof. When once regularly convened, such bodies possess an inherent power to adjourn from time to time until the business before them is completed,¹ provided such adjournments do not extend beyond the time within which they are required to complete their inquest.² The continuity of the original meeting should be kept up by regular adjournments,³ or else new notice should be given to the parties interested.⁴ Where six surveyors met and decided against an application for a road and reported without adjournment, and afterwards four met and signed a report laying it out, it was held invalid.⁵ Parties

164; *Matter of Girard Ave.*, 11 Phila. 449.

⁵ *San Francisco & San Jose R. R. Co. v. Mahoney*, 29 Cal. 112; *Wilcox v. Oakland*, 49 Cal. 29.

⁶ *Winebiddle v. Pennsylvania R. R. Co.*, 2 *Grant's Cases*, 32.

§ 418.

¹ *Goodwin v. Weatherfield*, 43 Conn. 437; *Polly v. Saratoga etc. R. R. Co.*, 9 Barb. 449; *Butman v. Fowler*, 17 Ohio, 101. Where the statute authorized "any number of the six surveyors" to adjourn, all may adjourn. *State v. Vanbuskirk*, 21 N. J. L. 86; *State v. Bergen*, 21 N. J. L. 342.

² *Ruhland v. Supervisors*, 55 Wis. 664; *Wood v. Commissioners of Highways*, 62 Ills. 391.

³ *McPherson v. Holdridge*, 24 Ills. 38; *Allison v. Commissioners of Highways*, 54 Ills. 170; *New York & Long Branch R. R. Co. v. Capner*, 49 N. J. L. 555.

⁴ *McPherson v. Holdridge*, 24 Ills. 38; *Goodwin v. Weatherfield*, 43 Conn. 437. Thus, where a time and place was fixed for the first meeting of supervisors to lay out a highway, when one appeared and adjourned to another day, when another appeared and adjourned to still another day, when no one appeared, and afterwards all met without any new notice and made the lay-out, it was held void. *McPherson v. Holdridge*, 24 Ills. 38.

⁵ *Matter of Highway*, 16 N. J. L. 391.

are bound to take notice of regular adjournments, and no notice or proclamation is necessary unless required by statute.⁶

§ 419. Whether a majority may act or decide.—It is a general rule of law that, where several persons are authorized to do any act of a public nature, they must all deliberate, though a majority may decide.¹ In the absence of any statutory provisions controlling the matter, it follows that commissioners and similar bodies must meet and deliberate together concerning the matters submitted to their decision,² and that, having done so, a decision of the majority will be valid and binding.³ If a power is conferred upon a *board*

⁶ *Board of Supervisors v. Magoon*, 109 Ills. 142.

§ 419.

¹ *Paradise Road*, 29 Pa. S. 20; *McLellan v. County Comrs.*, 21 Me. 390. “Where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority and their act will be the act of the whole.” *Grindley v. Barker*, 1 Bos. & Pul. 229.

² *Curry v. Jones*, 4 Del. Ch. 559; *Louk v. Woods*, 15 Ills. 256; *Galbraith v. Littlech*, 73 Ills. 209; *Commonwealth v. Ipswich*, 2 Pick. 70; *Smith v. Trenton Delaware Falls Co.*, 17 N. J. L. 5; *Marble v. Whitney*, 28 N. Y. 297; *People v. Hinds*, 30 N. Y. 470; *People v. Williams*, 36 N. Y. 441; *Board of Water Comrs. v. Lansing*, 45 N. Y. 19; *Matter of Application of Mayor etc. of New York*, 34 Hun, 441; affd. 99 N. Y. 569; *Christy v. Newton*, 60 Barb. 332; *Chapman v.*

Swan, 65 Barb. 210; *Young v. Buckingham*, 5 Ohio, 485; *Matter of Wells County Road*, 7 Ohio St. 16; *Road Leading etc.*, 1 Brown, 210; *Turnpike Road by Chad's Ford*, 5 Binney, 481; *Paradise Road*, 29 Pa. S. 20; *State v. Findley*, 67 Wis. 86.

³ *Louk v. Woods*, 15 Ills. 256; *Galbraith v. Littlech*, 73 Ills. 209; *Piper v. Connerville & Liberty Turnpike Road Co.*, 12 Ind. 400; *Beynon v. Brandywine etc. Turnpike Co.*, 30 Ind. 129; *Inhabitants of Vassalborough*, 19 Me. 338; *Plymouth v. County Comrs.*, 16 Gray, 341; *Ex parte Rogers*, 7 Cow. 526; *Woolsey v. Tompkins*, 23 Wend. 324; *Cruger v. Hudson River R. R. Co.*, 12 N. Y. 190; *Marble v. Whitney*, 28 N. Y. 297; *Astor v. Mayor etc. of New York*, 62 N. Y. 580, 591; 37 N. Y. Superior Ct. 539; *Matter of Application of Mayor etc. of New York*, 34 Hun, 441; affd. 99 N. Y. 569; *Rochester etc. R. R. Co. v. Beckwith*, 10 How. Pr. 168; *Young v. Buckingham*, 5 Ohio, 485; *Road Leading etc.*, 1

or *corporate body*, it may be exercised by a quorum which consists of a majority of the members.⁴ Such are the rules in the absence of statutory provisions upon the subject; but in most of the States statutory provisions exist, either of a general nature or in the particular acts which relate to eminent domain. Many States have a general enactment that, where an authority is conferred upon three or more, a majority may act. Such a statute is held to apply to commissioners in eminent domain proceedings.⁵

In New Jersey, in laying out highways, the tribunal consists of six surveyors appointed by the court, all of whom must have notice, and a majority of whom may act.⁶ Where the report is signed by less than the whole number, the record should show that all were notified and had the opportunity to act.⁷ If less than a majority attempt to act,⁸ or if five prevent the sixth from acting,⁹ their proceedings will be void.

A statute of New York provides that "any two commissioners of any town may make an order in execution of the powers conferred in this title, provided it shall appear in the order filed by them that all of the commissioners of highways of the town met and deliberated on the subject em-

Brown, 210; Turnpike Road by Chad's Ford, 5 Binney, 481; Road from App's Tavern, 17 S. & R. 388; Moore *v.* Street Passenger R. R. Co., 3 Phila. 417; Paradise Road, 29 Pa. St. 20; State Road in Lehigh County, 60 Pa. S. 330.

⁴ Cupp *v.* Commissioners of Seneca County, 19 Ohio St. 173; State Road in Lehigh County, 60 Pa. S. 330; Commett *v.* Pearson, 18 Me. 344.

⁵ Hays *v.* Parish, 52 Ind. 132; Acton *v.* York County, 77 Me. 128; Quayle *v.* M. K. & T. Ry. Co., 63 Mo. 465; Austin *v.* Helms, 65 N. C. 560; Union Pacific Ry. Co. *v.* Bur-

lington etc. R. R. Co., 1 McCrary, 452.

⁶ R. S., 1821, p. 616.

⁷ State *v.* Burnet, 14 N. J. L. 385; State *v.* Van Geison, 15 N. J. L. 339; Griscom *v.* Gilmore, 15 N. J. L. 475; Shough *ex parte*, 16 N. J. L. 264; Smith *v.* Trenton Delaware Falls Co., 17 N. J. L. 5. In Bassett *v.* Clement, 17 N. J. L. 166, it is said that it must appear, either from the record or by proof made to the court, that the absent surveyor had notice.

⁸ State *v.* Hall, 17 N. J. L. 374.

⁹ State *v.* Shreve, 4 N. J. L. 297.

braced in such order, or were notified to attend a meeting of the commissioners for the purpose of deliberating thereon."¹⁰ Under this statute it is imperative that the report should conform to the statute, and if made by two only it must show that the third met with them or had due notice.¹¹ The constitutional provision that the damages shall be ascertained by a jury, or by not less than three commissioners, does not prevent the legislature from enacting that two of the three may decide.¹²

In Pennsylvania the statutes in road cases provide for the appointment of six viewers, five of whom must act, and that four of those acting must join in the report.¹³ Under this statute it has been held that if five act it is immaterial whether the sixth was present or absent, and the record may be silent on that point;¹⁴ that if the report is signed by four it need not appear of record that five were present at the view, but this fact may be shown by evidence;¹⁵ and that it is immaterial that one of the six is disqualified from acting.¹⁶ But, if one acts who is not qualified by reason of his not taking the oath required, the proceedings are invalid, although the other five joined in the view and report.¹⁷

In Illinois it is held that a report signed by two viewers is good though it does not appear that the third was present and acted.¹⁸ In the first case cited it was held that it would be presumed the third viewer was present until the contrary

¹⁰ R. S., 1829, vol. I, p. 525, § 125.

¹⁴ Turnpike Road by Chad's Ford,

¹¹ People *v.* Hynds, 30 N. Y. 470; People *v.* Williams, 36 N. Y. 441; Stewart *v.* Wallis, 30 Barb. 344; Christy *v.* Newton, 60 Barb. 332; Chapman *v.* Swan, 65 Barb. 210; Matter of Summit St., 3 How. Pr. 26; these cases overrule Tucker *v.* Rankin, 15 Barb. 471.

⁵ Binney, 481; New Hannover Road, 18 Pa. S. 220; Road in Little Britain, 27 Pa. S. 69.

¹² Astor *v.* New York, 62 N. Y. 580; see Conger *v.* Hudson Riv. R. R. Co., 12 N. Y. 190.

¹⁵ Road from Mrs. Cully's, 13 S. & R. 25; see also Road to Ewing's Mill, 32 Pa. S. 282.

¹³ 2 Brightley's Pardon, 1272, 1283.

¹⁶ Paschall St., 81 Pa. S. 118.

¹⁷ Cambria St., 75 Pa. S. 357.

¹⁸ Louk *v.* Woods, 15 Ills. 256; Galbraith *v.* Littlech, 73 Ills. 209; see also Astor *v.* New York, 62 N. Y. 580.

was shown, and in the other that in a collateral proceeding this presumption could not be overcome by parol evidence.

Where a statute provided that the appraisers or any two of them might perform the duties, it was held that it could not be construed otherwise than as permitting two to act as the whole might act.¹⁹ Where a statute provided that, by agreement of parties, the damages might be assessed by a committee of three, it was held that all must act and concur in a decision.²⁰ Where damages were to be assessed by a jury of six and one was unable to attend, and the parties stipulated to go on with five, it was held the parties were estopped by their agreement to object on the ground of a defective organization of the jury.²¹

§ 420. Receiving *ex parte* communications.—Commissioners should in all respects act openly and fairly. If they permit one of the parties to discuss with them privately and in the absence of the other the questions to be decided, such action will vitiate a decision adverse to the absentee.¹ *Ex parte* communications touching the merits of the controversy will have the same effect.² But, where the counsel for one of the parties sent to the commissioners certain computations in writing which he had given orally at the hearing, it was held not sufficient cause for setting aside their report.³ Where a city charter provided that the city attorney should advise the jury in proceedings by the city to establish streets, alleys, etc., it was held to provide for improper relations and to render the proceedings void collaterally.⁴

But while all *ex parte* communications are improper and,

¹⁹ *Van Steenburgh v. Bigelow*, 3 Wend. 43. H. 286; *Patten's Petition*, 16 N. H. 277.

²⁰ *McLellan v. County Comrs.*, 21 Me. 390. 2 *Harris v. Woodstock*, 27 Conn. 567; *Lenox v. Knox & Lincoln R. R. Co.*, 62 Me. 322.

²¹ *Avery v. Groton*, 36 Conn. 304.

§ 420.

³ *New York etc. R. R. Co. v. Church*, 31 Hun, 440.

¹ *Peavy v. Wolfborough*, 37 N.

⁴ *Paul v. Detroit*, 32 Mich. 108.

prima facie, vitiate the proceedings, yet, if it appears that there was no improper motive, that they did not relate to the questions to be decided and that the tribunal could not have been influenced by them, the courts will not interfere with the proceedings on that ground. Thus, where one of the parties went to the commissioners privately after the hearing, in good faith and merely for the purpose of urging a speedy decision, it was held not to vitiate the proceedings.⁵

§ 421. Receiving entertainment.—The mere fact that the commissioners were served with refreshments by one of the parties or dined or lodged at his house, will not of itself be sufficient cause for setting aside the report.¹ While such bodies should not receive entertainment from interested par-

⁵ *Blake v. County Comrs.*, 114 Mass. 583, 585. The court say: "The interviews of Mr. Aspinwall with one or more of the commissioners, which are alleged as one of the grounds for this petition, and which took place subsequently to the hearing in reference to the proposed widening of Washington street, were of questionable propriety. It is important that contested matters upon which any tribunal is to pass should not in any way be made the subject of conversation, except in the presence of all parties to the controversy. If we were left in doubt as to whether the judgment of the commissioners was in any way affected by them, we might feel it our duty to grant the petition. The existence of a cause which might improperly affect their judgment, although it is not known that it did so, is a sufficient ground for such action. If it was found that the members of such a tribunal had been addressed with any improper motive, or with in-

tent to sway or bias their judgment, even if such attempt had not been shown to be effectual, it would also be a sufficient ground for such action. In the present case, however, the facts are distinctly found that Mr. Aspinwall addressed the commissioner or commissioners at their office in Boston, with no improper purpose to influence their action, his object being only to hasten it. It is also found that their action was not changed by reason of anything done by him. We do not think therefore that the proceedings should be quashed on account of these conversations or that important public rights should be lost because of an irregularity found to have been unintentional, and attended with no evil result."

§ 421.

¹ *State v. Justice*, 24 N. J. L. 413; *State v. Reckless*, 38 N. J. L. 393; *Lehigh Valley R. R. Co. v. Dover & Rockaway R. R. Co.*, 43 N. J. L. 528. *Contra: Magnolia Street*, 8 Phila. 468.

ties, yet, if there is no improper motive and no abuse of the privilege, it will be disregarded.² Where it is agreed that the committee to lay out a road may lodge with one of the parties,³ or the fact that one of them has done so is known and not objected to at the time,⁴ there is a waiver of the irregularity.

Where one of the parties treated the commissioners freely to intoxicating liquors, the report was set aside without looking into the merits.⁵ Where the owner furnished entertainment to one commissioner, and gave another for his expenses more than the law allowed, and there was a manifest disposition to secure an unfair advantage, the report was set aside.⁶

§ 422. Other improprieties.—Where the son of one of the commissioners in a railroad condemnation was taken into the company's employ immediately after the father's appointment, the award was set aside.¹ Where in a proceeding to condemn a lot for a school-house, the owner of the land, by violent and abusive language and threats of violence, deterred the representative of the school district from attending, the award was held to be void.² The fact that commissioners met at the house of the petitioner,³ or that they are paid more than their legal fees by the applicant,⁴ or that,

² *Green v. East Haddam*, 51 Conn. 547; *Road in Plymouth*, 5 Rawle, 150; *Coleman v. Moody*, 4 Hen. & Munf. 1; *Tripp v. County Comrs.*, 2 Allen, 556; *Blake v. County Comrs.*, 114 Mass. 583. In the last case the town furnished lunch to the commissioners, witnesses and all the parties in interest.

³ *Beardsley v. Washington*, 39 Conn. 265.

⁴ *Williams v. Stonington*, 49 Conn. 229.

⁵ *Petition for a Highway in Newport*, 48 N. H. 433.

⁶ *Matter of Buffalo, New York & Philadelphia R. R. Co.*, 32 Hun, 289.

§ 422.

¹ *New York, West Shore & Buffalo R. R. Co. v. Townsend*, 36 Hun, 630.

² *Peckham v. School District*, 7 R. I. 545.

³ *Oxford u. Brands*, 45 N. J. L. 332.

⁴ *State v. Miller*, 23 N. J. L. 383; *Matter of Staten Island Rapid Transit Co.*, 41 Hun, 392; *Matter of Buffalo, New York & Phila. R. R. Co.*, 32 Hun, 289.

in a railroad case where the law does not fix their fees, they agree upon the amount of their fees with the company after their report is made⁵ have been held not to vitiate the award in the absence of any proof of improper motives or influence. Charges of improper conduct must always be substantiated by proof.⁶

§ 423. Power of commissioners to reconsider or amend their report.—Commissioners, as a general rule, have complete authority over their report until it has been filed or otherwise placed beyond their control. Although they have once resolved to report adversely to an improvement, they may afterwards report in favor of it.¹ But, after having once filed their report, their power over it is gone and they are *functus officio*.² If they afterwards file an amended report, it is a nullity.³ They may perhaps be permitted by the court to amend it in formal matters only, if done within the time for filing the original report.⁴ Where by statute commissioners were authorized to review and correct their report after having given notice of its completion, it was held to be in the nature of an appellate power, and that no changes could be made in the absence of objections by those interested.⁵ Where on appeal the case was to be heard before referees, it was held that after the case had once been heard and submitted for decision they had no power to grant a re-hearing on the merits.⁶ Where the report of commissioners is set aside or quashed, they cannot proceed and make a new assessment without being again appointed and qualified as in the first instance.⁷

⁵ *Lehigh Valley R. R. Co. v. Dover & Rockaway R. R. Co.*, 43 N. J. L. 528.

⁶ *Hayward v. Bath*, 40 N. H. 100.

Pollard v. Ferguson, 1 Litt. 196.

³ *People v. Mott*, 60 N. Y. 649.

⁴ *Springbrook Road*, 64 Pa.S. 451.

⁵ *Matter of Hamilton Avenue*, 14 Barb. 405.

⁶ *People v. Ferris*, 41 Barb. 121.

¹ *Butman v. Fowler*, 17 Ohio, 101.

⁷ *People v. Brooklyn*, 49 Barb.

² *People v. Mott*, 60 N. Y. 649; *People v. Brooklyn*, 49 Barb. 136;

196.

§ 424. View of the premises by the jury.—In case of trials before common law juries, statutes usually provide for a view of the premises, either as matter of right or in the discretion of the court. If the statute is silent as to the stage of the trial at which the view shall be made, it rests in the discretion of the court, and they may be sent at any time before the instructions are given.¹ The jury are entitled to view the entire premises, and cannot be confined to the part taken.² Where the statute is that whenever, in the opinion of the court, it is proper for the jury to view the premises, it may so order, it is left to the discretion of the court, and its action will not be interfered with unless a very clear case of abuse is made out.³ Jurors have no right to visit the premises except by order of court, and in charge of an officer,⁴ and where it appeared that two jurors visited the premises during the trial, the verdict was set aside.⁵

§ 425. Effect to be given the view.—In view of the fact that the practice of submitting the question of damages in condemnation suits to a court and jury is becoming more and more general, and that in nearly all cases a view of the premises may be had by the jury, the effect which such view should have upon the result becomes a question of very considerable importance. Is the object of the view simply to enable the jury the better to understand and apply the evidence, or may they take into consideration all the facts which they learn upon such view, as so much additional evidence on which to found their verdict? Some courts take the latter view. In

§ 424.

¹ *Galena etc. R. R. Co. v. Haslam*, 73 Ills. 494; *Kankakee & Seneca R. R. Co. v. Straut*, 102 Ills. 666.

² *Wakefield v. Boston & Maine R. R. Co.*, 63 Me. 385. Here the presiding officer compelled them to keep within the right of way location, and it was held to be error.

³ *Clayton v. Chicago etc. R. R. Co.*, 67 Ia. 238; see also, under a similar statute, *Coyner v. Bouyd*, 55 Ind. 166; *Snow v. Boston & Maine R. R. Co.*, 65 Me. 230.

⁴ *Patchin v. Brooklyn*, 2 Wend. 877; *S. C. affd.*, 8 Wend. 47.

⁵ *Ortman v. Union Pacific Ry. Co.*, 32 Kan. 419.

Illinois an instruction was held correct which told the jury that they had the right, in finding their verdict, "to take into account such facts as they learned by viewing the property, as to whether the construction of the viaduct permanently depreciated or increased the market value of the property in question."¹ There are other courts which take a similar view.² In an early case in Indiana it was held that, as the facts learned and impressions made upon the jury by the view were not contained in the bill of exceptions, it failed to contain all the evidence and the court could not determine whether the verdict was against the evidence or not.³ This would seem to be a logical conclusion from the position that what the jury learn is evidence in the case.

Other courts take what seems to us the more correct view, namely, that the object of the view is to enable the jury the better to understand and apply the evidence, and so to more intelligently and fairly perform their duties.⁴ The reasons in support of this view are very fully and ably given in the case cited from Wisconsin, from which we quote as follows: "We understand that the object of a view is to acquaint the jury with the physical situation, condition, and surroundings

§ 425.

¹ Culbertson & Blair Provision Co. v. Chicago, 111 Ills. 651, 655; other cases declare or support the same rule. Chicago & Evanston R. R. Co. v. Jacobs, 110 Ills. 414; Peoria etc. Ry. Co. v. Barnum, 107 Ills. 160; Green v. Chicago, 97 Ills. 370; Chicago & Iowa R. R. Co. v. Hopkins, 90 Ills. 316; Mitchell v. Illinois & St. Louis R. R. & Coal Co., 85 Ills. 566; Peoria etc. R. R. Co. v. Sawyer, 71 Ills. 361.

² Evansville etc. R. R. Co. v. Cochran, 10 Ind. 560; Parker v. Boston, 15 Pick. 198; City of Kansas v. Butterfield, 89 Mo. 646; Omaha & Republican Valley R. R.

Co. v. Walker, 17 Neb. 432; *In re Barbadoes St.*, 8 Phila. 498; Lehigh Valley Coal Co. v. Chicago, 26 Fed. R. 415.

³ Evansville etc. R. R. Co. v. Cochran, 10 Ind. 560; see cases cited in next note, which overrule this case.

⁴ Jeffersonville etc. R. R. Co. v. Bowen, 40 Ind. 545; Heady v. Turnpike Co., 52 Ind. 117; overruling Evansville etc. R. R. Co. v. Cochran, 10 Ind. 560; Close v. Samm, 27 Ia. 503; Harrison v. Iowa Midland R. R. Co., 36 Ia. 323; Washburn v. Milwaukee etc. R. R. Co., 59 Wis. 364.

of the thing viewed. What they see they know absolutely. If a witness testify to anything which they know by the evidence of their senses on the view is false, they are not bound to believe, indeed cannot believe, the witness, and they may disregard his testimony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a witness testify that a certain farm is hilly and rugged when the view has disclosed to the jury and to every juror alike that it is level and smooth, or if a witness testifying that a given building was burned before the view, and the view discloses that it had not been burned, no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in regard of testimony given in court.

“But, if the fact to which the jury may thus take cognizance is only one of many elements which must be considered to determine some other fact which can only be satisfactorily determined by a resort to professional or expert testimony, the case is very different. Such are these cases. The jury were to assess the value of the land taken for the use of the railway company, and the damages to the other adjacent lands of the respective owners resulting from such taking. To do this intelligently it became necessary to determine the location, quality and condition of the land, the uses to which it was or might be applied, its market value, the manner in which the taking of a part of the tract would affect the residue, and perhaps other conditions affecting such value and damages. Some of these conditions, and more especially the value of the land, could not be definitely determined by the view alone, and cannot properly be said to be within the common knowledge of the jury. The opinions of witnesses acquainted with the values of such property are essential to an intelligent judgment.

“At the common law a view might have been had in a real action, and by statute in any action, to the end that the jury might see the land or thing claimed to enable the jurors

better to understand the evidence on the trial. Jacob's Law Dict., tit. 'View.' We think such is still the office of a view. Hence, whatever the jury in each of these cases learned of the lands in question by the view, was available to enable them to determine the weight of conflicting testimony respecting value and damage, but no further. For reasons hereinafter more fully stated, we think such value and damages could only be assessed upon the evidence given by the witnesses, and that an assessment outside of the evidence could not be upheld. For instance, if no witness had estimated the compensation to which a plaintiff was entitled at less than \$500, or more than \$1,000, a verdict for less than \$500 or more than \$1,000 should be set aside, because unsupported by the evidence. * * * To allow jurors to make up their verdict on their individual knowledge of disputed facts material to the case not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination, and the benefit of all the tests of credibility which the law affords. Besides, the evidence of such knowledge, or of the grounds of such opinions, could not be preserved in a bill of exceptions or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel the appellate court to affirm judgments on the facts, when all of the evidence is before it and there is none whatever to support the judgment. The court would be obliged to presume that the jury or some juror had, or at least thought he had, some personal knowledge of facts outside the testimony, or contrary to it, which would sustain the judgment. Such a ruling in a case, the procedure in which was governed by common law rules of evidence, we presume was never heard of.

"We think the correct rule in these cases is that above stated, to-wit, if the testimony of value and damages is conflicting, the jury may resort to their own general knowledge

of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony, but their assessment must be supported by the testimony, or it cannot stand.”⁵

Where the jury viewed the premises and the case was submitted to them without evidence, it was held, on appeal, that the court could not interfere with the verdict, as there was no evidence in the record and the court could have no knowledge of what the jury saw.⁶

§ 426. The right to open and close.—On the trial of the question of damages, the right to open and close the case is in the owner of the land taken or damaged.¹ While the

⁵ *Washburn v. Milwaukee etc. R. R. Co.*, 59 Wis. 364, 368; this case was approved and followed in *Munkovitz v. Chicago, Milwaukee & St. Paul R. R. Co.*, 64 Wis. 403, and *Seefeld v. Chicago, Milwaukee & St. Paul Ry. Co.*, 67 Wis. 96. Similar language is used by the Iowa court, which, in speaking of the statute in question, says: “The question then arises as to the purpose and intent of this statute. It seems to us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party. If they are thus permitted to include their personal examination, how could a court

ever properly set aside their verdict as being against the evidence, or even refuse to set it aside without knowing the facts ascertained by such personal examination by the jury?” *Close v. Samm*, 27 Ia. 503, 508.

⁶ *Peoria etc. Ry. Co. v. Barnum*, 107 Ills. 160.

§ 426.

¹ *Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 258; *Evansville & Crawfordsville R. R. Co. v. Miller*, 30 Ind. 209; *Grand Rapids & Indiana R. R. Co. v. Horn*, 41 Ind. 479; *Connecticut River R. R. Co. v. Clapp*, 1 Cush. 559; *Winnisimmet Co. v. Grueby*, 111 Mass. 543; *Burt v. Wigglesworth*, 117 Mass. 302; *Minnesota Valley R. R. Co. v. Doran*, 17 Minn. 188; *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500; *Omaha & Republican Valley R. R. Co. v. Walker*, 17 Neb. 432; *Omaha, Niobrara & Black Hills R. R. Co. v. Umstead*, 17 Neb. 459; *Matter of New York, Lackawanna & Western R. R. Co.*, 33 Hun, 148; *Oregon & Cal. R. R. Co. v. Barlow*,

weight of authority supports this proposition, the opposite doctrine is strenuously maintained in several of the States.² It will be proper, therefore, to consider the question on its merits. It may be conceded that the question is to be determined by the application of the general rules and principles of evidence to the particular case. Greenleaf says "that the obligation of proving any fact lies upon the party who *substantially asserts* the affirmative of the issue."³ Wharton, in his work on Evidence, states the rule as follows: "It makes no difference, therefore, whether the actor is plaintiff or defendant, so far as concerns the burden of proof. If he undertake to make out a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. Hence it may be stated, as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof, which he must satisfactorily sustain."⁴ These rules are laid down with reference to *formal* issues of fact in common law proceedings. In condemnation proceedings there are usually no formal pleadings and never any formal issues on the question of damages. The general rules which have been referred to cannot be applied without ascertaining what the *substantial* issue is in such inquiries and how the parties would be arranged with respect to it, if it was put into the form of a

³ Or. 311; Charleston etc. R. R. Co. v. Blake, 12 Rich. (S. C.) 634.

² Montgomery etc. Ry. Co. v. Sayre, 72 Ala. 443; Harrison v. Young, 9 Ga. 359; McReynolds v. Baltimore & Ohio Ry. Co., 106 Ills. 152; South Park Commissioners v. Trustees of Schools, 107 Ills. 489.

In an early case in Illinois the land-owner was held to have the

burden of proof. County of Sangamon v. Brown, 13 Ills. 207. So, where the owner filed a cross petition for damages to lots not taken, the burden is held to be on the owner as to the issue thus presented. Neff v. Cincinnati, 32 Ohio St. 215.

³ Greenleaf Evi. § 74.

⁴ 1 Wharton Evi. § 357.

proposition affirmed on the one side and denied on the other. The question to be determined is, What is the amount which the land-owner is entitled to receive as just compensation? It is always a conceded fact that he is entitled to something. The proceeding is always one to take property or some interest therein, or to obtain compensation for property which has already been taken. The fact of the taking implies the right to receive compensation. The party seeking the condemnation concedes the right to compensation, and is always willing as matter of fact to pay a certain sum. The amount may or may not be understood between the parties. In nearly all cases there must be an attempt to agree before the compulsory powers can be resorted to, and in such negotiations it is usually disclosed what the one party is willing to give and what the other party is willing to take. As to the amount which the party condemning is willing to give or which he concedes to be the amount of the just compensation to be paid, there is no controversy and no issue in form or substance between the parties. The real issue is as to whether the compensation is more than the amount conceded.⁵ If this issue was put in form it would consist of an affirmation on the part of the land-owner that the amount of compensation was more than a certain sum and of a denial of this affirmation by the other party. This is always the practical issue between the parties, and the land-owner always in effect maintains the affirmative of this issue. Consequently, upon the principle that he who maintains the affirmative of an issue must assume the burden of proof, the land-owner is entitled to open and close the case, and this is true no matter whether his position is plaintiff or defendant.⁶

⁵ This is analogous to the mode of determining the jurisdiction of the U. S. Court in respect to the amount involved. It depends not upon the amount involved *in the suit*, but upon the amount *actually* in dispute between the parties. *Tintzman v. National Bank*, 100 U. S. 6, *Dows v. Johnson*, 110 U. S. 223.

⁶ *Burt v. Wigglesworth*, 117 Mass. 302, and other cases cited above.

The same conclusion is reached in some of the cases on the principle that he who claims damages the amount of which is unliquidated is entitled to open and close, notwithstanding the fact that on the issue as to the *right* to damages the burden is on the other party.⁷

In the trial of other issues than the amount of damages, such as the necessity of taking particular property or the public utility of a particular improvement, the burden of proof is upon those who are seeking to have the appropriation made, and they are entitled to open and close the case.⁸

§ 427. Practice as to consolidation of cases and separate trials.—These matters are usually provided for by statute, and cases construing such statutes are given below.¹ In the absence of any express statutory provision it would seem to rest in the discretion of the trial court whether distinct claims for damages by the same work or improvement should be tried together or separately.²

§ 428. Instructions.—The same principles apply in regard to instructions as in other cases. The court should not attempt to interfere with the province of the jury by instructing them as to the comparative weight of different kinds of evidence.¹ It is error to call attention to the evidence of

⁷ Connecticut River R. R. Co. *v.* Clapp, 1 *Cush.* 559; Minnesota Valley R. R. Co. *v.* Doran, 17 *Minn.* 188; Matter of New York, Lackawanna & Western R. R. Co., 33 *Hun.* 148; 1 *Greenl. Evi.* § 76.

⁸ *Neff v. Reed*, 98 *Ind.* 341.

§ 427.

¹ *Grayville v. Mattoon R. R. Co. v. Christy*, 92 *Ills.* 337; *Bowman v. Carondelet Ry. Co.*, 102 *Ills.* 459; *Brown v. Ellis*, 26 *Ia.* 85; *Richardson v. Curtis*, 2 *Cush.* 341; *Pusey's Appeal*, 83 *Pa. St.* 67; *Williams' Executors v. Pittsburgh*, 83 *Pa. St.* 71; *Heyl v. Philadelphia*, 12 *Phila.*

291; *Abrahams v. Mayor etc. of London*, 37 *L. J. Ch.* 732; *Starr v. Same*, 7 *L. R. Eq. Cas.* 236.

² *Springfield v. Sleeper*, 115 *Mass.* 587; *Burt v. Wigglesworth*, 117 *Mass.* 302. In *Giesy v. Cincinnati, W. & Z. R. R. Co.*, 4 *Ohio St.* 308, it was held that each owner was entitled to a separate trial, though the statute was silent on the subject.

§ 428.

¹ *Cook v. South Park Commissioners*, 61 *Ills.* 115; *Smith v. Chicago etc. R. R. Co.*, 105 *Ills.* 511; *Watson v. Milwaukee & Madison Ry. Co.*, 57 *Wis.* 332.

one side only,² or one particular fact or item of evidence.³ It is not error that the instructions imply that the land-owner is entitled to something, when the evidence of both sides concedes it.⁴ Instructions should not deal too much in general principles and abstract propositions, but should be applicable to the facts of the particular case.⁵ In regard to the law applicable to such cases, the reader is referred to the other chapters where the various questions are discussed.

§ 429. Arbitration.—Where the condemnation is by individuals or corporations, the question of damages may be settled by arbitration in the same manner as any other private dispute, and in such an arbitration the statutory forms need not be followed.¹ But in the case of condemnation on behalf of the public, where the mode of ascertaining the compensation is pointed out by statute, that mode must be pursued, and an arbitration is unauthorized.² A statute which provides for submitting to arbitration any “controversy which might be the subject of a personal action at law or of a suit in equity,” does not include a claim for damages under the flowage acts.³

² *Dupuis v. Chicago & North Wisconsin Ry. Co.*, 115 Ills. 97.

§ 429.

³ *Cross v. Plymouth*, 125 Mass. 557.

¹ *Viele v. Troy & Boston R. R. Co.*, 20 N. Y. 184; *La Crosse & Milwaukee R. R. Co. v. Seeger*, 4 Wis. 268; *Collins v. South Staffordshire Ry. Co.*, 21 L. J. Ex, N. S. 247.

⁴ *Commissioners of Lyon Co. v. Kiser*, 26 Kan. 279.

² *Eastman v. Stowe*, 37 Me. 86; *Parst v. Bayonne*, 39 N. J. L. 559; *McCann v. Otoe Co.*, 9 Neb. 324.

⁵ *Whitman v. Boston & Maine R. R. Co.*, 3 Allen, 133; *Otoe Co. v. Heys*, 19 Neb. 289.

³ *Henderson v. Adams*, 5 Cush. 610.

CHAPTER XIX.

EVIDENCE.

§ 430. The general rules of evidence apply.—In the trial of condemnation cases by a court or jury, the general rules of evidence apply, except as modified by the statute under which the proceedings are had. It would be out of place, therefore, in this connection to do more than notice the questions which are peculiar to condemnation proceedings, referring the reader to the ordinary treatises on evidence for a discussion of those questions which are common to these and other proceedings alike.

§ 431. Competency of evidence generally.—It may be stated as a general rule that any evidence is competent which tends to prove or disprove the matters at issue. In nearly all condemnation proceedings the only matter at issue is the amount of just compensation or damages. The rules which apply in estimating the damages and the elements which should be included or excluded are discussed in the succeeding chapter. The evidence should conform to the rules there laid down. Whatever is a legitimate element of consideration in estimating the damages may be proved by proper evidence, and whatever is not legitimate cannot be proved. It is principally the mode of proof, and not the things to be proved, which forms the subject of consideration in this chapter.

§ 432. The burden of proof.—This subject has been fully discussed in the previous chapter, in considering the right to open and close the case.¹

§ 432.

¹ § 426.

§ 433. Competency of witnesses generally.—In regard to the competency of witnesses, the general rules apply. The disqualification of interest being now generally removed by statute, the question of competency seldom arises. Under the common law rule it has been held that petitioners for the improvement¹ and stockholders in a railroad corporation seeking to condemn land² were disqualified by interest. The fact that one has acted as a viewer does not render him incompetent.³ An objection to the competency of a witness must be made when he is offered, or it is waived.⁴

§ 434. Limiting the number of witnesses.—It is competent for the court to limit the number of witnesses which may be called to testify as to any particular fact or matter. This is frequently done in condemnation suits in respect of the question of value or damages.¹ The matter is in the discretion of the trial court, whose action in the matter will not be interfered with except in cases of abuse.² Limiting the number to five on each side was held proper in the cases cited.

§ 435. Opinion of witnesses as to value.—All the authorities, so far as they have come to our notice, agree that witnesses may give their opinion as to the value of property.¹

§ 433.

¹ *Watts v. Derry*, 22 N. H. 498; *Kennet's Petition*, 24 N. H. 139.

² *Dearborn v. Boston etc. R. R. Co.*, 24 N. H. 179; *Contra: Newcastle & Richmond R. R. Co. v. Brumback*, 5 Ind. 543.

³ *Plank Road Co. v. Thomas*, 20 Pa. S. 91; *Dorlan v. East Brandywine etc. R. R. Co.*, 46 Pa. S. 520.

⁴ *Watts v. Derry*, 22 N. H. 498.

§ 434.

¹ *Union Railroad, Transfer and Stock Yard Co. v. Moore*, 80 Ind. 458; *Everett v. Union Pacific Ry. Co.*, 59 Ia. 243; *Sheldon v. Minne-*

apolis & St. Louis Ry. Co., 29 Minn. 318.

² *Ibid.*

§ 435.

¹ *St. Louis etc. R. R. Co. v. Anderson*, 39 Ark. 167; *Texas & St. Louis Ry. Co. v. Kirby*, 44 Ark. 103; *Little Rock Junction Ry. Co. v. Woodruff*, 49 Ark. 381; *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *Cincinnati & Georgia R. R. Co. v. Mims*, 71 Ga. 240; *Illinois & Wis. R. R. Co. v. Van Horn*, 18 Ills. 257; *Johnson v. Freeport & Miss. River Ry. Co.*, 111 Ills. 413; *Chicago & Evanston R. R. Co. v.*

Opinions should be confined to the property in question, unless on cross-examination for the purpose of testing the knowledge and competency of the witness.² Where a part only is taken, witnesses may state the value before and after the taking,³ or with and without the improvement,⁴ and may

Blake, 116 Ills. 163; Evansville etc. R. R. Co. v. Cochran, 10 Ind. 560; Indianapolis etc. R. R. Co. v. Pugh, 85 Ind. 279; Yost v. Conroy, 92 Ind. 464; Watson v. Crowsore, 93 Ind. 220; Winkleman v. Des Moines North Western Ry. Co., 62 Ia. 11; McClean v. Chicago etc. Ry. Co., 67 Ia. 568; Kansas Central Ry. Co. v. Allen, 24 Kan. 33; Central Branch U. P. R. R. Co. v. Andrews, 37 Kan. 162; Snow v. Boston & Maine R. R. Co., 65 Me. 230; Shaw v. Charlestown, 2 Gray, 107; West Newbury v. Chase, 5 Gray, 421; Hosmer v. Warner, 15 Gray, 46; Bennet v. Clemence, 6 Allen, 10; Shattuck v. Stoneham Branch R. R. Co., 6 Allen, 115; Pinkham v. Chelmsford, 109 Mass. 225; Sexton v. North Bridgewater, 116 Mass. 200; Hawkins v. Fall River, 119 Mass. 94; Winona & St. Peter R. R. Co. v. Waldron, 11 Minn. 515; Colvill v. St. Paul & Chicago Ry. Co., 19 Minn. 283; Lehmicke v. St. Paul, Stillwater etc. R. R. Co., 19 Minn. 464; Curtis v. St. Paul etc. R. R. Co., 20 Minn. '28; Sherwood v. St. Paul & Chicago Ry. Co., 21 Minn. 127; County of Blue Earth v. St. Paul & Sioux City R. R. Co., 28 Minn. 503; Sherman v. St. Paul etc. Ry. Co., 30 Minn. 227; Hosher v. Kansas City etc. R. R. Co., 60 Mo. 303; Randall v. Pacific R. R. Co., 65 Mo. 325; Springfield & Southern Ry. Co. v. Calkin, 90 Mo. 538; Re-

publican Valley R. R. Co. v. Arnold, 13 Neb. 485; Same v. Linn, 15 Neb. 234; Troy & Boston R. R. Co. v. Northern Turnpike Co., 16 Barb. 100; Matter of Utica etc. R. R. Co., 56 Barb. 456; Matter of City of Rochester, 40 Hun, 588; Cleveland etc. R. R. Co. v. Ball, 5 Ohio St. 568; Pennsylvania & New York R. R. Co. v. Bunnell, 81 Pa. S. 414; Pittsburg & Lake Erie R. R. Co. v. Robinson, 95 Pa. S. 426; Tingley v. Providence, 8 R. I. 493; Washburn v. Milwaukee & Lake Winnebago R. R. Co., 59 Wis. 364; Lehigh Valley Coal Co. v. Chicago, 26 Fed. R. 415.

² Wyman v. Lexington & West Cambridge R. R. Co., 13 Met. 316; Bennett v. Clemence, 6 Allen, 10.

³ Indianapolis etc. R. R. Co. v. Pugh, 85 Ind. 279; McClean v. Chicago etc. Ry. Co., 67 Ia. 568; Missouri River etc. R. R. Co. v. Owen, 8 Kan. 409; Kansas Central Ry. Co. v. Allen, 24 Kan. 33; West Newbury v. Chase, 5 Gray, 421; Curtis v. St. Paul etc. R. R. Co., 20 Minn. 28; Sherwood v. St. Paul & Chicago Ry. Co., 21 Minn. 127; Hosher v. Kansas City etc. R. R. Co., 60 Mo. 303; Randle v. Pacific R. R. Co., 65 Mo. 325; Pennsylvania & New York R. R. Co. v. Bunnell, 81 Pa. S. 414; Tingley v. Providence, 8 R. I. 493.

⁴ Yost v. Conroy, 92 Ind. 464; County of Blue Earth v. St. Paul & Sioux City R. R. Co., 28 Minn. 503.

in all cases give the reasons upon which to base their opinions.⁵ But in giving their reasons they should not be allowed to go into the details of particular sales or transactions,⁶ though such details may be called out on cross-examination.⁷ Such opinions should, in general, be limited to the value of the property at the time with reference to which its value is required to be estimated,⁸ but in one case an expert in values was allowed to give in evidence a set of values he had fixed on the property in question six months before and to read the same from a memorandum which he made at the time.⁹ The jury are not bound by the opinions of the witnesses, but may consider them in connection with all other facts in evidence.¹⁰

§ 436. Opinions as to the amount of damages or benefits.

—There is quite a conflict of authority as to whether witnesses may be allowed to state their opinions as to the amount of damage or benefit to property by reason of works constructed under the power of eminent domain. It is now held that such opinions are competent, by the courts of Arkansas,¹ Illinois,² Maine,³ Massachusetts,⁴ Minnesota,⁵ New

⁵ Illinois & Wisconsin R. R. Co. v. Van Horn, 18 Ills. 257; McClean v. Chicago etc. Ry. Co., 67 Ia. 568; Sexton v. North Bridgewater, 116 Mass. 200; Burt v. Wigglesworth, 117 Mass. 302; Hawkins v. Fall River, 119 Mass. 94; Sawyer v. Boston, 144 Mass. 470.

⁶ Central Pacific R. R. Co. v. Pearson, 35 Cal. 247.

⁷ Same, and Dickenson v. Fitchburg, 13 Gray, 546.

⁸ See *Post*, § 477.

⁹ Cobb v. Boston, 109 Mass. 438.

¹⁰ Watson v. Crowsore, 93 Ind. 220; Green v. Chicago, 97 Ills. 370.

§ 436.

¹ Texas & St. Louis Ry. Co. v. Kirby, 44 Ark. 103.

² Hays v. Ottawa etc. R. R. Co., 54 Ills. 373; Galena & S. W. R. R. Co. v. Haslam, 73 Ills. 494; Keithsburg & East R. R. Co. v. Henry, 79 Ills. 290; Chicago v. McDonough, 112 Ills. 85; Spear v. Drainage Comrs., 113 Ills. 632; East St. Louis v. O'Flynn, 19 Ills. App. 64.

³ Snow v. Boston & Maine R. R. Co., 65 Me. 230.

⁴ Dwight v. County Comrs., 11 Cush. 201; Shaw v. Charlestown, 2 Gray, 107; Shattuck v. Stoneham Branch R. R. Co., 6 Allen, 115; Swan v. County of Middlesex, 101 Mass. 173.

⁵ Simmons v. St. Paul & Chicago R. R. Co., 18 Minn. 184; Colvill v. St. Paul & Chicago Ry. Co., 19

York,⁶ Oregon,⁷ Pennsylvania,⁸ Texas,⁹ West Virginia,¹⁰ and Wisconsin.¹¹ On the other hand, such opinions are held to be incompetent in the States of Alabama,¹² Georgia,¹³ Indiana,¹⁴ Iowa,¹⁵ Kansas,¹⁶ Nebraska,¹⁷ Ohio,¹⁸ and Rhode Island.¹⁹ In some of the latter States it has been held, and very likely is the practice in all of them, that witnesses may state the value before and after the taking or

Minn. 283; *Lehmicke v. St. Paul, Stillwater etc. R. R. Co.*, 19 Minn. 464; *Curtis v. St. Paul etc. R. R. Co.*, 20 Minn. 28; *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 Minn. 127; *Sherman v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 227.

⁶ *Rochester etc. R. R. Co. v. Bud-long*, 6 How. Pr. 467; *Same v. Same*, 10 How. Pr. 289; *Matter of Utica etc. R. R. Co.*, 56 Barb. 456; *Hine v. New York El. R. R. Co.*, 36 Hun, 293. A contrary view is expressed in *Matter of New York, West Shore & Buffalo Ry. Co.*, 29 Hun, 609.

⁷ *Portland v. Kamm*, 10 Or. 383.

⁸ *White Deer Creek Improvement Co. v. Sassaman*, 67 Pa. S. 415; *Pittsburgh etc. R. R. Co. v. Robinson*, 95 Pa. S. 426.

⁹ *Telephone Telegraph Co. v. Forke*, 2 Tex. App. Civil Cas. p. 318.

¹⁰ *Railroad Co. v. Foreman*, 24 W. Va. 662.

¹¹ *Snyder v. Western Union R. R. Co.*, 25 Wis. 60; *Parks v. Wisconsin Central R. R. Co.*, 33 Wis. 413; *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis. 311; *Neilson v. Chicago, Mil. & N. W. Ry. Co.*, 58 Wis. 516; *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364. *Contra: Ferrand v. Chicago & North Western Ry. Co.*, 21

Wis. 435; *Stowell v. Milwaukee*, 31 Wis. 523.

¹² *Montgomery & West Point R. R. Co. v. Varner*, 19 Ala. 185; *Alabama & Florida R. R. Co. v. Burkett*, 42 Ala. 83.

¹³ *Brunswick & Albany R. R. Co. v. McLaren*, 47 Ga. 546.

¹⁴ *Evansville etc. R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Same v. Stringer*, 10 Ind. 551; *New Albany & Salem R. R. Co. v. Huff*, 19 Ind. 315; *Hagaman v. Moore*, 84 Ind. 496; *Yost v. Conroy*, 92 Ind. 464.

¹⁵ *Dalzell v. Davenport*, 12 Ia. 437; *Prosser v. Wapello*, 18 Ia. 262; *Harrison v. Iowa Midland R. R. Co.*, 36 Ia. 323.

¹⁶ *Parsons Water Co. v. Knapp*, 33 Kan. 752; *contra: Leavenworth etc. Ry. Co. v. Paul*, 28 Kan. 816.

¹⁷ *Fremont etc. R. R. Co. v. Whalen*, 11 Neb. 585; *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421; *Same v. Beebe*, 14 Neb. 463; *contra: Republican Valley R. R. Co. v. Arnold*, 13 Neb. 485; *Same v. Hays, Ibid.* 489.

¹⁸ *Atlantic etc. R. R. Co. v. Campbell*, 4 Ohio St. 583; *Cleveland etc. R. R. Co. v. Ball*, 5 Ohio St. 568. But see *Miller v. Weber*, 1 Ohio Circ. Ct. Rep. 130.

¹⁹ *Tingley v. Providence*, 8 R. I. 493; *Brown v. Providence & Springfield R. R. Co.*, 12 R. I. 238.

injury, or with or without the improvement.²⁰ This in effect permits the very thing to be done which is condemned, since the amount of damages or benefits, as the case may be, is then arrived at by the mere arithmetical process of subtraction. The law is supposed to discourage all indirect and circuitous methods. Why a witness should not be allowed to state at once and directly his opinion of the amount of damages or benefits in answer to a single question, instead of stating it indirectly in answer to two questions, we are unable to perceive. The distinction attempted to be maintained between the two methods is without any substantial difference and must eventually be abandoned. This is clearly pointed out in an opinion of Selden, J., which we subjoin.²¹ The

²⁰ *Hagaman v. Moore*, 84 Ind. 496; *Yost v. Conroy*, 92 Ind. 464; *Dalzell v. Davenport*, 12 Ia. 437; *Harrison v. Iowa Midland Ry. Co.*, 36 Ia. 323; *Missouri River etc. R. R. Co. v. Owen*, 8 Kan. 409; *Kansas Central Ry. Co. v. Allen*, 24 Kan. 33; *Atlantic etc. R. R. Co. v. Campbell*, 4 Ohio St. 583; *Tingley v. Providence*, 8 R. I. 493.

²¹ We quote from the opinion in *Rochester & Syracuse R. R. Co. v. Budlong*, 10 How. Pr. 289, 293: "But all this is merely preliminary to my main object, which is, to examine the foundation of the rule, so often repeated, and so frequently misunderstood, that while opinions are uniformly received upon a question of value, they can never be received upon a question of damages. It is clear, that in many cases the two questions are identical; that is, the amount of damages depends entirely upon a question of value. For instance, in an action upon the warranty of a horse, proved to have a certain defect warranted against, a witness competent to tes-

tify, may be asked, first, the value of the horse as he is; then, what would be his value in case he was as warranted—leaving to the jury the important intellectual process of subtracting the one from the other; or this process may be performed by the witness, who may then give the result. The difference constitutes the damages in the case. Why, then, may not the question be, what damages has the plaintiff sustained by reason of the breach of the defendant's warranty? It is certain that the answer, if correct, must be precisely the same as to the previous question; and yet the question *in this form* would be improper, for the reason that it involves a *question of law*. *Damages* is a legal term; and the rule of damages is, in all cases, a question for the court; an answer to a question, as to the amount of damages *in a suit*, must necessarily assume what is the rule or measure of damages, and is therefore inadmissible. But, in the case supposed, if the question be so framed as to call for

true rule is that a witness may give his opinion as to the amount of damages or benefits when the question relates simply to a *difference in values*, and opinions are admissible to prove the values. Witnesses have also been allowed to state what per cent. property was damaged or benefited by a public work or improvement.²² Where property is affected in a variety of ways by the same improvement, as by constructing a railroad through it, it has been held improper to ask witnesses the effect of each particular element of damage or benefit, but that they should give their opinion in view of all combined.²³

§ 437. Who are competent to give such opinions.—This is a question the determination of which is left mostly to the discretion of the trial judge.¹ There is no presumption that

the difference in value of the horse, and nothing else, it is no objection to it that the word *damages* is used. As for instance, what is the amount of damage or injury to the horse, arising from the defect? It would be absurd to exclude this question, as calling for an opinion as to damages, and not as to value. The difference is merely verbal. There is clearly no such inherent distinction between questions of value and questions of damages, if you exclude from the latter all idea of any legal rule or measure of damages, as will bring one within and the other without the province of opinions from witnesses. Every one who has had much experience in judicial trials, knows, that in most cases brought for the recovery of unliquidated damages, the opinion of witnesses enters, of necessity, as a large ingredient into the evidence which enables the jury to estimate the damages. If the rule, that whenever opinions are resorted to,

the fact upon which the witness bases his opinion shall in all cases be given, were strictly observed, there would, I think, be far less hostility, both at the bar and on the bench, to their admission. Where this is done, the jury have all the means of forming an *independent judgment*, which the case affords, together with all the aid they can derive from the opinions of those conversant with the subject." See also Rogers on Expert Testimony, § 152.

²² Leavenworth etc. Ry. Co. v. Paul, 28 Kan. 816.

²³ Matter of New York, West Shore & Buffalo Ry. Co., 29 Hun, 609; Matter of Utica etc. R. R. Co., 56 Barb. 456.

§ 437.

¹ St. Louis etc. R. R. Co. v. Anderson, 39 Ark. 167; Texas & St. Louis Ry. Co. v. Kirby, 44 Ark. 103; Howard v. Providence, 6 R. I. 514; Warren v. Spencer Water Co., 143 Mass. 155.

a witness is competent to give an opinion, and his competency must be shown.² It must appear that he has some peculiar means of forming an intelligent and correct judgment as to the value of the property in question, or the effect upon it of a particular improvement, beyond what is presumed to be possessed by men generally.³ These peculiar means may consist in a general knowledge of values derived from buying and selling, valuing and managing real estate in the town or county where the particular property is situated;⁴ or in a long acquaintance with the particular property and the neighborhood where it is situated, accompanied with the occupation or ownership of similar property,⁵ and especially if accompanied with a knowledge of sales of similar property;⁶ or in any other matter which the court can see gives the witness some peculiar advantage in forming a correct opinion. It is not necessary that the witnesses should have been engaged in the real estate business. Intelligent men who have resided a long time in the place, and who are acquainted with the land in question and say they know its value, are competent, although they are merchants or farmers and have never bought or sold land in the place.⁷ It is

² Missouri Pacific Ry. Co. v. Coon, 15 Neb. 232.

³ Boston & Maine R. R. Co. v. Old Colony & Fall River R. R. Co., 3 Allen, 142.

⁴ Central Branch U. P. R. R. Co. v. Andrews, 37 Kan. 162; Swan v. County of Middlesex, 101 Mass. 178.

⁵ St. Louis etc. R. R. Co. v. Anderson, 39 Ark. 167; Keithsburg & East R. R. Co. v. Henry, 79 Ills. 290; Kansas Central Ry. Co. v. Allen, 24 Kan. 33; Johnson v. Freeport etc. Ry. Co., 111 Ills. 413; Republican Valley R. R. Co. v. Arnold, 13 Neb. 485.

⁶ Walker v. Boston, 8 Cush. 279;

West Newbury v. Chase, 5 Gray, 421; Whitman v. Boston & Maine R. R. Co., 7 Allen, 313; Pinkham v. Chelmsford, 109 Mass. 225.

⁷ Cherokee v. S. C. & I. F. etc. Co., 52 Ia. 279; Lehmicke v. St. Paul, Stillwater etc. R. R. Co., 19 Minn. 464; Curtis v. St. Paul etc. R. R. Co., 20 Minn. 28; Springfield & Southern Ry. Co. v. Calkins, 90 Mo. 538; Burlington etc. R. R. Co. v. Schlantz, 14 Neb. 421. *Contra:* Buffum v. New York & Boston R. R. Co., 4 R. I. 221; and see last two notes. In Jacksonville etc. R. R. Co. v. Caldwell, 21 Ills. 75, it is said that, in estimating the damages for taking a right of way through a

not necessary that one's opinion should be founded upon actual sales.⁸ One who leased a building on the same street and sub-rented it, and who knew nothing more than one in his position naturally would, was held competent to testify as to the value of the lease, though he had not seen the building in question.⁹ But a tenant of a building in Boston, a shoemaker by trade, who had merely rented five different buildings in different parts of the city, but had no other experience in real estate, was held incompetent to give an opinion of the value of the building he occupied.¹⁰ One who has been assessor, and whose duties require him to assess the property in question and other property in the neighborhood, is competent to give an opinion.¹¹ His position and duties qualify him to form a correct opinion in such matters. A witness who had only seen part of the land in question on two occasions, and who stated that he was not much acquainted with it, was held incompetent.¹² A witness with but little experience was allowed to give his opinion as to the value of sufficient water to supply the plaintiff's meadow for raising cranberries.¹³

The value of such opinions depends upon the intelligence of the witness and the knowledge and experience which he

farm, more weight should be given to the evidence of farmers than to the evidence of persons in other pursuits. In *Brown v. Providence & Springfield R. R. Co.*, 12 R. I. 238, it was held that farmers were only competent to say how much land was worth for farming purposes, and not to say what it was worth generally.

⁸ *Chicago & Evanston R. R. Co. v. Blake*, 116 Ills. 163; *Montana Ry. Co. v. Warren*, 6 Mon. 275.

⁹ *Lawrence v. Boston*, 119 Mass. 126.

¹⁰ *Whitney v. Boston*, 98 Mass. 312.

¹¹ *Dickenson v. Fitchburg*, 13 Gray, 546; *Whitman v. Boston & Maine R. R. Co.*, 7 Allen, 813; *Sexton v. North Bridgewater*, 116 Mass. 200; *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544. In the last case it was held that it might be shown, by way of establishing competency, that the witness had testified frequently in such cases.

¹² *Pittsburgh & Charleston Ry. Co. v. Vance*, 115 Pa. S. 325.

¹³ *Warren v. Spencer Water Co.*, 143 Mass. 155.

possesses in such matters,¹⁴ and is in all cases a question for the jury.¹⁵

§ 438. Opinions of witnesses as to other matters.—Opinions of witnesses as to the necessity or public utility of the proposed taking or improvement are not admissible.¹ But one who is familiar with all the facts and has shown himself competent to judge may give his opinion as to the probable effect upon the public health of a proposed work, such as a drain or dam.² A grazier may give his opinion as to the effects upon cattle of their being disturbed by the operation of a railroad through the pasture where they are kept.³ An engineer who has made a study of such things may testify as to the probable effect of enlarging and raising a reservoir upon adjoining land, as respects rendering it damp and unfit for building.⁴

§ 439. Admissions.—In regard to the proof of admissions of the parties, the same general rules apply as in other cases. It is competent to prove the declarations of the owner of the property in question as to its value¹ and the price at which he has offered to sell it,² and other admissions which are pertinent to the issue.³ But such declarations, to be competent, should be so recent in point of time as to be presumptively applicable at the time of the taking.⁴ A witness cannot state

¹⁴ *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. R. 415.

³ *Baltimore & Ohio R. R. Co. v. Thompson*, 10 Md. 76.

¹⁵ *Johnson v. Freeport etc. Ry. Co.*, 111 Ills. 413; *Pittsburgh etc. R. R. Co. v. Robinson*, 95 Pa. S. 426.

⁴ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

§ 439.

¹ *Central Branch U. P. R. R. Co. v. Andrews*, 37 Kan. 162.

² *East Brandywine etc. R. R. Co. v. Ranck*, 78 Pa. S. 454.

³ *Hobart v. County of Plymouth*, 100 Mass. 159; *Paine v. Woods*, 108 Mass. 160.

⁴ *Central Branch U. P. R. R. Co. v. Andrews*, 37 Kan. 162.

¹ *Loshbaugh v. Birdsell*, 90 Ind. 466; *Dillman v. Crooks*, 91 Ind. 158; *Yost v. Conroy*, 92 Ind. 464; *Thompson v. Deprez*, 96 Ind. 67; *People v. Burton*, 65 N. Y. 452.

² *Burnett v. Meehan*, 83 Ind. 566.

his *impressions* as to what the owner has said concerning the value of his property.⁵ In a suit by a lessee for damages by reason of widening a street, statements of the landlord, who had settled with the city and agreed to save it harmless from all claims by the tenants, cannot be proved as admissions, since he is not a party to the proceeding.⁶ An owner agreed to release damages to his property by reason of widening a street, in consideration of certain alterations being made in the street. Alterations were made, but not according to the agreement. In a suit by the owner it was held that the release was admissible, not as a release of damages, but as tending to show that alterations similar to those actually made were regarded by the owner as beneficial.⁷ In a railroad case it was held incompetent to show that the owner had once offered to donate his land if the company would locate its road *where he wanted it*.⁸ In a similar case it was held incompetent to prove that, after proceedings were commenced, the company offered and an agent of the owner agreed to accept a certain price for the property.⁹

§ 440. Whether the owner must prove his title.—Where the owner takes the initiative and institutes proceedings under the statute for an assessment of damages, or brings a suit at common law for the same purpose, he must prove his title, unless it is admitted by the proceedings,¹ as that lies at the foundation of the suit or proceedings.² Pos-

⁵ Matter of New York, West Shore & Buffalo R. R. Co., 33 Hun, 231.

⁶ Lawrence v. Boston, 119 Mass. 126.

⁷ Chase v. Worcester, 108 Mass. 60.

⁸ East Pennsylvania R. R. Co. v. Hiester, 40 Pa. S. 53.

⁹ Chicago, Evanston & Lake Superior R. R. Co. v. Catholic Bishop of Chicago, 119 Ills. 525.

§ 440.

¹ Benson v. Soule, 32 Me. 39.

² La Fayette v. Wortman, 107 Ind. 404; Costello v. Burke, 63 Ia. 361; Waltemeyer v. Wisconsin etc. Ry. Co., 71 Ia. 626; Jones' Heirs v. Barclay, 2 J. J. Marsh. Ky. 73; Nelson v. Butterfield, 21 Me. 220; Minot v. Cumberland County Comrs., 28 Me. 121; Thurston v. Portland, 63 Me. 149; Brainard v. Boston & New York Central R. R.

session alone is sufficient to enable one to maintain a suit or proceeding for an injury which affects the possession, but not for the value of the property or injury to the fee.³

When proceedings are instituted by the party condemning, the question of title is not usually submitted to the tribunal which assesses the damages or passes on the questions of necessity or public utility.⁴ The condition of the title is either ascertained beforehand and persons made parties and notified as the owners of particular interests, or, if this cannot be done, all persons interested are brought in by a general notice to all whom it may concern. In the former case title is admitted,⁵ in the latter, either the owners appear and show their various interests and titles and claim damages accordingly, or the damages are assessed and deposited and the owner obtains them by making proof of his title, as may be required by law.⁶ An issue of title may be made and decided if necessary.⁷

§ 441. Estoppel to deny title.—Where proceedings are instituted by the party seeking to condemn the property, and it is alleged in the petition that certain persons are owners of the property desired, proof of title is dispensed with and the petitioner is estopped to dispute the title as alleged in

Co., 12 Gray, 407; Tufts *v.* Charlestown, 117 Mass. 401; Directors of the Poor *v.* Railroad Co., 7 W. & S. 236; Philadelphia & Reading R. R. Co. *v.* Obert, 109 Pa. S. 193; Robbins *v.* Milwaukee & Horicon R. R. Co., 6 Wis. 636; Winchester *v.* Stevens Point, 58 Wis. 350.

³ King *v.* Tarlton, 2 Harris & McH., (Md.) 473; Trustees of State Lunatic Asylum *v.* County of Worcester, 1 Met. 437; Pace *v.* Freeman, 10 Ired. L. 103.

⁴ Norristown etc. Turnpike Co. *v.* Burkett, 26 Ind. 53; Spring Val-

ley Water Works *v.* San Francisco, 22 Cal. 434; Galveston H. & S. A. etc. R. R. Co. *v.* Mud Creek etc. Co., 1 Tex. App. Civil Cas. p. 169; Ft. Worth & Denver City Ry. Co. *v.* Hogsett, *Ibid.* p. 200; Appeal of Lefevre, 32 Cal. 565; Queen *v.* London & Northwestern Ry. Co., 23 L. J. Q. B. N. S. 185.

⁵ See *post*, § 441.

⁶ Bentonville R. R. Co. *v.* Stroud, 45 Ark. 278.

⁷ G. B. & L. Ry. Co. *v.* Haggart, 9 Col. 346.

the petition.¹ If a mistake is made, the petition should be amended or the proceedings abandoned.² If there is any doubt about the title, the allegation should not be made in positive terms. It may be stated that certain persons claim to be owners, or that the owners are unknown. The city of San Jose filed a petition to condemn certain property for a street, alleging that the defendant was the only owner. It was held to be estopped by its petition from showing that the land in question had been dedicated as a street for the purpose of affecting the damages. If it claims a dedication, it should proceed for obstructing the street.³

§ 442. What is sufficient proof of title.—Whenever it is necessary for the owner to prove title, a *prima facie* case is made out by proving possession under a deed purporting to convey a fee,¹ or even by proving possession claiming title.²

§ 441.

¹ Mount Sterling *v.* Givens, 17 Ills. 255; Peoria etc. Ry. Co. *v.* Bryant, 57 Ills. 473; Peoria etc. R. R. Co. *v.* Lansie, 63 Ills. 264; Metropolitan City Ry. Co. *v.* Chicago West Div. Ry. Co., 87 Ills. 317; Bensley *v.* Mountain Lake Water Co., 18 Cal. 306; San Jose *v.* Reed, 65 Cal. 241; Republican Valley R. R. Co. *v.* Hayes, 13 Neb. 489; Omaha etc. R. R. Co. *v.* Gerrard, 17 Neb. 587; Bentonville R. R. Co. *v.* Stroud, 45 Ark. 278; G. B. & L. Ry. Co. *v.* Haggart, 9 Col. 346; Wilcox *v.* St. Paul & Northern Pacific Ry. Co., 35 Minn. 439. Where a railroad company was required by its charter to name the owners of land, so far as they could be ascertained, in the report of its location, it was held that it was not estopped to dispute the title of one so named as owner. Allyn *v.* Providence etc. R. R. Co., 4 R. I. 457.

² Wilcox *v.* St. Paul & Northern Pacific Ry. Co., 35 Minn. 439.

³ San Jose *v.* Reed, 65 Cal. 241; also Board of Commissioners *v.* Bisby, 37 Kan. 253.

§ 442.

¹ Williamson *v.* Carlton, 51 Me. 449; Whitman *v.* Boston & Maine R. R. Co., 3 Allen, 133; Swenson *v.* Lexington, 69 Mo. 157; Carl *v.* Sheboygan & Fond du Lac R. R. Co., 46 Wis. 625; Benton *v.* Milwaukee, 50 Wis. 368. See Wisconsin cases cited in next note. A deed alone, without showing possession in the grantor, or possession under it, is insufficient. La Fayette *v.* Wortman, 107 Ind. 404. Where title is shown to be in B, a deed purporting to be from the heirs of B is not sufficient without proof of heirship. Costello *v.* Burke, 63 Ia. 361.

² Morrison *v.* Hinkson, 87 Ills. 587; St. Paul & Sioux City R. R. Co. *v.* Matthews, 16 Minn. 341;

Where deeds have been introduced for the purpose of showing title, it is held in Illinois that the jury was to take into account the consideration named therein, in fixing the value or damages.³

§ 443. Proving sales of similar property.—The propriety of allowing proof of the sales of similar property to that in question, made at or about the time of the taking, is left very much in doubt by the authorities. Such proof is held competent in Illinois,¹ Iowa,² Massachusetts,³ New Hampshire,⁴ New York,⁵ and Wisconsin.⁶ The cases show that the practice of admitting such testimony must be com-

Sherwood *v.* St. Paul & Chicago Ry. Co., 21 Minn. 127; Burlington & Mo. Riv. R. R. Co. *v.* Beebe, 14 Neb. 463; Lawrence Railroad Co. *v.* Cobb, 35 Ohio St. 94; Commissioners of Kensington *v.* Wood, 10 Pa. S. 93; Shoenberger *v.* Mulhol-
lan, 8 Pa. S. 134. *Contra:* Rob-
bins *v.* Milwaukee & Horicon R. R. Co., 6 Wis. 636; Winchester *v.* Stevens Point, 58 Wis. 350. In the latter case both sides of the question are elaborately discussed in an opinion of the court and in a dissenting opinion. Ham *v.* Wisconsin etc. Ry. Co., 61 Ia. 716, also favors the text.

¹ Jones *v.* Chicago etc. R. R. Co., 68 Ills. 380; but see Seefeld *v.* Chi-
cago, Milwaukee & St. Paul Ry. Co., 67 Wis. 96.

§ 443.

¹ St. Louis etc. R. R. Co. *v.* Hal-
ler, 82 Ills. 208; Colbertson & Blair
Packing and Provision Co. *v.* Chi-
cago, 111 Ills. 651.

² Cherokee *v.* S. C. & I. F. etc.
Co., 52 Ia. 279. The right to make
such proof is indirectly approved
in the following Iowa cases, by

rulings approving its rejection in particular cases upon other grounds than its entire incompetency. King *v.* Iowa Midland R. R. Co., 34 Ia. 458; Everett *v.* Union Pacific Ry. Co., 59 Ia. 243; Winklemans *v.* Des Moines Northwestern Ry. Co., 62 Ia. 11; Cummings *v.* Des Moines & St. Louis Ry. Co., 63 Ia. 397; Hollingsworth *v.* Same, 63 Ia. 443.

³ Paine *v.* Boston, 4 Allen, 168;
Shattuck *v.* Stoneham Branch R. R.
Co., 6 Allen, 115; Benham *v.* Dun-
bar, 103 Mass. 365; Chandler *v.*
Jamaica Pond Aqueduct Co., 122
Mass. 305; Gardner *v.* Brookline,
127 Mass. 358; Sawyer *v.* Boston,
144 Mass. 470.

⁴ March *v.* Portsmouth & Con-
cord R. R. Co., 19 N. H. 372; Con-
cord R. R. Co. *v.* Greely, 23 N. H.
237.

⁵ Matter of New York, Lacka-
wanna & Western Ry. Co *v.* Arnot,
27 Hun, 151.

⁶ West *v.* Milwaukee etc. Ry. Co.,
56 Wis. 318; Watson *v.* Milwaukee
& Madison Ry. Co., 57 Wis. 332;
Washburn *v.* Milwaukee & Lake
Winnebago R. R. Co., 59 Wis. 364.

mon with the *nisi prius* courts. On the other hand, such evidence is held to be wholly incompetent in Pennsylvania.⁷

A late case in Minnesota adopts the Pennsylvania doctrine,⁸ although in an earlier case the admission of such

⁷ East Pennsylvania R. R. Co. v. Hiester, 40 Pa.S. 53; Hays v. Briggs, 74 Pa. S. 373; Pennsylvania & New York R. R. Co. v. Bunnell, 81 Pa. S. 414; Pittsburgh, Va. & C. Ry. Co. v. Vance, 115 Pa. S. 325; Pittsburgh & Western R. R. Co. v. Patterson, 107 Pa. S. 461, 464. In the last case the court say: "It is well settled by numerous decisions of this court, that the proper measure of damages for lands taken for railroad purposes is the difference between the market value of the land before and after the appropriation of the right of way; and it seems to be equally well settled under the law of this State, that evidence of particular sales of alleged similar properties, under special circumstances, is inadmissible to establish market value; Searle v. Lackawanna R. R. Co., 9 Casey, 57; Railroad Co. v. Hiester, 4 Wright, 53; Railroad Co. v. Rose, 24 P. F. S. 362; Hays v. Briggs, 24 P. F. S. 373; Vanderslice v. City of Philadelphia, 7 Out. 102. The cases cited determine the question here raised, so directly, that any extended discussion of it here would be a mere repetition of what is there fully stated. The selling price of lands in the neighborhood at the time, is undoubtedly a test value, but it is the general selling price, not the price paid for particular property. The location of

the land, its uses and products, and the general selling price in the vicinity, are the *data* from which a jury may determine the market value. The price which, upon a consideration of the matters stated, the judgment of well-informed and reasonable men will approve is the market value. A particular sale may be a sacrifice compelled by necessity, or it may be the result of mere caprice or folly; if it be given in evidence, it raises an issue collateral to the subject of injury, and these collateral issues are as numerous as the sales. The offer was to show particular sales, made about the time of the location of the railroad and since, of properties alleged to possess similar qualities, and equal facilities as landings; the consideration of each of such sales, therefore, involved necessarily not only the collateral issues already stated, but also a comparison of these various properties, with that in question, as well as with each other. Such a course of examination must inevitably lead rather to the confusion than to the enlightenment of the jury, on the single matter for consideration. The introduction of evidence of particular sales is therefore not allowable under our decisions to establish market value."

⁸ Stinson v. Chicago etc. Ry. Co., 27 Minn. 284.

testimony was referred to and the practice not commented upon.⁹

The admissibility of such evidence is, therefore, supported by the greater weight of authority, and it seems to us by the better reasoning. There is no more important factor in determining the value of particular property than the sales of similar property in the same neighborhood at about the time in question. This is admitted even by the authorities which reject direct proof of such sales. The objection that the practice introduces collateral inquiries in regard to the comparison of the properties and the circumstances of the sale does not seem to be a valid one. Such sales should not be proved except by those conversant with the facts, and all the circumstances may be brought out either on the direct or cross-examination.

In regard to the degree of similarity which must exist, and the nearness in respect of time and distance, no general rules can be laid down. These are matters with which the trial judge is usually conversant, and they must rest largely in his discretion.¹⁰ A reference to some of the decided cases will perhaps best illustrate the law upon this subject. In a proceeding to assess damages for a portion of Long Island, in Boston Harbor, taken by the United States, evidence was received of the sales of similar lands upon islands and headlands in and about Boston Harbor, from half a mile to six miles distant, and ranging from one to eight years back. The case was affirmed by the Supreme Court, which said: "The rule must vary with the circumstances of each case. If the value of a town lot was in question, it is plain that the evidence should be confined to sales of comparatively recent date and of land in the near vicinity. If it was wild land, in a thinly settled part of the country, a more liberal rule would be applicable. Without some fur-

⁹ *Lehmicke v. St. Paul, Stillwater etc.* R. R. Co., 19 Minn. 464. *Aqueduct Co.*, 122 Mass. 305; see cases already cited in this section.

¹⁰ *Chandler v. Jamaica Pond*

ther evidence, we cannot suppose that the changes in the title to real estate in the islands and headlands of the harbor are so frequent, or the difference in situation and value so great, as to render the evidence here objected to admissible."¹¹ In a proceeding to condemn land which was shown to be suitable for raising cranberries and situated on the Charles River, a witness was permitted to testify for what he sold similar land situated across the river and in another town, some three or four years before. In approving this ruling, the court says: "If the question was as to the value of building lots, the exact situation of the two parcels with respect to each other might be of more importance; but when it is as to the value of land of rare quality, which is adapted to the cultivation of cranberries, a different standard applies, and if the land sold is in the same general locality and of the same peculiar quality, the price obtained may afford a just measure of the value of the land taken."¹²

Rejecting evidence of a sale of land on the same street, and only 176 feet distant from the property in question, as too remote in distance, was held error.¹³ In a New Hampshire case it was held competent to show the price received for an undivided half of the property in question at an administrator's sale.¹⁴ The ruling in another case may be shown by an extract from the opinion: "The petitioner offered evidence as to the value of the land taken, and situated on the shore of the pond, as an ice privilege. In reply to this, the respondents offered to show, by witnesses acquainted with the subject, the sums for which ice privileges and land to be used for that business had been recently sold, about the time of the taking of the land in question, in Peabody and Lynn. The ponds in these places are seven or eight miles from the pond in question. This evidence was re-

¹¹ Benham *v.* Dunbar, 103 Mass. 365, 368.

¹³ Paine *v.* Boston, 4 Allen, 168.

¹² Gardner *v.* Brookline, 127 Mass. 358, 363.

¹⁴ March *v.* Portsmouth & Concord R. R. Co., 19 N. H. 372.

jected. In respect to such evidence much must be left to the discretion of the presiding officer; *Shattuck v. Stoneham Branch Railroad Co.*, 6 Allen, 115. Considering the distance between these ponds, and the importance of locality in fixing the value of an ice privilege, we think the officer decided properly in rejecting the evidence. It does not appear that it would aid the jury in determining the value of the petitioner's privilege."¹⁵ A sale ten or twelve years before the time in question is clearly too remote, unless the circumstances are very peculiar.¹⁶ In another case sales made within a year of the taking, in the town of Fall River, Mass., were held properly rejected as too remote in time in a place so liable to change in the value of property.¹⁷ Proof of sales made subsequently to the taking are limited to those made at or about the time, since presumptions do not run backwards, and the existence of a condition of things at one time is not evidence of its previous existence for any great length of time. A sale made three years after the time in question was held too distant.¹⁸ To render proof of sales competent, they must be for money and not by way of exchange in whole or in part.¹⁹ Where property was taken for a park, sales of surrounding property after the park had been established and which had been greatly enhanced thereby were held incompetent.²⁰ The proof of sales must be made by witnesses testifying directly to the facts, not by the consideration recited in deeds between third parties.²¹

§ 444. Proving the cost of the property or of improvements thereon.—If the owner has purchased the property

¹⁵ *Ham v. Salem*, 100 Mass. 350, 352.

¹⁶ *Everett v. Union Pacific Ry. Co.*, 59 Ia. 243.

¹⁷ *Green v. Fall River*, 113 Mass. 262.

¹⁸ *Chandler v. Jamaica Pond Aqueduct Co.*, 122 Mass. 305. It is proper to state that the sale in

this case was also held to have been improperly admitted, on account of distance and dissimilarity in the property.

¹⁹ *Hollingsworth v. Des Moines & St. Louis Ry. Co.*, 63 Ia. 443.

²⁰ *Kerr v. South Park Comrs.*, 117 U. S. 379.

²¹ *Rose v. Taunton*, 119 Mass. 99.

within a time so recent that its cost will afford any fair indication of its present value, it is competent to show the cost.¹ If such evidence is received, it is competent for the opposite party to show any change of circumstances or condition which would tend to make the value at the time of the taking more or less than the cost proved.² But, if the property was purchased at a forced sale, the cost price is not competent evidence.³ What the owner paid for the property in question twelve to fourteen years before has been held incompetent.⁴

§ 445. Proving a sale of property claimed to be damaged made after the damage has been incurred.—Such proof has been held to be competent in Massachusetts¹ and Wisconsin,² and impliedly so in Minnesota.³ In the Massachusetts case a sale seventeen years after the damaging was held competent, while in the Minnesota case a sale one month afterwards was held to be too remote. There seems to be no reason why such sales are not competent within reasonable limits as to time.

§ 446. Offers to buy or sell.—It is not competent for the owner to prove what he has been offered for his property,¹ or what persons who have been looking for similar property

§ 444.

¹ *St. Louis & San Francisco Ry. Co. v. Smith*, 42 Ark. 265; *Ham v. Salem*, 100 Mass. 350, 352; and see *Hoffman v. Connor*, 76 N. Y. 121. In the following cases it was held that evidence of the cost of structures was properly excluded: *New New York, West Shore & Buffalo Ry. Co. v. Gennett*, 37 Hun, 317; *Schuylkill Navigation Co. v. Farr*, 4 W. & S. 362; and see *Squire v. Somerville*, 120 Mass. 579.

² *Ibid.*

³ *Dietrichs v. Lincoln etc. R. R. Co.*, 12 Neb. 225.

⁴ *Denver etc. Ry. Co. v. Schmitt* (Col.) 16 P. R. 842.

§ 445.

¹ *Whitman v. Boston & Maine R. Co.*, 7 Allen, 313.

² *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332.

³ *Sheldon v. Minneapolis & St. Louis Ry. Co.*, 29 Minn. 318.

§ 446.

¹ *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *St. Joseph & Denver City R. R. Co. v. Orr*, 8 Kan. 419; *Fowler v. County Comrs.*, 6 Allen, 92; *Dickenson v. Fitch*.

were willing to give for it.² Nor is it competent to prove offers for adjacent and similar property,³ or the price at which the owners of such property have offered it for sale.⁴ Offers made by the condemning party to the owner, for the property in question, are in the nature of an attempt to compromise, and cannot be proved.⁵ It may be shown, as against the owner, what he has offered to take for the property in question, unless it was by way of compromise.⁶ But it is not competent to show the price at which the owner has offered to sell to the party condemning after the proceedings were instituted.⁷

§ 447. Purchases by the party condemning.—What the party condemning has paid for other property is incompetent.¹ Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such a price as may be fixed by

burg, 13 Gray, 546; *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332; *Louisville, N. O. & T. R. R. Co. v. Ryan*, 64 Miss. 399.

² *Selma etc. R. R. Co. v. Keith*, 53 Ga. 178.

³ *Davis v. Charles River Branch R. R. Co.*, 11 Cush. 506; *Lehmicke v. St. Paul, Stillwater etc. R. R. Co.*, 19 Minn. 464; *Concord R. R. Co. v. Greely*, 23 N. H. 237.

⁴ *Winnisimet Co. v. Greuby*, 111 Mass. 543; *Montclair R. R. Co. v. Benson*, 36 N. J. L. 557; see also *Drury v. Midland R. R. Co.*, 127 Mass. 571.

⁵ *Upton v. South Branch Reading R. R. Co.*, 8 Cush. 600.

⁶ *Springfield v. Schmook*, 68 Mo. 394.

⁷ *Chicago, Evanston & Lake Su-*

perior R. R. Co. v. Catholic Bishop of Chicago

119 Ills. 525.

§ 447.

¹ *Kelliner v. Miller*, 97 Mass. 71; *Presbrey v. Old Colony & Newport R. R. Co.*, 103 Mass. 1; *Fall River Print Works v. Fall River*, 110 Mass. 428; *Cobb v. Boston*, 112 Mass. 181; *Donovan v. Springfield*, 125 Mass. 371; *Springfield v. Schmook*, 68 Mo. 394; *Amoskeag Manf. Co. v. Worcester*, 60 N. H. 522, *Howard v. Providence*, 6 R. I. 514. The question was involved, but not referred to, in *King v. Iowa Midland R. R. Co.*, 34 Ia. 458. An agreement to sell is incompetent for the same reason. *Chapin v. Boston & Providence R. R. Co.*, 6 Cush. 422. A contrary view to

the tribunal appointed by law. In most cases the same party must have the particular property, even if it costs more than its true value. The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more or the other taking less than is considered to be the fair market value of the property.² For these reasons such sales would not seem to be competent evidence of value in any case, whether in a proceeding by the same condemning party or otherwise.³

§ 448. Assessment for taxation.—The assessment of property for taxation, being made for another purpose, and not at the instance of either party and not usually at the market value of the property, is not admissible as evidence of value in condemnation proceedings.¹

§ 449. Reports of commissioners, etc., as evidence.—On an appeal from commissioners and trial *de novo*, the report appealed from is not evidence as to the amount of damages.¹ But, where a commissioner is examined as a witness, he may be cross-examined as to his report.²

the text is taken in *Wyman v. Lexington & West Cambridge R. R. Co.*, 13 Met. 316.

² See cases cited in last note, and especially *Presbrey v. Old Colony & Newport Ry. Co.*, 103 Mass. 1; *Fall River Print Works v. Fall River*, 110 Mass. 428; and *Cobb v. Boston*, 112 Mass. 181.

³ In *Brunswick & Albany R. R. Co. v. McLaren*, 47 Ga. 546, it was held, in a proceeding to condemn a right of way through certain lands, that it was not competent to show what another railroad had paid for a right of way through the same lands.

§ 448.

¹ *Texas & St. Louis Ry. Co. v. Eddy*, 42 Ark. 527; *Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 258; *Brown v. Providence, Warren & Bristol R. R. Co.*, 5 Gray, 35.

§ 449.

¹ *Coyner v. Boyd*, 55 Ind. 166; *McKinsey v. Bowman*, 58 Ind. 88; *Corey v. Swagger*, 74 Ind. 211; *Winklemans v. Des Moines, Northwestern Ry. Co.*, 62 Ia. 11; *Seefeld v. Chicago, Mil. & St. Paul Ry. Co.*, 67 Wis. 96. *Contra:* *White v. Boston & Providence R. R. Co.*, 6 Cush. 420; *Chapin v. Same*, 6 Cush. 422.

² *Munkwitz v. Chicago, Mil. & St. P. Ry. Co.*, 64 Wis. 403.

§ 450. **Miscellaneous points.**—In a railroad case it was held proper to ask a witness how many times he had testified for the company.¹ In the trial of a case to condemn a right of way through a farm for a railroad, it was held incompetent to prove the experience of the owners of other farms having railroads through them, as to the damages, losses and inconveniences arising from the existence and operation of the roads through them.²

§ 450.

² Fitchburg, Bradford & Buffalo

¹ Setzler *v.* Pennsylvania & Ry. Co. *v.* McCloskey, 110 Pa. S. Schuylkill Valley R. R. Co., 112 436 Pa. S. 56.

CHAPTER XX.

JUST COMPENSATION AND DAMAGES.

§ 451. Right to compensation when the constitution does not require it.—This question has lost all practical importance, from the fact that the constitutions of all the States, except one (North Carolina), now require compensation to be made when property is taken for public use. The question has been discussed in several of the States in cases arising under former constitutions which contained no provision on this subject. In all the States which have been called upon to pass upon the question, except South Carolina,¹ compensation was held to be obligatory. The cases will be found collated and discussed in a former chapter.²

§ 452. Statutes which authorize a taking must provide for compensation.—Statutes which provide for a condemnation of private property, and fail to provide compensation therefor, have sometimes been spoken of as void.¹ This is probably, however, a mere inadvertence of expression. Such acts would simply be inoperative so far as the power to condemn property is concerned,² but might be carried into execution by the purchase of the requisite property,³ or aided

§ 451.

¹ See *ex parte* Withers, 3 Brevard, 83; Patrick *v.* Comrs., 4 McCord, 541; State *v.* Dawson, 3 Hill, S. C. 101.

² *Ante*, § 10.

§ 452.

¹ Bloodgood *v.* Mohawk & Hudson River R. R. Co., 18 Wend. 9; Brown *v.* Bowman, 9 Ga. 37; State *v.* West Hoboken, 37 N. J. L. 77; Doe *v.* Georgia R. R. & Banking

Co., 1 Ga. 524; Watson, Executor *v.* Trustees etc. 21 Ohio St. 667.

² See People *v.* Loew, 39 Hun, 490; S. C., 102 N. Y. 471; Tuckahoe Canal Co. *v.* Tuckahoe etc. R. R. Co., 11 Leigh, 42; Wheelock *v.* Young, 4 Wend. 647.

³ Carbon Coal & Mining Co. *v.* Drake, 26 Kan. 345; Carson *v.* Coleman, 11 N. J. Eq. 106; Curran *v.* Shattuck, 24 Cal. 427.

by a subsequent act supplying the defect.⁴ Proceedings under such an act to take property *in invitum* will be quashed or set aside on motion,⁵ and any interference with property thereunder may be enjoined.⁶ If any injury has been done to property in pursuance of such an act, the owner may have his common law remedies of trespass or case.⁷ It has been held, however, that the owner of property taken under such an act may acquiesce in the taking and recover its value.⁸ Where the legislature, by special act, provide for the establishment of a particular highway and make no provision for compensation, it will be presumed that they intend the general road law to apply.⁹ All property is within the protection of the constitution, and a statute which permits a highway to be laid out through wild and uncultivated lands without the consent of the owner is unconstitutional, and the lay-out of a road under it will be void.¹⁰

§ 453. Exceptional cases in New Jersey and Pennsylvania.—Under the proprietary governments in these States it was customary to include with every grant of land a certain excess, being five per cent. in New Jersey and six per cent. in Pennsylvania, for public roads. The grantee and those claiming under him were regarded as trustees for the public,

⁴ *State v. Seymour*, 35 N. J. L. 47; *McCunley v. Weller*, 12 Cal. 500; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 Bald. 205; *Cairo & Fulton R. R. Co. v. Turner*, 31 Ark. 494.

⁵ *Matter of Cheesbrough*, 17 Hun, 561.

⁶ *Watson v. Trustees etc.*, 21 Ohio S. 667; *Carbon Coal & Mining Co. v. Drake*, 26 Kan. 345; *Curran v. Shattuck*, 24 Cal. 427; *Brewer v. Bowman*, 9 Ga. 37; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Martin, ex parte*, 13 Ark. 198.

⁷ *Cogswell v. Essex Mill Corp.*, 6 Pick. 94; *Seneca Road Co. v. Auburn & Rochester R. R. Co.*, 5 Hill, 170; *Comins v. Bradbury*, 10 Me. 447; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Williamson v. Canal Co.*, 78 N. C. 156.

⁸ *Watkins v. Walker County*, 18 Tex. 585; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546.

⁹ *Warner v. Hennepin Co.*, 9 Minn. 139. See *ante*, § 260.

¹⁰ *Wallace v. Karlenowefski*, 19 Barb. 118; *Gould v. Glass*, 19 Barb. 179. See also *Smith v. Inge*, 80 Ala. 283; *Ward v. Peck*, 49 N. J. L. 42.

as to this excess, which might be required of them when needed.¹ The constitution of New Jersey of 1844 recognized this right in the public by providing that "lands may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made."² The servitude or trust, however, only extends to public roads, including turnpikes,³ but not to other public ways, such as canals.⁴ Nor could improvements be taken without compensation,⁵ nor a turnpike laid out as a common highway.⁶

§ 454. Express constitutional provisions with reference to the time or manner of making compensation.—The constitutions of many of the States at the present time provide, either that compensation shall be first made in all cases, or that it shall be first made when the taking is by individuals or corporations or for certain specified purposes. Sometimes the provision is that it shall be first made, or deposited, or secured, in such manner as shall be provided by law. Some constitutions provide that compensation shall be made in money; some that benefits shall be excluded in all cases, or

§ 453.

¹ *Feevee v. Meily*, 3 Yates, 153; *Plank Road Co. v. Thomas*, 20 Pa. S. 91; *Same v. Ramage*, *ibid.* 95; *Commonwealth v. Fisher*, 1 P. & W. (Pa.) 462; *Commonwealth v. McAllister*, 2 Watts, 190; *State v. Potts*, 4 N. J. L. 347; *Matter of Highway*, 22 N. J. L. 293; *Simmons v. Passaic*, 42 N. J. L. 619; *McClenachan v. Curwin*, 3 Yates, 362; S. C., 6 Binn. 509.

² Art. 1, § 16. In *State v. Seymour*, 35 N. J. L. 47, 53, the opinion is expressed that after the legislature had once provided for compensation in such cases it could not recede from its action and reimpose this servitude on private

property. Private ways, though really public, are not within the exception. *Perrine v. Farr*, 22 N. J. L. 356.

³ *McClenachan v. Curwin*, 3 Yeates, 362; S. C., 6 Binn. 509; *Plank Road Co. v. Thomas*, 20 Pa. S. 91; *Same v. Ramage*, *ibid.* 95.

⁴ *Commonwealth v. McAllister*, 2 Watts, 190; *McClenachan v. Curwin*, 3 Yeates, 362; S. C., 6 Binn. 509. See, however, *Commonwealth v. Fisher*, 1 P. & W., 462, 465.

⁵ *Plank Road Co. v. Thomas*, 20 Pa. S. 91; and other cases cited in this section.

⁶ *Matter of Highway*, 22 N. J. L. 293.

in certain specified cases.¹ These provisions are imperative, and any law which violates them is incapable of enforcement.² Where the constitution required compensation to be first made except where the taking was by the State, it was held that the taking for a public highway to be paid for out of the treasury of a county was within the exception.³ Where compensation was required to be first made *or secured*,

§ 454.

¹ See constitutional provisions, *ante*, §§ 14-52.

² Under the recent constitutions of Alabama and Georgia: Montgomery Southern Ry. Co. *v.* Sayse, 72 Ala. 443; Southern R. R. Co. *v.* Southern & Atlantic Tel. Co., 46 Ga. 43; Chambers *v.* Cincinnati & Ga. R. R. Co., 69 Ga. 320. But the constitutional right of prepayment may be waived by the owner. New Orleans & Selma R. R. Co. *v.* Jones, 68 Ala. 48. Under Indiana constitution of 1851: Norristown etc. Turnpike Co. *v.* Burkett, 26 Ind. 53.—Trustees of Iowa College *v.* Davenport, 7 Ia. 213; Atchison, Topeka & Santa Fe R. R. Co. *v.* Weaver, 10 Kan. 344; Eidemiller *v.* Wyandotte City, 2 Dillon, 376; Waller *v.* Martin, 17 B. Mon. 181; Evansville etc. R. R. Co. *v.* Grady, 6 Bush. 144; Municipality No. 2 for opening Emphrosine St., 7 La. An. 72; Harsh *v.* First Division of the St. Paul & Pacific R. R. Co., 17 Minn. 439; Warren *v.* Same, 18 Minn. 384; Leber *v.* Minneapolis & N. W. Ry. Co., 29 Minn. 256; Northern Pacific R. R. Co. *v.* St. Paul etc. Ry. Co., 1 McCrary, 302; Thompson *v.* Grand Gulf R. R. Co., 3 How. (Miss.) 240; Pearson *v.* Johnson, 54 Miss. 259; Yazoo etc.

Levee Board *v.* Dancy, (Miss.) 3 So. R. 568; New Central Coal Co. *v.* George's Creek Coal & Iron Co., 37 Md. 537; Baltimore *v.* Hook, 62 Md. 371; Baltimore & Ohio R. R. Co. *v.* Boyd, 63 Md. 325; Blanchard *v.* Kansas City, 5 McCrary, 217; McElroy *v.* Same, 21 Fed. R. 257; (The last two cases are under the Missouri constitution of 1875.) Doughty *v.* Somerville etc. R. R. Co., 7 N. J. Eq. 51; Same *v.* Same, 21 N. J. L. 442; Morris & Essex R. R. Co. *v.* Hudson Tunnel R. R. Co., 25 N. J. Eq. 384; Redman *v.* Philadelphia etc. Ry. Co., 33 N. J. Eq. 165; Champion *v.* Session's County Comrs., 1 Nev. 478; S. C., 2 Nev. 271; Oregon Ry. Co. *v.* Hill, 9 Or. 377; Harrisburg *v.* Crangle, 3 W. & S. 460; Sharpless *v.* West Chester, 1 Grant's Case, 257; S. C., 2 Phila. 130; McClinton *v.* Pittsburgh etc. R. R. Co., 66 Pa. S. 404; Philadelphia etc. R. R. Co. *v.* Cooper, 105 Pa. S. 239; Spencer *v.* Point Pleasant & Ohio R. R. Co., 23 W. Va. 406; Smith *v.* Same, *ibid.* 451; Hale *v.* Same, *ibid.* 454.

³ Rudisill *v.* State, 40 Ind. 485. To same effect, Dronberger *v.* Reed, 11 Ind. 420; Jeffersonville etc. R. R. Co. *v.* Dougherty, 40 Ind. 33. But see La Fayette *v.* Bush, 19 Ind. 326

the liability of a county was held a sufficient security.⁴ Compensation was required to be *first made*; it was held that the *money* must be paid or tendered, and that the giving of security was not a compliance.⁵ The provision in the Pennsylvania constitution, that a corporate body or individual shall not be vested with the *privilege* of taking private property for public use without requiring compensation to be first made or secured, does not apply to a case where the *duty* of taking is *imposed* upon individuals.⁶ The constitution of Kentucky requires that compensation shall be *previously* made. In some early cases this was held to be satisfied by the giving of adequate security.⁷ Later cases indicate a tendency to depart from this doctrine, or at least to restrict it to a taking by the State.⁸ Where the statute provided that the compensation for a ditch should be fixed and allowed by the county commissioners, it was held that the allowance by the commissioners was equivalent to a deposit of the same within the meaning of a constitutional provision which required the damages to be first paid or first secured by a deposit of money.⁹

§ 455. Questions which arise when the constitution is silent in these respects.—Where the constitution simply provides that private property shall not be taken for public use without just compensation, the question arises as to what is a sufficient provision for compensation, to comply with the constitution. Must the compensation be made before the property is entered upon for the purpose of appropriation, or may it be made after such entry? And, if it may be made after such entry, what is a sufficient provision for securing

⁴ *State v. Messenger*, 27 Minn. 119.

1 A. K. Marsh. 84, 1817; *Jackson v. Winner's Heirs*, 4 Litt. 322, 1832.

⁵ *Redman v. Philadelphia, M. & M. R. R. Co.*, 33 N. J. Eq. 165.

⁸ *Waller v. Martin*, 17 B. Mon. 181; *Evansville etc. R. R. Co. v. Grady*, 6 Bush. 144.

⁶ *Yost's Report*, 17 Pa. S. 524.

⁹ *Zimmerman v. Canfield*, 42 Ohio S. 463.

⁷ *Gashweller's Heirs v. McIlroy*,

compensation? Must compensation be made wholly in money or may benefits to other property be considered? These and other questions present themselves, which we shall now proceed to consider.

§ 456. As to the time of making compensation.—As an original question, it seems to us clear that the proper interpretation of the constitution requires that the owner should receive his just compensation before entry upon his property. When an individual is ousted from possession under a claim of right, his property is taken from him, and, if he has not been paid an equivalent in money, it is taken from him without compensation. Some of the cases so hold.¹ But in

§ 456.

¹ *California.* *San Francisco v. Scott*, 4 Cal. 114; *McCann v. Sierra Co.*, 7 Cal. 121; *McCauley v. Weller*, 12 Cal. 500; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Johnson v. Alameda County*, 14 Cal. 106; *Colton v. Rossi*, 9 Cal. 595; *Burnet v. Sacramento*, 12 Cal. 76; *Curran v. Shattuck*, 24 Cal. 427. In *Fox v. W. P. R. R. Co.*, 31 Cal. 538, the foregoing cases were reviewed, and the conclusion reached that an act authorizing a judge to make an order allowing possession pending proceedings, upon giving security to be approved by the court, was valid. This case was subsequently overruled and the prior doctrine repeatedly affirmed. *Brudy v. Bronson*, 45 Cal. 640; *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 317; *Cal. P. R. R. Co. v. Cent. P. R. R. Co.*, 47 Cal. 528; *San Mateo Water Co. v. Sharpstein*, 50 Cal. 284; *Sanborn v. Belden*, 51 Cal. 266; *Vilhac v. S. & I. R. R. Co.*, 53 Cal. 208. In *Sanborn v. Belden* it is intimated that it might be different in case of a

taking by the State or a municipal corporation. *Potter v. Ames*, 43 Cal. 75.

Illinois. *Hall v. People*, 57 Ills. 307; *People v. Williams*, 51 Ills. 63; *Cook v. South Park Commissioners*, 61 Ills. 115; *People v. McRoberts*, 62 Ills. 38; *Shute v. Chicago & Milwaukee R. R. Co.*, 26 Ills. 436; *Johnson v. Joliet etc. R. R. Co.*, 23 Ills. 203; *Phillips v. South Park Commissioners*, 119 Ills. 626; *Chicago, St. Louis & Western R. R. Co. v. Gates*, 120 Ills. 86. In *Hall v. People* the court say: "No man can be compelled to part with his property without just compensation. This is a constitutional right that he cannot be deprived of by any statute. No corporation, public or private, can appropriate the property of any one to their own use without first tendering or paying the damages assessed under the forms of law. The party ought not to be driven to his action against a corporation, responsible or irresponsible, for his damages. This would be to take his property

most States it is held that the making of compensation need not precede an entry upon the property, provided some definite provision is made whereby the owner will certainly obtain compensation.²

without first making compensation and would be a plain violation of a constitutional right." See also *Dunning v. Matthews*, 16 Ills. 308; *Norton v. Studley*, 17 Ills. 556.

Maryland. *Hamilton v. Annapolis & Elk Ridge R. R. Co.*, 1 Md. Ch. 107; *Harness v. Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248.

Texas. *Buffalo Bayou etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Tait v. Matthews*, 33 Tex. 112; *Paris v. Mason*, 37 Tex. 447. And see *Avery v. Fox*, 1 Abb. U. S. 246; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 Bald. 205; *Sadler v. Langham*, 34 Ala. 311; *Foster v. Stafford*, 57 Vt. 128; *Hawley v. Harrall*, 19 Conn. 142; *Garrison v. New York*, 21 Wall. 196.

² *Alabama.* Commissioners' Court *v. Bowie*, 34 Ala. 461. A contrary view is intimated in *Sadler v. Langham*, 34 Ala. 311.

Arkansas. *Cairo & Fulton R. R. Co. v. Turner*, 31 Ark. 494.

Connecticut. *Hawley v. Harrall*, 19 Conn. 142.

Florida. *Moody v. Jacksonville, Tampa & Key West R. R. Co.*, 20 Fla. 597; *State ex rel. Moody v. Same*, 20 Fla. 616.

Georgia, under the old constitution. *Doe v. Georgia etc. R. R. Co.*, 1 Ga. 524; and see *Young v. Harrison*, 6 Ga. 130; *Parham v. Decatur County*, 9 Ga. 341; *Hall v. Boyd*, 14 Ga. 1; *Powers v. Armstrong*, 19 Ga. 427.

Indiana. *Rubottom v. McClure*,

4 Blackf. 505; *Hankins v. Lawrence*, 8 Blackf. 266; *McCormick v. La Fayette*, 1 Ind. 48; *New Albany & Salem R. R. Co. v. Connelly*, 7 Ind. 32. The constitution of 1851 required prepayment, except in case of taking by the State. This was held not to apply to charters in existence before 1851. *Prather v. Jeffersonville etc. R. R. Co.*, 52 Ind. 16.

Maine. The doctrine in this State is that title does not pass until payment is made, but that possession may be taken and held for a reasonable length of time with a view to the acquisition of title, and three years has been held to be a reasonable time, that being the time limited for the owner to apply for an assessment of damages. *Cushman v. Smith*, 34 Me. 247; *Nichols v. Somerset & Kennebec R. R. Co.*, 43 Me. 356; *Davis v. Russell*, 47 Me. 443; *Riche v. Bar Harbor Water Co.*, 75 Me. 91.

Maryland. Prior to 1851 there was no provision for compensation in the Maryland constitution. In an early case it was held that, though compensation must be made, it need not be made before entry. *Compton v. Susquehanna R. R. Co.*, 3 Bland, Ch. 386. Later cases lay down a contrary doctrine. *Hamilton v. Annapolis & Elk Ridge R. R. Co.*, 1 Md. Ch. 107; *Harness v. Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248.

Massachusetts. *Hazen v. Essex*

Some courts have gone so far as to hold that the property may be occupied before compensation is made, provided the statute under which it is taken provides a mode for ascertaining the compensation, and requires its payment by the party taking, although the taking may be by an individual

Co., 12 Cush. 475; *Talbot v. Hudson*, 16 Gray, 417; *Haverhill Bridge Proprietors v. Essex Co.*, 103 Mass. 120; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71.

Michigan. *People v. Michigan Southern R. R. Co.*, 3 Mich. 496 (under constitution of 1838); *Smith v. McAdam*, 3 Mich. 506; see *Newcomb v. Smith*, 1 Chand. 71.

North Carolina. *Raleigh & Gaston R. R. Co. v. Davis*, 2 Dev. & B. (N. C.) 451; *State v. McIver*, 88 N. C. 686; *Johnston v. Rankin*, 70 N. C. 550; *McIntire v. Western N. C. R. R. Co.*, 67 N. C. 278.

New Jersey. *Den v. Morris Canal etc. Co.*, 24 N. J. L. 587. This under a charter prior to constitution of 1844, which requires compensation to be first made.

New Hampshire. *Orr v. Quimby*, 54 N. H. 590; but see *Ash v. Cummings*, 50 N. H. 591, which seems to favor the view that compensation should be first made.

New York. Compensation need not be first made where the taking is by a State or a public corporation. *Wheeloock v. Young*, 4 Wend. 647, 1830; *Case v. Thompson*, 6 Wend. 634, 1831; *Coles v. Williamsburg*, 10 Wend. 659, 666, 1833; *Smith v. Helmer*, 7 Barb. 416, 1849; *Rexford v. Knight*, 11 N. Y. 308, 1854; *Chapman v. Gates*, 54 N. Y. 132, 1873; *Rider v. Stryker*, 63 N. Y. 186, 1875; *Sage v. Brooklyn*, 89 N. Y. 189, 195, 1882; but must be

when the taking is by a private corporation. *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, overruling same case in 14 Wend. 51; *Jamaica etc. Road Co. v. N. Y. M. B. Ry. Co.*, 25 Hun, 585; *Dusenbury v. Mutual Union Telegraph Co.*, 64 How. Pr. 206. In the last case the court say that it is the settled doctrine of the State that compensation must be first made.

Ohio. *Mercer v. McWilliams, Wright*, 132; *Bates v. Cooper*, 5 Ohio, 115; *Ferris v. Bramble*, 5 Ohio S. 109; *Willyard v. Hamilton*, 7 Ohio Pt. 2, 111.

Pennsylvania. *Pittsburgh v. Scott*, 1 Pa. S. 309; *Hattermehl v. Dickinson*, 8 Phila. 282; *Yost's Report*, 17 Pa. S. 524. But in case of private roads the statute required the damages to be first paid. *Clowes Private Road*, 31 Pa. S. 12.

Tennessee. *Wetherspoon v. State, Mar. & Yerg.* 118; *Anderson v. Turbeville*, 6 Caldw. 150; *Parker v. East Tenn. etc. R. R. Co.*, 13 Lea, 669; *Louisville & Nashville R. R. Co. v. Quinn*, 14 Lea, 65.

Virginia. *Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co.*, 11 Leigh. 42.

Vermont. *Foster v. Stafford National Bank*, 57 Vt. 128.

Wisconsin. *Shepardson v. Milwaukee & Beloit R. R. Co.*, 6 Wis. 605; *Robbins v. Railroad Co.*, 6 Wis. 636; *Powers v. Bears*, 12 Wis.

or private corporation.³ In many of these cases the owners of the property taken did not have the right to initiate proceedings.

§ 457. Distinction between a taking by the public and by private parties.—As a general rule, the courts which hold that compensation need not precede occupation also hold that some provision must be made for compensation whereby the owner will *certainly* obtain it, and that it is not enough that the law provides a mode for ascertaining the amount of compensation and imposes, on the party taking, the duty of making payment. A distinction is usually made by such courts between a taking by the public, that is by the State or public corporations, and a taking by private corporations or individuals.¹ In the former case the compensation is a public charge, the good faith of the public is pledged for its payment, and all the resources of taxation may be employed in raising the amount. Where, therefore, the law requires the compensation to be paid out of the State treasury,² or

213; *Smeaton v. Martin*, 57 Wis. 364. See *Norton v. Peck*, 3 Wis. 714.

United States. Great Falls Manf. Co. v. Garland, 25 Fed. R. 521. The same thing is also implied in the cases cited in the following sections.

³ *Nicholas v. Somerset & Kennebec R. R. Co.*, 43 Me. 356; *Rubottom v. McClure*, 4 Blackf. 505; *Hankins v. Lawrence*, 8 Blackf. 266; *McCormick v. La Fayette*, 1 Ind. 48; *New Albany & Salem R. R. Co. v. Connelly*, 7 Ind. 39; *Prather v. Jeffersonville etc. R. R. Co.*, 52 Ind. 16. This case was under a charter passed prior to the constitution of 1851, which required pre-payment. *Compton v. Susquehanna R. R. Co.*, 3 Bland, Ch. 386;

Harness v. Chesapeake & Ohio Canal Co., 1 Md. Ch. 248; *Hazen v. Essex Co.*, 12 Cush. 475; *Raleigh & Gaston R. R. Co. v. Davis*, 2 Dev. & B. (N. C.) 451; *State v. McIver*, 88 N. C. 686; *McIntire v. Western N. C. R. R. Co.*, 67 N. C. 278; *Mercer v. McWilliams*, Wright (Ohio), 132; *Bates v. Cooper*, 5 Ohio, 115; *Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co.*, 11 Leigh, 42.

§ 457.

¹ *Robbins v. Railroad Co.*, 6 Wis. 636; *Smeaton v. Martin*, 57 Wis. 364; *Walther v. Warner*, 25 Mo. 277.

² *Young v. Harrison*, 6 Ga. 130; *People v. Michigan Southern R. R. Co.*, 3 Mich. 496; *Smith v. McAdam*, 3 Mich. 506; *Wheeler v. Young*, 4 Wend. 647; *Talbot v. Hudson*, 16

makes it a charge upon the general resources of a public corporation, such as a county,³ city,⁴ town,⁵ or school district,⁶ it is held that such sure and certain provision is made for obtaining compensation as satisfies the constitution. But, if it can be shown that the resources of a municipal corporation, from taxation or otherwise, are insufficient to enable it to make compensation in a reasonable time, an entry will be enjoined until security is given.⁷ It has been held that, where the

Gray, 417, 431. In the last case the act required that the amount ascertained should be paid out of the State treasury, and the governor was authorized to draw his warrant therefor. Of this the court say: "That such an appropriation affords a remedy sufficiently adequate and certain is too clear to admit of doubt. It is a pledge of the faith and credit of the commonwealth, made in the most solemn and authentic manner, for the payment of damages as soon as they are ascertained and liquidated by due process of law. * * * The answer to the argument that no process is provided by which the payment can be secured and enforced is, that no such provision is necessary in cases where the power of eminent domain is exercised immediately by the State itself, in pursuance of a statute which enacts that compensation is to be made by a warrant drawn by the governor of the commonwealth upon the public treasury. We are bound to presume that the chief magistrate of the State will perform his duty by drawing his warrant in conformity with the requirements of law, and that payment of a public debt thus created will be duly made in like manner as all public dues and lia-

bilities are paid out of the treasury of the State." So the responsibility of the Federal Government is deemed sufficient security. Great Falls Manf. Co. v. Garland, 25 Fed. R. 521.

³ Lowndes County v. Bowie, 34 Ala. 461; Gashweller's Heirs v. McElroy, 1 A. K. Marsh. 84; State v. Messenger, 27 Minn. 119; Yost's Report, 17 Pa. S. 524; Haverhill Bridge Proprietors v. County Comrs. of Essex, 103 Mass. 120; State v. McIver, 88 N. C. 686.

⁴ Pittsburgh v. Scott, 1 Pa. S. 309; Coles v. Williamsburgh, 10 Wend. 659; Hatermehl v. Dickinson, 8 Phila. 283; Case v. Thompson, 6 Wend. 684; Matter of Application etc. of New York, 34 Hun, 441; aff. 99 N. Y. 569.

⁵ Brock v. Hishen, 40 Wis. 674; Dronberger v. Reed, 11 Ind. 420; Jeffersonville, M. & I. R. R. Co. v. Dougherty, 40 Ind. 83.

⁶ Chamberlain v. Morgan, 68 Pa. S. 168; Long v. Fuller, 68 Pa. S. 170.

⁷ Keene v. Bristol, 26 Pa. S. 46. In this case a bill was filed to enjoin the opening of a road through the complainant's grounds. It appeared that the damage would be considerable, that the borough could only levy a tax of thirty cents

statute provides for payment of the compensation out of the proceeds to be levied upon the property benefited by the improvement, the security is not sufficient to authorize an entry before payment.⁸ A law will, if possible, be so construed as to sustain its validity in respect to making compensation as in other respects.⁹ Directing the payment of compensation out of the earnings of a railroad, the property of the State, is not a provision sufficiently certain to satisfy the constitution.¹⁰ A statute of New York in reference to the Niagara Falls Reservation provided that, unless the legislature made an appropriation to pay the amount awarded within two years, all the proceedings taken should be void. Within two years an act was passed appropriating just the amount of the award. It was contended that the appropriation was insufficient, because it made no provision for the contingency of the award being increased on a new hearing, but it was held otherwise.¹¹

§ 458. What is sufficient security when the taking is by private parties.—Those courts which hold that the compensation must be secured in some way so that it will not be subject to the ordinary perils of collection, have found great difficulty in dealing with private corporations and individuals.

on the hundred dollars, and that that tax barely enabled it to meet ordinary expenses. The opening was enjoined until the giving of bond with surety to be approved by the court.

⁸ *Sage v. Brooklyn*, 89 N. Y. 189; *Chapman v. Gates*, 54 N. Y. 132; *Rider v. Stryker*, 2 Hun, 115; but see *S. C.*, 63 N. Y. 136; *Hammersley v. Mayor etc. of New York*, 56 N. Y. 533; *Coles v. Williamsburgh*, 10 Wend. 659; *Lawrence v. Newark*, 38 N. J. L. 151; *Baldwin v. Same*, *Ibid.* 158.

⁹ *Sage v. Brooklyn*, 89 N. Y. 189.

¹⁰ *Conn. River R. R. Co. v. County Commissioners*, 127 Mass. 50. A writ of prohibition was granted against proceedings to condemn, although it was admitted that the earnings of the road would be ample for the payment, and although an act had been passed subsequently to the filing of the petition to condemn which made the compensation payable absolutely by the State.

¹¹ *Matter of Commissioners of State Reservation at Niagara*, 102 N. Y. 734; *S. C.*, 15 Abb. N. C. 159 and 395.

The Supreme Court of Wisconsin, after reviewing prior cases in that State, sum up the whole matter as follows: "These cases conclusively establish that one of two things must invariably be done before the public can, against the will of the owner, acquire the right to enter upon and permanently occupy his land, which may be needed for public uses.

"1. The value of the property to be taken must be ascertained by some legal and proper proceeding, and be paid; or,

"2. If the value thus ascertained be not paid to, or secured by, the owner, an adequate and safe fund must be provided, from which he may at some future time be compensated.

"These, it seems to us, are the results of those cases, and they are such as we should be unwilling to depart from. The latter proposition, in the case of a private corporation, like a railroad company, would undoubtedly require it to tender or offer in money the amount of the ascertained damages, or compensation with expenses, if any, to the owner or person interested, and if, on the ground of an intended appeal or otherwise, he should refuse to receive it, the company would be required to deposit the same with some proper officer or person, to be kept good for the owner until the end of the litigation, or until such time as he should apply for and signify his readiness to accept it."¹ The Supreme Court of Texas takes a similar position. "The property must be paid for when taken, or within a reasonable time thereafter, and the making of compensation must be as absolutely certain as that the property is taken."² But the court do not say what will satisfy this requirement. A bond with surety to be approved by a judge or court has been held sufficient security.³ In Ohio, where compensation was to be first paid

§ 458.

³ Cairo & Fulton R. R. Co., *v.*

¹ Powers *v.* Bears, 12 Wis. 213, 221. Turner, 31 Ark. 494; Walther *v.* Warner, 25 Mo. 277; Doe *v.* Georgia

² Buffalo Bayou etc. R. R. Co. *v.* Ferris, 26 Tex. 588. R. R. Co., 1 Ga. 524.

or secured by a deposit of money, a bond was held ineffectual.⁴ In California such a bond is held insufficient.⁵ Some courts have gone so far as to hold that it is sufficient to provide a remedy whereby the owner may obtain judgment for his damages, to be enforced by execution in the ordinary way,⁶ or by enjoining the use of the property, if the judgment is not paid.⁷ But the weight of authority is against this position, as it certainly ought to be.⁸ If the owner is to be compelled to give up possession of his property for public use, and perhaps see it placed beyond the possibility of being restored to its former estate, before receiving his just compensation, he ought at least to have an adequate fund provided or security given, whereby he will certainly obtain what the constitution guarantees him. This is the very least that the constitutional provision should be held to ensure him.⁹

§ 459. Summary as to time of compensation.—It is thus seen that in those States where the constitution contains no specific provision as to the time or manner of compensation, the cases divide themselves into two principal classes: *first*, those which hold that the compensation must be paid before entry; *second*, those which hold that it may be ascertained

⁴ *Ferris v. Bramble*, 5 Ohio S. 109.

⁵ *Sanborn v. Belden*, 51 Cal. 266; *Vilhac v. Stockton & I. R. R. Co.*, 53 Cal. 208; see also *Moody v. Jacksonville etc. R. R. Co.*, 20 Fla. 597.

⁶ *McCormick v. La Fayette*, 1 Ind. 48; *Hazen v. Essex Co.*, 12 Cush. 475; *McIntire v. Western N. C. R. R. Co.*, 67 N. C. 278; *Johnston v. Rankin*, 70 N. C. 550; *Willyard v. Hamilton*, 7 Ohio Pt. 2, 111.

⁷ *Brickeit v. Haverhill Aqueduct Co.* 142 Mass. 394.

⁸ *Moody v. Jacksonville etc. R. R. Co.*, 20 Fla. 597; *Thompson v.*

Grand Gulf R. R. etc. Co., 3 How. (Miss.) 240; *Pearson v. Johnson*, 54 Miss. 259; *Piscataque Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Buffalo Bayou etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Tait v. Matthews*, 33 Tex. 112; *Foster v. Stafford National Bank*, 57 Vt. 128; *Newell v. Smith*, 15 Wis. 101; *Gilmann v. Sheboygan & Fond du Lac R. R. Co.*, 37 Wis. 317.

⁹ *Walther v. Warner*, 25 Mo. 277; *Bloodgood v. Mohawk & Hudson R. R. Co.* 18 Wend. 9; *Chapman v. Gates*, 54 N. Y. 132; *Sage v. Brooklyn*, 89 N. Y. 189, 195.

and paid after entry. The second class again divide themselves into two subordinate classes: *first*, those which hold that the compensation must be secured, and, *second*, those which hold that no security is necessary. The first of these may be again divided into those which make a distinction in respect of public corporations, and those which do not. This great diversity and confusion in the authorities shows the lack of any guide in the constitution when it is once held that the compensation need not be first made. All these decisions distinguishing between public and private corporations, and laying down various requirements as to security in case of a taking by the latter, are clear cases of judicial legislation. They are probably due in a large measure to an erroneous idea as to what constitutes a taking. It was the view of the earlier cases that there was no taking without the transfer of the legal title. By holding that the legal title did not vest until the compensation was paid, it was thought the constitution was satisfied. But any interference with the rights of property is a taking. The occupation of property is clearly such an interference,¹ and should not be permitted until the compensation is paid.

§ 460. Compensation must be made in money.—Some constitutions provide that compensation shall be made irrespective of benefits. Some courts hold the same in the absence of any such provision in the constitution. Others hold that benefits to property not taken may be considered in reduction of damages. These questions will be discussed hereafter.¹ But, whether benefits are excluded or not, the just compensation, when ascertained, must be paid in money.² Some of the constitutions expressly require that the compen-

§ 459.

¹ *San Mateo Water Works v. Sharpstein*, 50 Cal. 284; *Fox v. Western Pacific R. R. Co.*, 31 Cal. 538.

§ 460.

¹ *Post*, §§ 45-476.

² *Hamilton v. Annapolis & Elk River R. R. Co.*, 1 Md. Ch. 107; 8 S. C., 1 Md. 553; *Matter of New York, West Shore & Buffalo R. R. Co.*, 28 Hun, 426.

sation shall be made in money.³ In any event, no part of the just compensation is paid in benefits, but benefits are considered in estimating the amount of the just compensation. The compensation cannot be paid in canal scrip, even at its market value,⁴ nor by certificates of indebtedness against municipal corporations.⁵ Whether the owner may be required to accept in lieu of money the doing of certain things by the party condemning, or certain concessions in his favor as to the use of the property taken, or other similar advantages, are questions which are discussed hereafter.⁶

§ 461. The legislature cannot fix the compensation or prescribe the rules for its computation.—In the ascertainment of the just compensation to be made for property taken, the parties are entitled to an impartial tribunal and to an opportunity to appear and be heard before such tribunal.¹ It follows, therefore, that the legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules or principles upon which it shall be computed.²

§ 462. Meaning of the phrase “just compensation.”—The etymology of the word “compensation” presents the idea of balancing one thing against another. To compensate is to render something which is equal to that taken or received. The word “just” was not intended to have a mere literal meaning as opposed to unjust, but as placing the matter upon a broad and equitable basis. “It is difficult to imagine an unjust compensation; but the word ‘just’ is used evidently to intensify the meaning of the word ‘compensation;’ to convey the idea that the equivalent to be ren-

³ See Arkansas, Kansas, and Vermont, *ante* §§ 16, 26, 49.

§ 461.

¹ *Ante*, §§ 313, 363, 368.

⁴ *State v. Beackmo*, 8 Blackf. 246.

² *Pennsylvania R. R. Co v. Baltimore & Ohio R. R. Co.*, 60 Md. 263; *Commonwealth v. Pittsburgh & Connellsville R. R. Co.*, 58 Pa. S. 26; *Isom v. Mississippi Central R. Co.*, 36 Miss. 300.

⁵ *Butler v. Sewer Comrs.*, 39 N. J. L. 665.

⁶ *Post*, § 505.

dered for property taken shall be real, substantial, full, ample; and no legislature can diminish by one jot the rotund expression of the constitution."¹ "Just compensation," therefore, as used in the constitution, means a fair and full equivalent for the loss sustained by the taking for public use.² It may be more or it may be less than the mere money value of the property actually taken. The exercise of the power being necessary for the public good, and all property being held subject to its exercise when, and as the public good requires it, it would be unjust to the public that it should be required to pay the owner more than a fair indemnity for the loss he sustains by the appropriation of his property for the general good. On the other hand, it would be equally unjust to the owner if he should receive less than a fair indemnity for such loss. To arrive at this fair indemnity, the interests of the public and of the owner and all the circumstances of the particular appropriation should be taken into consideration.³

§ 462.

¹ Virginia & Truckee R. R. Co. v. Henry, 8 Nev. 165.

² San Francisco etc. R. R. Co. v. Caldwell, 31 Cal. 367; Alton & Sangamon R. R. Co., v. Carpenter, 14 Ills. 190; McIntire v. State, 5 Blackf. 384; Sater v. Burlington & Mount Pleasant Plank Road Co., 1 Ia. 386; Bangor & Piscataquis R. R. Co. v. McComb, 60 Me. 290; Winona & St. Peter R. R. Co. v. Denman, 10 Minn. 267; Symonds v. Cincinnati, 14 Ohio, 147; Livingston v. New York, 8 Wend. 85; Bigelow v. West Wisconsin Ry. Co., 27 Wis. 478; Chesapeake & Ohio Canal Co. v. Key, 3 Cranch, C. C. 599.

³ In speaking of the meaning of the words in question the court in *McIntire v. State*, 5 Blackf. 384, says: "That meaning is, not that

property thus taken shall be valued and its price paid in money, but that the individual who claims to be a sufferer, in consequence of the exercise of the right of eminent domain over his property, shall be recompensed for the actual injury which he may have sustained, all circumstances considered, by the measure of which he complains." P. 387. And, as illustrating the same view, the court in *Bangor & Piscataquis R. R. Co. v. McComb*, 60 Me. 290, says: "The words selected are significant—'just compensation.' These words cover more than the mere value of the quantity taken, measured by rods or acres. They intend nothing less than to save the owner from suffering in his property or estate, by reason of this setting aside of his right of property—as far as compensation in

§ 463. Measure of damages when an entire tract is taken.—This case presents but little difficulty, and, so far as we have observed, there is no difference in the authorities as to the proper measure of damages. A fair equivalent for any entire piece of property is its market value in money.¹ The circumstances which may be taken into consideration in fixing this value, and the manner in which it shall be arrived at, are considered elsewhere.²

§ 464. When part is taken, just compensation includes damages to the remainder.—Upon this point there is entire unanimity of opinion. “The constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner of the lot, confined to that lot, occasioned by the taking of his land. The paramount law intends that such owner, so far as that lot is in question, shall be put in as good a condition, pecuniarily, by a just compensation, as he would have been in if that lot of land had remained entire, as his own property. How much less is that lot, and its erections thereon remaining, worth to the owner, as property to be used or leased or sold the day after the part was taken, to be used for the purpose designed, than the whole lot intact was the day before such taking?”¹ In considering damages to

money can go—under the rules of law applicable to such cases.” P. 296. And, again: “Just compensation consists in making the owner good by an equivalent in money for the loss he sustains in the value of his property by being deprived of a portion of it.” *Bigelow v. West Wisconsin Ry. Co.*, 27 Wis. 478.

§ 463.

¹ *Cooley, Const. Lims.*, p. 567; *San Francisco etc. R. R. Co. v. Caldwell*, 31 Cal. 367; *Hollingsworth v. Des Moines & St. Louis Ry. Co.*, 63 Ia.

443; *Gardner v. Brookline*, 127 Mass. 358.

² *Post, § 478 et seq.*

§ 464.

¹ *Bangor & Piscataquis R. R. Co. v. McComb*, 60 Me. 290. To the same effect, *Indiana, B. & W. Ry. Co. v. Allen*, 100 Ind. 409; *Virginia & Truckee R. R. Co. v. Henry*, 8 Nev. 165; *Dearborn v. Boston, Concord & Montreal R. R. Co.*, 24 N. H. 179; *Petition of Mount Washington Road Co.*, 35 N. H. 134; *Albany etc. R. R. Co. v. Dayton*, 10

the remainder, however, the *whole* remainder must be taken into account. If part is damaged and part benefited the question will be whether the whole is worth less than before the taking.²

§ 465. **The question of benefits.**—While the authorities are agreed that, where part of a tract is taken, just compensation includes not only the value of that which is taken, but damages, if any, to the remainder, there is great diversity of opinion as to the right to take into consideration the benefits which may accrue to the remainder by reason of the appropriation of a part to public use. In some States the consideration of benefits is prohibited by the constitution.¹ Sometimes the statute conferring authority to condemn prohibits *any* deduction for benefits in estimating the compensation or damages. In the absence of any such constitutional or statutory provisions, it becomes a question of construction as to the meaning of the phrase "just compensation" in the constitution. The decisions may be divided into five classes, according as they maintain one or the other of the following propositions:

First. Benefits cannot be considered at all.

Second. *Special* benefits may be set off against damages to the remainder, but *not* against the value of the part taken.

Third. Benefits, whether *general* or *special*, may be set off as in the last proposition.

Fourth. *Special* benefits may be set off against *both* damages to the remainder or the value of the part taken.

Fifth. Both *general* and *special* benefits may be set off as in the last proposition.

It will be observed that these propositions pass from one

Abb. Pr. N. S. 182; Tait's Exr. v. Central Lunatic Asylum, (Va.) 4 S.

succeeding sections, where the question of benefits is discussed.

E. R. 697; Baltimore & Ohio R. R. Co. v. P. W. & Ky. R. R. Co., 17

² Page v. Chicago, Milwaukee & St. Paul Ry. Co., 70 Ills. 324.

W. Va., 812. The same rule is held in nearly all the cases cited in the

§ 465.

¹ See *ante*, Chap. II.

extreme to the other. The decisions and the grounds upon which they rest will now be examined.

§ 466. **Cases holding that benefits cannot be considered at all.**—The only State in which this doctrine is maintained is Mississippi. The question first arose in *Brown v. Beatty*.¹ The charter of the Mississippi Central Railroad Company provided that “the jury, in estimating the damages, if for the ground occupied by the said road, shall take into the estimate the benefit resulting to such owner or owners, by reason of said road passing through or upon said land, towards the extinguishment of said claim for damages.” The court held that this provision was void. The reasoning of the court is as follows: “The party, at the time the assessment was made, was entitled to ‘just compensation’ for the injury sustained in consequence of the appropriation of his property to the uses of the road. No diversity can exist as to the true construction of the language of the Bill of Rights. He was entitled to the cash value of the land when the assessment was made, and also to be indemnified for the damage to his adjacent land, consequent upon the location of the road. He was entitled to be paid in money. It was as clearly incompetent for the legislature to prescribe in what he should be paid, as to prescribe how much or how little he should receive. Manifestly, a party whose property has been taken and appropriated to public use in the construction of a railroad, cannot be compelled to receive as compensation the estimated enhancement in the value of his remaining property. The cash value and the actual damage are the true standard by which to determine the compensation to which, in such cases, the party is entitled. We think, therefore, that the provision in the eighth section, by which the jury are directed in assessing the damages, when land is the subject, to take into the estimate as

§ 466.

¹ 34 Miss. 227, 241, 1857.

an off-set to the claim of compensation ‘the benefits’ to the owner, resulting from the location of the road upon his land, is invalid.” The doctrine has been repeatedly affirmed.²

§ 467. Cases holding that special benefits only may be set off against damages to the remainder, but not against the value of the land taken.—This is the doctrine in Maryland,¹ Nebraska,² Tennessee,³ Virginia,⁴ West Virginia⁵ and Wisconsin.⁶

¹ *Isom v. Mississippi Central R. R. Co.*, 36 Miss. 300; *Pensici v. Wallis*, 37 Miss. 172; *New Orleans etc. R. R. Co. v. Moyer*, 39 Miss. 374. In *Balfour v. Louisville etc. R. R. Co.*, 62 Miss. 508, the rule is apparently departed from. In the latter case the rule of damages is said to be the difference in value of the whole tract before the taking and the remainder after the taking. This would allow the consideration of benefits. The point really decided, however, was that the value of the strip taken was not properly estimated by considering it as a strip by itself and out of its relation to the remainder. The rule of the Isom case as to benefits was expressly affirmed in *Board of Levee Comrs. v. Harkelroads*, 62 Miss. 807.

§ 467.

¹ *Shipley v. Baltimore etc. R. R. Co.*, 34 Md. 336; *Tide Water Canal Co. v. Archer*, 9 Gill. & J. 479.

² *Wagner v. Gage County*, 3 Neb. 237; *Freemont, Elkhorn & Mo. Valley R. R. Co. v. Whalen*, 11 Neb. 585.

³ *Woodfolk v. Nashville & Chattanooga R. R. Co.*, 2 Swan, 422; *East Tenn. & Va. R. R. Co. v. Love*, 3 Head, 63; *Memphis v. Bolton*, 9 Heisk. 508; *Paducah &*

Memphis R. Co., v. Storall, 12 Heisk. 1; *Mississippi R. R. Co. v. McDonald*, 12 Heisk. 54. Some of these cases do not appear to distinguish between general and special benefits, but in the last case it is expressly ruled that benefits common to the community cannot be set off, and this is said to be the rule established or intended by the earlier cases. In *Chattanooga v. Geiler*, 13 Lea, 611, it is held that, in a suit for damages by change of grade under the statute, benefits both general and special may be set off. But this involves simply a construction of the statute and not of the constitution, since damages by a change of grade are not a taking.

⁴ *Mitchell v. Thornton*, 21 Gratt. 164; *James River & Kanawha Co. v. Turner*, 9 Leigh, 313.

⁵ *Railroad Company v. Tyree*, 7 W. Va. 693; *Railroad Company v. Foreman*, 24 W. Va. 662.

⁶ *Robbins v. Milwaukee & Horicon R. R. Co.*, 6 Wis. 636; *Neilson v. Chicago etc. Ry. Co.*, 58 Wis. 516; *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364. See also *Brown v. Merrill*, 3 Chand. 46; *Milwaukee & Mississippi R. R. Co. v. Eble*, 4 Chand. 72; *Pick v. Rubicon Hydraulic Co.*, 27

It is difficult to understand the logic of these cases. They all recognize the right to compensation for damages to the remainder, and at the same time regard the constitution as applying only to property actually taken. The reasoning of the courts may be gathered from the leading case in Tennessee, from which we quote as follows:

“ But the contested and embarrassing question, still arises upon the rule prescribed in this law, for ascertaining the ‘just compensation’ to the owner of the land, the use and title of which he is thus forced to surrender to the corporation. On the one hand, in making the valuation of the land, the ‘*loss or damages*’ which may accrue to the owner by taking the land is to be fixed; on the other, the ‘*benefit or advantage*’ to the owner from the erection of the road, is to be estimated, and the excess of the former over the latter, in the language of the act, ‘*shall form the measure of the valuation of said land.*’

“ Is this the measure of ‘compensation,’ prescribed in the constitution? Was the compensation secured to the owner for the loss of his property to be paid in money, or may it be made in other property, or incidental ‘benefits and advantages?’ Was it intended, that the citizen should not only be forced to give up his land for the common or public use, but to take in payment for it, anything it might suit the party taking it, to offer? If such be the true meaning of the constitution, it is certainly a poor protection of private rights against the exactions of power, and is only calculated to excite false hopes of security. By the supreme law, the legislature are empowered, where, in their opinion, the good of the whole people requires it, and for the use and benefit of the whole, to compel him who owns property to give it up, upon the payment to him by the same public, for whose use

Wis. 433; Bigelow *v.* West Wis. Western Union R. R. Co., 32 Wis. Ry. Co., 27 Wis. 478; Holton *v.* 569.
Milwaukee, 31 Wis. 27; Driver *v.*

it is taken, of a ‘just compensation,’ or, in other words, a fair price, or the value in money for the property taken.

“He cannot be paid off in ‘benefits and advantages,’ which are thus forced upon him, against his consent. He may be compelled to submit to the encroachment upon his private rights, when they come thus in conflict with the public interest, but with the charter of his liberties in his hand, he can say to the powers that be, ‘Thus far shalt thou come and no farther.’ In the appropriation of the property, the public power is exhausted. It cannot be allowed to prescribe how much and in what he shall be paid. The value of the thing taken, must be assessed by a just and proper tribunal, and the amount paid, in the lawful coin of the United States—in money. It is a debt against those who take the property, and must be paid like all other debts. The creditor in this case cannot be coerced to receive as compensation, ameliorations of his remaining property, or the enhancement of its value, nor any other ‘benefit or advantage,’ either real or imaginary, that may be conferred upon him. He may not wish to part with a portion of his land to have the price of that which remains enhanced. The increase of price without any improvement of its fertility or beauty, is no advantage to him, if he does not wish to sell it; it only increases his public burdens in the way of taxation. What others might regard as a great ‘advantage and benefit,’ he might consider a decided injury. If his lands are appreciated, and his facilities for travel and trade increased by this improvement, these are benefits to which he is entitled, with the community in general, and for which he has to pay, in common with others, in taxes and other burthens. But there can be no good reason, why any more should be taken from him than others, for these common benefits.

“Then we arrive at the conclusion, that the plaintiff is entitled to the value of the land, taken from him by the defendants, in money, and that this value, when ascertained, cannot be liquidated in whole, or in part, by any ‘benefit or

advantage' he may in fact or by supposition, derive from the making of the road, in the appreciation of his remaining land, or otherwise. * * *

"Here, the constitutional provision ends; its inhibition upon the government goes no farther. The legislature may make any regulations it thinks right and proper for an account, or estimate of incidental 'loss or damage,' or injuries to the land-owner. These may consist of the necessity created for the building of new fences, the removal of buildings, separating him from his spring, well, mills, negro houses, barns, etc. And against this may be set off the 'benefits and advantages' to the owner, in the enhancement of the value of his remaining land, of the same, or any adjoining tract, his increased facilities of travel, etc."⁷

§ 468. Cases holding that benefits, both general and special, may be set off against damages to the remainder, but not against the value of the part taken.—This position is maintained in Georgia,¹ Kentucky,² Louisiana,³ and Texas.⁴

⁷ *Woodfolk v. Nashville etc. R. R. Co.*, 2 Swan's Reports (Tenn.) 422, 434 *et seq.* and 440.

§ 468.

¹ *Jones v. Wills Valley R. R. Co.*, 30 Ga. 43; *Savannah v. Hartridge*, 37 Ga. 113; *Atlanta v. Central R. R. Co.*, 53 Ga. 120; *Selma etc. R. R. Co. v. Keith*, 53 Ga. 178. In *Augusta v. Marks*, 50 Ga. 612, it was held that an act which required that, in case of opening streets, the appraisers should consider benefits and set off the benefits against the damages, having been passed since the cases cited from 30 Ga. and 37 Ga., should be held to mean the same as the rule laid down in those cases. The case of *Jones v. Wills Valley R. R. Co.*, in which this doctrine is established, makes no reference to the prior case of *Young v. Harrison*, 17 Ga. 30, in which a dif-

ferent doctrine is laid down after much deliberation.

² *Sutton's Heirs v. Louisville, 5 Dana*, 28; *Rice v. Danville, Lancaster & Nicholsville Turnpike Co.*, 7 Dana, 81; *Jacob v. Louisville, 9 Dana*, 114; *Henderson & Nashville R. R. Co. v. Dickerson*, 17 B. Mon. 173; *Louisville & Nashville R. R. Co. v. Thompson*, 18 B. Mon. 735; *Same v. Glazebrook*, 1 Bush, 325; *Elizabethtown & Paducah R. R. Co. v. Helm's Heirs*, 8 Bush, 681.

³ *New Orleans etc. R. R. Co. v. Lagarde*, 10 La. An. 150; *R. R. Co. v. Calderwood*, 15 La. An. 481; *New Orleans Pacific Ry. Co. v. Gay*, 31 La. An. 430; *Vicksburg etc. R. R. Co. v. Dillard*, 35 La. Ad. 1045; *New Orleans Pacific Ry. Co. v. Murrell*, 36 La. An. 344.

⁴ *Buffalo Bayou etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Tait v. Mat-*

Sutton's Heirs *v.* Louisville⁵ is the leading case in support of the doctrine that the "just compensation" requires that the owner should receive the value of the property actually taken, in money, irrespective of any benefit which may accrue to him from the taking. Upon this question the court say:

"Hence, when the property of one citizen is taken without his consent, for the use of the whole community of which he is a member, the constitution imperiously requires—not that the public shall decide whether he is entitled to any compensation, but that a just compensation shall be paid or secured; and that compensation implies the value, at least, of the thing taken. No citizen can be compelled to give his land to the public without an equivalent. And what is that equivalent but the value, in money, of the land surrendered to public use? He may act unreasonably and unjustly, in an imaginable case, by insisting on a pecuniary compensation, or in refusing to make the surrender without exacting the value of the property. But he has a right to insist on being paid the value of the thing taken from him, although he may be incidentally benefited, with others, in the appropriation of it to public use. If, however, claiming more than the value of the property taken, he seeks indemnity for consequential inconvenience or injury, then the true question will be whether, upon a survey of all advantages, as well as disadvantages, which will be likely to result to him, the balance will be for or against him; and if ascertained to be in his favor, then, of course, he will be entitled to nothing for alleged damages for such inconvenience or injury, because, the whole case being properly considered, in all its bearings, he will sustain no damage. Thus, and only thus, advantages and disadvantages may be compared and set off, the one against the other. And, in reference to the question we are now

thews, 33 Tex. 112: Paris *v.* Mason, R. Co. *v.* Matthews, 60 Tex. 215.
37 Tex. 447: Texas & St. Louis R. ⁵ Dana, 28, 34, 1837.

considering, this is the only constitutional sense of the term ‘advantage.’

“For property taken for public use without the owner’s consent, the constitution entitles him to be paid, in money, the actual value of the property, and the actual or supposed advantage to him, of the appropriation, cannot be set off against that value.”

Upon the point that damages to the remainder may be offset by general as well as special benefits thereto, the same court, in the case of *Henderson & Nashville R. R. Co. v. Dickerson*,⁶ say:

“In this case, however, the court instructed the jury who assessed the damages, that they were not to take into consideration, in estimating the consequential damages which the owner might sustain, any advantage that he might derive from the construction of the road, unless it were a special individual benefit, which was not common to others in the same neighborhood. In this exposition of the law, we think that the court erred.

“The advantages which the owner may derive from the construction of the road are not in the least diminished by the fact that they will be enjoyed by others, nor does it furnish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from the establishment of the road. Other persons, it is true, may enjoy the same advantages, without being subjected to the same inconvenience; but this results from the nature of the improvement itself, and does not in any degree detract from the value of these advantages to the owner of the land through which the road passes.”⁷

§ 469. Cases holding that special benefits only may be set off against both the value of the part taken and damages to the remainder.—This doctrine is maintained by the courts

⁶ 17 B. Mon. 173.

⁷ pp. 180-181.

of the following States: Connecticut,¹ Kansas,² Maine,³ Minnesota,⁴ Massachusetts,⁵ Missouri,⁶ New Hampshire,⁷

§ 469.

¹ Nicholson *v.* New York & New Haven R. R. Co., 22 Conn. 74; Nichols *v.* Bridgport, 23 Conn. 189; Trinity College *v.* Hartford, 32 Conn. 452.

² Harding *v.* Funk, 8 Kan. 315; Commissioners of Pottawattamie Co. *v.* O'Sullivan, 17 Kan. 58; Marcey *v.* Fries, 18 Kan. 353; Tobie *v.* Comrs. of Brown County, 20 Kan. 14; Roberts *v.* Same, 21 Kan. 247; Tosper *v.* Comrs. of Saline County, 27 Kan. 391.

³ Bangor & Piscataquis R. R. Co. *v.* McComb, 60 Me. 290.

⁴ Winona & St. Peter R. R. Co. *v.* Denman, 10 Minn. 267; Same *v.* Waldron, 11 Minn. 515; Carli *v.* Stillwater & St. Paul R. R. Co., 16 Minn. 260; Weir *v.* St. Paul etc. R. R. Co., 18 Minn. 155; Simmons *v.* St. Paul & Chicago Ry. Co., 18 Minn. 184; Grannis *v.* Same, *ibid.*, 194; Colvill *v.* St. Paul & Chicago Ry. Co., 19 Minn. 283; St. Paul & Sioux City R. R. Co. *v.* Murphy, 19 Minn. 500; Arbrush *v.* Oakdale, 28 Minn. 61; County of Blue Earth *v.* St. Paul & Sioux City R. R. Co., 28 Minn. 503.

⁵ Commonwealth *v.* Coombs, 2 Mass. 489; Same *v.* Sessions of Middlesex, 9 Mass. 388; Avery *v.* Vandusen, 5 Pick. 182; Palmer Co. *v.* Ferrill, 17 Pick. 58; Meacham *v.* Fitchburg R. R. Co., 4 Cush. 291; Upton *v.* South Branch Reading R. R. Co., 8 Cush. 600; Heard *v.* Proprietors of the Middlesex Canal, 5 Met. 81; Tufts *v.* Charlestown, 4 Gray, 537; Farwell *v.* Cambridge, 11 Gray, 413; Gile, Admr. *v.* Ste-

vens, 13 Gray, 146; First Church in Boston *v.* Boston, 14 Gray, 214; Hosmer *v.* Warner, 15 Gray, 46; Whitman *v.* Boston & Maine R. R. Co., 7 Allen, 313; Dorgan *v.* Boston, 12 Allen, 223; Whitney *v.* Boston, 98 Mass. 312; Chase *v.* Worcester, 108 Mass. 60; Allen *v.* Charlestown, 109 Mass. 243; Howe *v.* Ray, 113 Mass. 88; Upham *v.* Worcester, 113 Mass. 97; Green *v.* Fall River, 113 Mass. 262; Wood *v.* Hudson, 114 Mass. 513; Bancroft *v.* Boston, 115 Mass. 377; French *v.* Lowell, 117 Mass. 363; Hilbourne *v.* County of Suffolk, 120 Mass. 393; Parks *v.* County of Hampden, 120 Mass. 395; Clark *v.* Worcester, 125 Mass. 226; Cross *v.* Plymouth, 125 Mass. 557.

⁶ Newby *v.* Platte County, 25 Mo. 258; Louisiana & Frankford Plank Road Co. *v.* Pickett, 25 Mo. 535; Pacific R. R. Co. *v.* Chrystal, 25 Mo. 544; St. Louis & St. Joseph R. R. Co. *v.* Richardson, 45 Mo. 466; Lee *v.* Tebo & Neosho R. R. Co., 53 Mo. 178; Quincy etc. R. R. Co. *v.* Ridge, 57 Mo. 599; Mississippi River Bridge Co. *v.* Ring, 58 Mo. 491; Hosher *v.* Kansas City etc. R. R. Co., 60 Mo. 303; State *ex rel.* *v.* St. Louis, 62 Mo. 244; Springfield *v.* Schmoock, 68 Mo. 394; Wyandotte etc. Ry. Co. *v.* Waldo, 70 Mo. 629; Combs *v.* Smith, 78 Mo. 32; Jackson County *v.* Waldo, 85 Mo. 637; State *v.* City of Kansas, 89 Mo. 34; Daugherty *v.* Brown, 91 Mo. 26; Wells *v.* Chicago, B. & K. C. Ry. Co., 19 Mo. App. 127.

⁷ Carpenter *v.* Landaff, 42 N. H. 218; Adden *v.* Railroad Company, 55 N. H. 413.

New Jersey,⁸ North Carolina,⁹ Pennsylvania,¹⁰ and Ver-

⁸ The question does not appear yet to be very definitely or satisfactorily settled in this State. We have found no decision by the Court of Errors covering the question. The doctrine of this section is approved in *Swayze v. New Jersey Midland R. R. Co.*, 36 N. J. L. 295; *Loweree v. Newark*, 38 N. J. L. 151; *Baldwin v. Same*, 38 N. J. L. 158; see also *State v. Miller*, 23 N. J. L. 383; *Matter of Application for Drainage*, 35 N. J. L. 497. In *Carson v. Coleman*, 11 N. J. Eq. 106, the chancellor decides that just compensation cannot be made in benefits. This decision is commented upon in *Loweree v. Newark*, 38 N. J. L. 151, 158.

⁹ *Frudle v. North Carolina R. R. Co.*, 4 Jones Law, 89; *Commissioners v. Johnston*, 71 N. C. 398; *Raleigh & Augusta Air Line R. R. Co. v. Wicker*, 74 N. C. 220.

¹⁰ *Schuylkill Navigation Co. v. Thoburn*, 7 S. & R. 411; *Quigley's Case*, 3 P. & W. 139; *McMasters v. Commonwealth*, 3 Watts, 292; *Railroad Co. v. Gilson*, 8 Watts, 243; *Harvey v. Lloyd*, 3 Pa. S. 331; *Pennsylvania R. R. Co. v. Heister*, 8 Pa. S. 445; *Plank Road Co. v. Rea*, 20 Pa. S. 97; *Brown v. Corey*, 43 Pa. S. 495; *East Penn. R. R. Co. v. Holtenstine*, 47 Pa. S. 28; *Hornstein v. Atlantic etc. R. R. Co.*, 51 Pa. S. 87; *Delaware etc. R. R. Co. v. Burson*, 61 Pa. S. 369; *Susanna Root's Case*, 77 Pa. S. 276; *Shenango & Allegheny R. R. Co. v. Graham*, 79 Pa. S. 447; *East Brandywine etc. R. R. Co. v. Ranck*, 78 Pa. S. 454; *Cummings v. Williamsport*,

84 Pa. S. 472; *Hoffer v. Pennsylvania Canal Co.*, 87 Pa. S. 221; *Pittsburgh etc. R. R. Co. v. Robinson*, 95 Pa. S. 426; *Pittsburgh etc. Ry. Co. v. McClosky*, 110 Pa. S. 436; *Setzler v. Pennsylvania Schuylkill Valley R. R. Co.*, 112 Pa. S. 56; *In re Fairmount Park*, 9 Phila. 553. Of these cases special attention may be called to those in 7 S. & R. 411, 51 Pa. S. 87; 95 Pa. S. 426, and 112 Pa. S. 56. In the last case (112 Pa. S. 56, 65), after quoting with approval from the case in 7 S. & R. 411, the rule there laid down that the measure of damages is the "difference between what the property unaffected by the obstruction would have sold for at the time the injury was committed and what it would have sold for as affected by the injury," the court proceed to interpret the rule as follows:

"The adjustment of this difference involves, in all cases, a fair and just comparison of the advantages and disadvantages resulting from the opening and operation of the road, and the construction of its works; but the advantages to be considered are such only as are special, and the disadvantages such as are actual. The general appreciation of property in the neighborhood, consequent to the projected construction of the road, cannot enter into the calculation; to this the land-owner whose lands have been taken is as fairly entitled as is his neighbor whose possession and enjoyment have not been disturbed. The general increase of value, resulting from the growth

mont.¹¹ In one of the cases cited from Connecticut the court say: "There are obviously three classes of benefits that may result from the openings of highways: one, the general benefit which the public as such receive from the opening of a new avenue of travel; another, the special benefits which those receive who reside or own land upon the new highway, in the more convenient access that is given to their lands; and another, the strictly local benefit which land as such may receive from the opening and construction of the road; an illustration of which would be drainage, if it should happen to be drained by the road and its ditches, or the filling up of low ground by surplus earth that has to be disposed of in lowering some neighboring hill. As to the character of these classes of benefits, and as to their general relation to the road with reference to questions of assessment and damage, there seems to be no serious difference between the claims of the parties. The mere public benefit could not be assessed at all, and is only to be considered with reference to the question how much of the expense of the road shall be paid by general taxation. The merely local benefit is clearly to be de-

of public improvements, railroads, canals and highways, accrues to the public benefit, and in the computation of damages the land-owner cannot be charged therewith. The question in each case is whether or not the special facilities afforded by the improvement have advanced the market value of the property beyond the mere general appreciation of property in the neighborhood. So, also, on the other hand, the disadvantages must be actual, not speculative; they must be such as substantially affect the present market value of the land. Merely speculative damages cannot be allowed. The inconvenience arising from a division of the property, or

from increased difficulty of access, the burden of increased fencing, the ordinary danger from accidental fires to fences, fields or farm buildings, not resulting from negligence, and generally all such matters as, owing to the peculiar location of the road, may affect the convenient use and future enjoyment of the property, are proper matters for consideration; but, they are to be considered in comparison with the advantages only as they affect the market value of the land."

¹¹ *Livermore v. Jamaica*, 23 Vt. 361; *Adams v. St. Johnsbury & Lake Champlain R. R. Co.*, 57 Vt. 240.

ducted from the damage that would be allowed the owner for the part of his land taken for the road, and it goes so far to reduce the actual damage done to him in taking his land. The special benefits, within the limits fixed by the law, are clearly to be considered in assessing benefits; and, if nothing was to be done except to assess the benefits, there would probably be no difference of opinion as to the rule to be adopted in determining the proportions in which the burden of the road should be laid upon the benefits. The sole question is in the case where the same person has received benefits, and has also a claim for damages. We will suppose his claim for damages is \$1,000, that he gets no local benefit, and that his special benefit is exactly \$1,000. Now if he had received only a benefit, and was assessed for that benefit with all the other persons enjoying special benefits, he probably would be assessed only a moderate percentage upon it. We will suppose that assessment would be ten per cent., so that he would be called upon to pay \$100 on account of his having received \$1,000 of benefit. Now the counsel for the petitioners contend that, where the same person has a claim for \$1,000 damage, he should not have the whole benefit he has received applied to the damage, satisfying it in full and leaving him nothing, but only the ten per cent. which he would have been assessed for his benefit, if the benefit had been independently assessed, should be so applied and the balance, \$900, should be paid for his damage. There is much that is plausible in this claim, and it is not altogether unreasonable. But the rule has been long settled in this State, not only in practice, but by repeated decisions of this court, that where a land-owner has a claim for damage for land taken, and has received local and special benefits equal to the damage, the value of the benefits shall be set off against the damage, and he shall be allowed nothing. It is true that his entire benefit may be exhausted in this application, while the benefits received by his neighbors are assessed only a small percentage, and thus there may be a seeming and per-

haps a real inequality, but so long as his benefit equals his damage he cannot be said to have suffered by the laying out of the road, and there would be an injustice in compelling others to pay him for damage that has really no existence. Whatever may be said against the reasonableness and justice of this rule, it is too well settled in this State to be shaken, and is one so simple in its application, and that does on the whole so little real injustice, that we should not be disposed to change the rule if we felt perfectly at liberty to do so.”¹²

While some of the cases cited from Minnesota seem to sanction the consideration of general benefits, yet, where that particular question is considered, the judgment of the court is always against it. The cases in 11 Minn. 515, 16 Minn. 260, and 28 Minn. 61, very fully and carefully state the doctrine of the court. In 11 Minn. 515, 537, the court say: “The benefits which result to the country generally or to particular communities, by reason of the construction and operation of railroads, and other internal improvements prosecuted by private enterprise although for public use, are to be shared equally by the citizens affected by them. The railroad company, the appellant, is a private corporation, and possesses only the rights conferred by the statute. The State has granted to it important and valuable rights and franchises, among them a corporate existence, the right to take, *in invitum*, the land of the private citizen for the construction and operation of a railroad, and the right to take fare, freight and tolls for carrying passengers and merchandise. In the consideration of these and other privileges, the company contracts to build and operate the road in accordance with the terms of the act. The charter gives it no right to assess upon lands benefited by the road through which it does *not* pass, any sum to aid in the construction, pay damages or otherwise; and, whatever may be the case when a public improvement is prosecuted *by the public*, in

¹² Trinity College *v.* Hartford, 32 Conn. 452, 476-478.

this instance no such right exists. It would scarcely be claimed by the appellant here that it could maintain an action against a land-holder through whose land the road does not pass to recover any sum for general benefits accruing to him from the construction of the road. This principle being established, it follows that if benefits of this character are to be recouped from damages suffered by the owner of the land through which the road passes the operation of the law must be very unequal and unjust.

“These allowances will fall upon but a small portion of those receiving benefits, and that portion, those whose lands have been taken and injured without their consent; thus requiring them to bear the whole public burden, and at the same time denying to them advantages conferred upon others. Such construction of the charter would be unreasonable; the benefits to be deducted must be those resulting directly to the land, a part of which is taken, from the construction of the road, not through the vicinity, but through the land.”

In most of the cases cited the right to set off special benefits is assumed, and the questions discussed are the right to consider general benefits and what constitute special benefits. They all proceed upon the theory that just compensation is that which will make the owner whole or put him relatively in as good a position as his neighbors whose property is not taken. Special and peculiar benefits, therefore, which are not shared by his neighbors and which add to the value of what remains, should be taken into consideration. General benefits should be excluded, because otherwise the owner whose land was taken would alone pay for such benefits, while the rest of the community would enjoy them without price.

§ 470. Cases holding that benefits, both general and special, may be set off against both damages to the remainder and the value of the part taken.—This is the law in Alabama,¹

California,² Delaware,³ Illinois,⁴ Indiana,⁵ New York,⁶ Ohio,⁷ Oregon⁸ and South Carolina.⁹ The early cases in Georgia held the same doctrine.¹⁰ As the doctrine itself is as well stated here as in any case, we quote the following illustration of the process by which the conclusion is arrived at: "No one can dispute the strong natural equity which dictates the propriety of considering the advantages, which the land holder has gained by reason of his land having been taken for some public work, as an offset to the injuries. And if this be naturally just, and the forms of law do not obstruct, why should not the award or verdict be rendered accordingly?"

"The terms employed, and the character of the proceeding,

granted prior to the constitution of 1807, which prohibited any deduction for benefits, and the court held the charter was a contract and not affected by the new constitution.

² San Francisco etc. R. R. Co. v. Caldwell, 31 Cal. 367; California Pacific R. R. Co. v. Armstrong, 46 Cal. 85.

³ Whitman, Ex. v. Wilmington & Susquehanna R. R. Co., 2 Harr. 514.

⁴ State v. Evans, 2 Scam. 203; Alton & Sangamon R. R. Co. v. Carpenter. 14 Ills. 190; Curry v. Mount Sterling, 15 Ills. 320; People v. Williams, 51 Ills. 63.

⁵ McIntire v. State, 5 Blackf. 384; Vanblaricum v. State, 7 Blackf. 209; Indiana Central R. R. Co. v. Hunter, 8 Ind. 74; Sidener v. Essex, 22 Ind. 201; Hagaman v. Moore, 84 Ind. 496; Ross v. Davis, 97 Ind. 79.

⁶ Troy & Boston R. R. Co. v. Lee, 13 Barb. 169; Betts v. Williamsburgh, 15 Barb. 255; Rexford v. Knight, 15 Barb. 627; Matter of the Utica etc. R. R. Co., 56 Barb.

456; Granger v. Syracuse, 38 How. Pr. 308 (decision of the court of appeals 1869); People v. Eldredge, 3 Hun, 541; Long Island R. R. Co. v. Bennett, 10 Hun, 91; Matter of New York, Lackawana & Western Ry. Co. v. Arnot, 27 Hun, 151; Eldridge v. Binghamton, 42 Hun, 202; Livingston v. New York, 8 Wend. 85; Genet v. Brooklyn, 99 N. Y. 296. A different view was taken in People v. Brooklyn, 6 Barb. 209.

⁷ Symonds v. Cincinnati, 14 Ohio, 147; Brown v. Same, 14 Ohio, 541; Columbus etc. R. R. Co. v. Simpson, 5 Ohio St. 251; Kramer v. Cleveland etc. R. R. Co., 5 Ohio St. 140; Platt v. Pennsylvania Co., 43 Ohio St. 228. These cases arose prior to the constitution of 1851, which prohibited any deduction for benefits.

⁸ Putnam v. Douglas County, 6 Or. 328.

⁹ Greenville & Columbia R. R. Co. v. Partlow, 5 Rich. 428; White v. Charlotte etc. R. R. Co., 6 Rich. 47.

¹⁰ Young v. Harrison, 17 Ga 30.

support the idea, that this is what is intended. *Compensation* is the thing provided for—*just compensation*—not *payment in money*. And the term *compensation* seems to have been advisedly adopted. It is borrowed from the civil law, where its use and signification strikingly favor the view we are submitting. We know, too, that damages for a civil injury might be compensated, or pleaded as an offset in some cases at the civil law. (Inst. L. 10, § 2 D. de Compens.) When, then, we find the word employed in the common law and the constitution, to the case in question, the presumption is that it was done advisedly; that the word was used in its most familiar legal sense; that it was thereby intended that ‘recompense,’ not alone payment in money, should be made to the land holder; that as *just compensation* was required, it should be made upon principles of equity; and that accordingly, all such advantages or benefits derived by the land holder, by reason of the public work, or the exercise of the franchise, upon his land, as made it just and equitable that he should not be paid in money for his land, should be carried to the account of such compensation. (42–3.) * * * *

“It is sometimes said that the benefits derived by a land holder from a public work, for the benefit of which his land has been taken, should not be considered except so far as they are advantages peculiar to himself (as the erection of a station for example, which enhances the value of his land) and not enjoyed by other land-owners contiguous to the improvement. But this is not logical. What matters it, if others have been benefited? They are taking no issue with those who construct the public work. But he whose land has been taken is making such issue, and the duty has been devolved on his fellow-citizens of ascertaining whether or not he has been injured, and if so, how much. And can they say he has been injured and is justly entitled to compensation, if they find he has been benefited?

“It is very true that the method of arriving at such com-

pensation is, in its nature, not very precise, and more or less dependent upon the speculative opinions of witnesses. But this is no good objection, or a very large portion of that testimony which is constantly and necessarily received in courts of justice, for the purpose of ascertaining the value of property and the damage done to it, would be excluded." (43-4.)¹¹

A late case in Texas also holds the same doctrine, although without overruling and even without any reference to prior cases that hold a different position.¹² Some cases in the federal courts favor the same view.¹³ The reasoning of these cases is that it is immaterial how the owner of land is benefited or that others whose lands are not taken are benefited to an equal or even greater extent—that it is enough for him that the value of his land is enhanced by the construction of the improvement over it.¹⁴

The Illinois decisions cited are prior to the constitution of 1870, which provides that private property shall not be taken or damaged for public use without just compensation. In 1872 the legislature passed an act "to provide for the exercise of the right of eminent domain."¹⁵ Section 9 of this act provides "that no benefits or advantages which may accrue to lands or property affected shall be set off against or deducted from such compensation in any case." It is difficult to state what the law of Illinois is at the present time in regard to the measure of damages where part of a tract is taken. In *Carpenter v. Jennings*,¹⁶ the court held that the constitution of 1870 prohibited the setting off of benefits against the value of the land taken. This decision was fol-

¹¹ *Young v. Harrison*, 17 Ga. 30, 42.

¹² *Bourgeois v. Mills*, 60 Tex. 76. For the prior cases see *ante*, § 468.

¹³ *Chesapeake & Ohio Canal Co. v. Key*, 3 Cranch C. C. 599; *Kennedy v. Indianapolis*, 103 U. S. 599.

¹⁴ See especially *Allen & Sangamon R. R. Co. v. Carpenter*, 14 Ills. 190; *Greenville & Columbia R. R. Co. v. Partlow*, 5 Rich. L. (S. C.) 428; *Young v. Harrison*, 17 Ga. 30.

¹⁵ Chap. 47 R. S.

¹⁶ 77 Ills. 250.

lowed in *Deitrick v. Highway Comrs.*¹⁷ In *Keithsburg & Eastern R. R. Co. v. Henry*¹⁸ it is held that under the act of 1872 *general* benefits cannot be set off either against the value of the part taken or damages to the remainder. The question whether *special* benefits could thus be set off was expressly reserved until a case arose involving it. The doctrine of the later cases seems to be that the owner is entitled to the value of the part taken, without reduction for benefits of any kind,¹⁹ and that *special* benefits only may be set off against damages to the remainder.²⁰

§ 471. Conclusion as to the question of benefits.—The law in regard to benefits is now pretty well settled in every State, either by the decisions of its courts, or by its statutes, or its constitution. While different and conflicting rules prevail in the different States under precisely the same constitutional provisions, it is evident that there can be but one absolutely correct rule. In taking private property for public use the State acts rightfully and not as a wrong-doer. It guarantees *just* compensation, and nothing more. In arriving at what is just compensation the matter is to be viewed in the same light as though the State had bargained with the owner for a portion of his land and had agreed to make him a just compensation therefor. It is self-evident that, where a part of a tract is taken, the just compensation cannot be determined without considering the manner in which the part is taken, the purpose for which it is taken, and the effect of the taking upon that which remains. All the authorities concede this so far as damages to the remainder are con-

¹⁷ 6 Ills. App. 70.

¹⁸ 79 Ills. 290.

¹⁹ *Green v. Chicago*, 97 Ills. 370; *Hyslop v. Finch*, 99 Ills. 171; *St. Louis etc. R. R. Co. v. Kirby*, 104 Ills. 345.

²⁰ *Hyde Park v. Dunham*, 85 Ills. 569; *McReynolds v. Burlington & Ohio Ry. Co.*, 106 Ills. 152; *Dupris*

v. Chicago & North Wisconsin Ry. Co., 115 Ills. 97; *Chicago & Evanston R. R. Co. v. Blake*, 116 Ills. 163. Compare *Bloomington v. Miller*, 84 Ills. 621; *Chicago & Pacific R. R. Co. v. Francis*, 70 Ills. 238; *Page v. Chicago, M. & St. P. Ry. Co.*, 70 Ills. 324; *Eberhart v. Same*, 70 Ills. 347.

cerned, and the justice of so doing may be taken for granted. But what justice is there in considering the effect in so far as it produces damage only? If a railroad is constructed through a farm and drains a valuable spring whereby the remainder is depreciated five hundred dollars, it is conceded that just compensation must include this five hundred dollars. But if, instead of draining a valuable spring, it drains a marshy tract so as to make it worth five hundred dollars more for actual use, the same sense of justice requires that this five hundred dollars of benefits should be considered. It seems to us that there is no answer to this position.

The distinction which is taken by so many courts between the value of the part taken and damages to the remainder, seems to us wholly without foundation. This is very clearly demonstrated by the Supreme Court of Minnesota in an early case from which we quote as follows:

“I am unable to see a ground for any such distinction. It seems to me the right to compensation for both elements of damage is found in the same source, the fundamental right of the citizen to just compensation when his private property is taken for public use. The compensation is for the taking and its proximate consequences; otherwise it leaves the right of the citizen to redress for these *consequences* at the option of the legislature, to which I do not assent. To take land of the citizen for public use by the State when necessary, is an essential incident to sovereignty. The right of *eminent domain* is not conferred by the constitution; but, if affected at all, is limited thereby, and only to the extent of the limitation can the citizen obtain any redress. If, therefore, the limitation extends only to requiring compensation for the *land* taken, any other injury being done under the power of *eminent domain*, and in pursuance of statute, must be *damnum absque injuria*, and the citizen has no redress. This would take from the principle contained in the constitutional provision half its virtue, and in many, if not in most cases, render the citizen comparatively without remedy. For in

this day we know that, in many cases, the value of the strip of land actually taken for a railroad, is but a small portion of the actual damage to the owner by the construction of the road through his land. Nor can I discover that the nature of the injury is more aggravated, or the right infringed more sacred, in one case than the other. In one instance the possession of a small part of a tract of land may be taken, and in the other the whole tract or parcel may be rendered comparatively useless or valueless. The constitution should receive no such narrow and technical construction. It was intended to declare a fundamental principle of government, that when the public exigency requires the government to take for public use the property of the citizen, full compensation shall be made for the injury; not only the value of the portion of land taken, but the damages caused by taking it. Const. art. 1, sec. 13; *Ib.* art. 10, sec. 4; Pet. of Mt. Wash. R. Co., 35 N. H. 146. If this view is correct, then the damages are a unit, although composed of integral parts, and if benefits are to be deducted at all, they must be deducted from the aggregate sum; and it would seem but just and equitable that if the same act at the same time inflicts injury and confers benefits, the one should be set off against the other in determining the compensation due for the injury; then a just and full compensation is ascertained, and, thus ascertained, must be paid in money.”¹

It follows, therefore, that benefits may not only be offset against the damages to the remainder, but also against the value of the part taken.

In regard to the distinction between general and special benefits, it seems to us to be well taken. General benefits consist of an increase in the value of land common to the neighborhood or community generally, arising from the supposed advantages which will accrue to the community by reason of the work or improvement in question. These ad-

§ 471.

¹ *Winona & St. Peter R. R. Co. v. Waldron*, 11 Minn. 515, 538-9.

vantages may never be realized, and if they are it is unjust that one person should be obliged to pay for them by a contribution of property while his neighbor whose property is not taken enjoys the same advantages without price. Moreover, it is in part to secure these very advantages, that the legislature is induced to authorize the particular work or improvement. In the case of individuals and corporations, these general advantages stand, in a measure, as the consideration for the grant of authority to condemn property and of the franchise of constructing and operating works thereon. Such being the case, the community and each individual of the community is entitled to enjoy these advantages without otherwise paying for them.

Where part of a tract is taken, just compensation would, therefore, consist of the value of the part taken and damages to the remainder, less any special benefits to such remainder by reason of the taking and use of the part for the purpose proposed; or, what is the same thing, it is the value of the whole tract irrespective of the taking less the value of that which is not taken, taking into consideration the purpose for which the part taken is to be used and excluding any but special benefits to the property which remains. Just compensation, thus estimated, is a sum of money which makes the owner whole, and, in respect to general benefits or damages resulting from the work or improvement, leaves him in as good a situation as his neighbor no part of whose property has been taken.²

² Judge Cooley, in his work on Constitutional Limitations, lays down the following rules: "The question, then, in these cases, relates, first, to the value of the land appropriated; which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be applied, and not simply in reference to its produc-

tiveness to the owner in the condition in which he has seen fit to leave it. Second, if less than the whole estate is taken, then there is further to be considered how much the portion not taken is increased or diminished in value in consequence of the appropriation. But, in making this estimate, there must be excluded from consideration

§ 472. Constitutional provisions as to benefits.—The recent constitutions of Alabama, Arkansas, Ohio and South Carolina contain a provision that, when property is taken for the right of way for any corporation, compensation shall be made “irrespective of any benefit from any improvement proposed by such incorporation.”¹ The constitution of California contains a similar provision, except that it does not apply to municipal corporations.² These provisions are held to exclude benefits altogether in the cases to which they apply.³ In *Atchison, etc., R. R. Co. v. Blackshire*,⁴ this instruction was held correct. “The fair way of determining the injury is to determine the fair market value of the premises before the right of way is set apart, and then again after, and difference will be the true measure of damages.” This was held to exclude the consideration of benefits, but it is difficult to see why it does not permit benefits of all kinds to be considered so far as they affect the value of the premises. In *Little Miami R. R. Co. v. Collett*,⁵ it is doubted whether, notwithstanding the constitution, special benefits might not be set off against damages to the remainder. In

those benefits which the owner receives only in common with the community at large in consequence of his ownership of other property, and also those incidental injuries to other property, such as would not give to other persons a right to compensation, while allowing those which directly affect the value of the remainder of the land not taken; such as the necessity for increased fencing, and the like. And, if an assessment on these principles makes the benefits equal the damages, and awards the owner nothing, he is nevertheless to be considered as having received full compensation, and consequently as not being in position to complain.” Cooley, *Con. Lim.* 567-570.

§ 472.

¹ Alabama, 1867, Art. 13, § 5, in force only until 1875: Arkansas, 1874, Art. 2, § 22; Kansas, Art. 12, § 4; Ohio, 1851, Art. 13, § 5; South Carolina, 1868, Art. 12, § 3.

² 1879, Art. 1, § 14.

³ *St. Louis etc. R. R. Co. v. Anderson*, 39 Ark. 167; *Springfield and Memphis Ry. Co. v. Rhea*, 44 Ark. 258; *St. Joseph etc. R. R. Co. v. Orr*, 8 Kan. 419; *Hunt v. Smith*, 9 Kan. 137; *Reisner v. Union Depot & R. R. Co.*, 27 Kan. 382; *Cincinnati etc. Railway Company v. Longworth*, 30 Ohio St. 108.

⁴ 10 Kan. 477.

⁵ 6 Ohio St. 182.

Kansas it is held that the provision does not apply to a taking for a highway, since it is not for the use of any corporation nor an improvement proposed by any corporation, but is for the public at large.⁶ The rule for assessing damages is the same under the above provision and under one which provides that compensation shall be assured "without deduction for benefits to any property of the owner."⁷

The constitution of Iowa has always provided that the compensation for property taken shall in all cases be assessed by a jury "who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."⁸ Under this provision the measure of damages has been repeatedly held to be the difference between the fair marketable value of the premises on which the proposed improvement is to pass, irrespective of such improvement, and the value of the same in the condition in which they will be immediately after the land for the improvement has been taken, irrespective of the benefit which will result from the improvement.⁹ All benefits, though special, must be excluded.¹⁰

· § 473. Statutory provisions as to benefits and measure of damages.—It is not competent for the legislature to limit or in any way detract from the constitutional provision for compensation. Any law which necessarily requires such a construction is to that extent inoperative. But, since the

⁶ Commissioners of Pottawatomie County *v.* O'Sullivan, 17 Kan. 58.

⁷ Giesy *v.* Cincinnati etc. R. R. Co., 4 Ohio St. 308. Sec. 6, Art. 13, of the Constitution of Ohio recognizes the right to make local assessments. This may be enforced notwithstanding any deduction for benefits is prohibited by Art. 319. Cleveland *v.* Wick, 18 Ohio St. 303.

⁸ Art. 1, § 18.

⁹ Sater *v.* Burlington & Mt. Pleas-

ant Plank Road Co., 1 Ia. 386; Henry *v.* Dubuque & Pacific R. R. Co., 2 Ia. 288; Kennedy *v.* Same, 2 Ia. 521; Harrison *v.* Iowa Midland R. R. Co., 36 Ia. 323; Brooks *v.* Davenport & St. Paul R. R. Co., 37 Ia. 99; Britton *v.* Des Moines etc. R. R. Co., 59 Ia. 540; Ham *v.* Wisconsin etc. Ry. Co., 61 Ia. 716.

¹⁰ Fraderick *v.* Shane, 32 Ia. 254; Bland *v.* Hixenbaugh, 39 Ia. 532; Britton *v.* Des Moines etc. R. R. Co., 59 Ia. 540.

legislature may annex any conditions to the exercise of the power of eminent domain which it pleases, it may prescribe a rule of damages more favorable to the property-owner than the constitution requires. This has frequently been done by excluding the consideration of benefits.

An act was passed in Indiana in 1852 providing that "no deduction should be made for any benefit that may be supposed to result to the owner in estimating damages."¹ This act has been construed in a number of cases but its provisions are too plain to require comment.²

Statutes will always be given such a construction as will make them constitutional and valid where that is possible. Hence a statute which provides for an assessment of the value of the land taken will be held to include damages to the remainder as well.³ So a statute which provides for a set-off of benefits will be held to mean only *special* benefits.⁴ A statute which provides for an assessment of the damages sustained by the owner was held to precluded the consideration of benefits.⁵ A statute of Illinois passed in 1852 re-

§ 473.

¹ 2 R. S. 1852, p. 193, § 711.

² *McMahon v. Cincinnati & Chicago Short Line R. R. Co.*, 5 Ind. 413; *Newcastle & Richmond R. R. Co. v. Brumback*, 5 Ind. 543; *Evansville etc. R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Same v. Stringer*, 10 Ind. 551; *White Water Valley R. R. Co. v. McClure*, 29 Ind. 536; *Grand Rapids & Indiana R. R. Co. v. Horn*, 41 Ind. 479; *Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328. The convention which adopted the constitution of 1851 voted down a proposition to exclude benefits in estimating damages for property taken for public use. See *Indiana Central R. R. Co. v. Hunter*, 8 Ind. 74, 79.

³ *Colvill v. St. Paul & Chicago*

Ry. Co.

19 Minn. 283; *Scott v. Same*, 21 Minn. 322; *Albany, Northern R. R. Co. v. Lansing*, 16 Barb. 68; *Bigelow v. West Wisconsin Ry. Co.*, 27 Wis. 478.

⁴ *Weir v. St. Paul etc. R. R. Co.*, 18 Minn. 155; *Arbrush v. Oakdale*, 28 Minn. 61; *Fredle v. North Carolina R. R. Co.*, 4 Jones Law, 89.

⁵ *Crater v. Fritts*, 44 N. J. L. 374. The act in regard to public roads required an assessment of the damages over and above the advantages, etc. The act in regard to private roads required the assessment of the damages only. The decision was based upon the omission of any reference to advantages in the latter statute.

quired the commissioners to fix the compensation for the land taken, "and also estimate and assess the damages sustained by any person or persons by reason of the construction and use of the work specified in the petition, taking into consideration and estimating the benefits and advantages to the parties, resulting from the construction and use of the road," etc. This was construed to mean that benefits to the remainder could be set off against damages to the remainder, but not against the value of the part taken.⁶ A statute provided for compensation to the owner of land appropriated, "irrespective of any increased value thereof by reason of the proposed improvement by such corporation." This was construed to mean that the value of that taken should be estimated irrespective of any additional value given to it by the improvement, not that the owner should get damages to the remainder without deduction for benefits.⁷

A few miscellaneous cases construing statutes are referred to below.⁸

§ 474. Benefits or damages to a different tract.—Where part of a tract is taken, only damages and benefits to that tract can be considered.¹ Thus an owner who had part of a tract of land taken for a railroad claimed damages in the same proceeding to a mill which was situated at some distance on a distinct parcel of land, no part of which was taken. It was held error to allow such claim to be included

⁶ *Hayes v. Ottawa etc. R. R. Co.*, 54 Ills. 373; *Wilson v. Rockford etc. R. R. Co.*, 59 Ills. 273; *Buckles v. Northern Bank of Kentucky*, 63 Ills. 268; *Emerson v. Western Union R. R. Co.*, 75 Ills. 176; *Todd v. Kankakee & Illinois River R. R. Co.* 78 Ills. 530.

⁷ *Oregon Central R. R. Co. v. Wait*, 3 Or. 91; S. C., 3 Or. 428. And see *Willamet Falls Canal & Lock Co. v. Kelly*, 3 Or. 99.

⁸ *Ventura Co. v. Thompson*, 51 Cal. 577; *Susanna Root's Case*, 77 Pa. S. 276; *Chicago & Mexican Central R. R. Co. v. Ritter*, 1 Tex. App. Civil Cases, p. 107; *Bowen v. Atlantic etc. R. R. Co.*, 17 S. C. 574; *Bevier v. Dillingham*, 18 Wis. 529.

§ 474.

¹ *Cleveland etc. R. R. Co. v. Ball*, 5 Ohio St. 568.

in the assessment.² So benefits to a separate and distinct parcel of land cannot be considered.³

§ 475. What constitutes an entire tract.—Under the rule that, where part of a tract is taken, damages or benefits to the entire tract may be considered, it sometimes becomes a question of some difficulty to determine what is to be regarded as the entire tract. In general it is so much as belongs to the same proprietor as that taken, and is continuous with it and used together for a common purpose. Thus the whole of a farm is one tract, although it may consist of several government subdivisions,¹ or lie partly in different counties,² or have its parts separated by a highway³ or canal.⁴ But, where a man has two farms which are contiguous, and occupies one himself and rents the other, and part of one is taken, he cannot have damages to both.⁵ Whether they are two farms or one is held to be a question of fact for the jury. A man had 265 acres of land, eighty of which were cut off by a highway. This eighty acres had been worked as a separate farm and leased to a tenant for two years. The court held it to be a question for the jury whether the whole was one farm or not.⁶ A lot may be

² *Selma, Rome & Dalton R. R. Co. v. Camp*, 45 Ga. 180.

³ *State v. Digby*, 5 Blackf. 543; *Meacham v. Fitchburg R. R. Co.*, 4 Cush. 291; *Lexington v. Long*, 31 Mo. 369; *Railroad Co. v. Gilson*, 8 Watts, 243; *Paducah & Memphis R. R. Co. v. Stovall*, 12 Heisk. 1.

§ 475.

⁴ *Wilmes v. Minneapolis & North Western Ry. Co.*, 29 Minn. 242; *Cedar Rapids etc. Ry. Co. v. Ryan*, 37 Minn. 546; *Kansas City etc. R. R. Co. v. Merrill*, 25 Kan. 421; *Wyandotte etc. Ry. Co. v. Waldo*, 70 Mo. 629; *Ham v. Wisconsin, Iowa & Neb. Ry. Co.*, 61 Ia. 716.

² *Atchison & Nebraska R. R. Co. v. Gough*, 29 Kan. 94.

³ *Kansas City etc. R. R. Co. v. Merrill*, 25 Kan. 421; *Matter of New York, West Shore & Buffalo R. R. Co. v. Le Fevre*, 27 Hun, 537; *Welch v. Milwaukee & St. Paul Ry. Co.*, 27 Wis. 108; *Ham v. Wisconsin, Iowa & Neb. Ry. Co.*, 61 Ia. 716.

⁴ *Matter of Boston, Hoosac Tunnel and Western Ry. Co.*, 31 Hun, 461.

⁵ *Minnesota Valley R. R. Co. v. Doran*, 15 Minn. 230.

⁶ *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500.

occupied by several buildings which are leased to different tenants and still be one tract.⁷ Where a man had a farm of ninety acres and released the right of way through the east forty acres, it was held, in proceedings to condemn a right of way through the other fifty, that only the damages and benefits to that fifty could be considered.⁸

If two or more contiguous city or village lots are improved and used as one tract, and any part of any one is taken, the owner may recover the damage to all;⁹ so, where a tract is subdivided into lots and blocks, but continues to be used as before for agricultural purposes, the subdivision being a mere paper one.¹⁰ In the last case it is intimated that a different rule might prevail if the lots were merely held for sale. Two lots in a block all of which belonged to the same owner were taken for a railroad. All were vacant and unoccupied. It was held that damages to the other lots could not be recovered, there being no connected use.¹¹ Where a block is divided by a street, the parts become distinct tracts as to each other where they are merely held for sale or use as building lots.¹²

A brewery property was divided by an alley, the fee of which was in the adjoining owners. On the west side was the brewery proper, on the other side was the malt house, horse-power, etc., with connections between the two underneath the alley. The property on the east side was taken. It was all held to be one tract and the owner to be entitled to damages to the part on the west side of the alley.¹³ But,

⁷ *Whitney v. Boston*, 98 Mass. 312.

¹⁰ *Sheldon v. Minneapolis & St.*

⁸ *St. Louis etc. R. R. Co. v. Brown*,
58 Ills. 61.

¹¹ *Louis Ry. Co.*, 29 Minn. 318; *Welch v. Milwaukee & St. Paul Ry. Co.*, 27 Wis. 108.

⁹ *Chicago & Evanston R. R. Co. v. Dresel*, 110 Ills. 89; *Cummins v. Des Moines & St. Louis Ry. Co.*, 63 Ia. 397; *Reisner v. Union Depot & R. R. Co.*, 27 Kan. 382; *Port Huron etc. Ry. Co. v. Voorhies*, 50 Mich. 506; *Sherwood v. St Paul & Chicago Ry. Co.*, 21 Minn. 122.

¹² *Wilcox v. St. Paul & Northern Pacific Ry. Co.*, 35 Minn. 439.

¹³ *Pittsburg, Ft. Wayne & Chi. R. R. Co. v. Reich*, 101 Ills. 157.

¹⁴ *Hannibal Bridge Co. v. Schanbacher*, 57 Mo. 582.

when the property is divided into blocks bounded by streets actually in use, and part of a block is taken, the assessment of damages must be confined to that block, although the owner has other adjacent blocks and all are used in the same business.¹⁴ In one case the plaintiff owned an ore-bed and a railroad four or five miles long connecting the ore-bed with a railroad. It was proposed to take part of the railroad for railroad purposes. The commissioners allowed simply the value of the land taken, including the value of the iron, ties, etc. It was held the owner was entitled to damages to the whole property, including the railroad and ore mine.¹⁵ Three quarter sections of land lying contiguous were owned in severalty by three persons, but were used in common for grazing, under a contract between the owners, and each quarter was more valuable to be so used. One quarter had water on it and the others had none. The water privilege was rendered more valuable by supplying a larger territory, and the quarters without water were more valuable by having a right to the water in question. A highway was laid out taking part of each quarter and separating a part of each tract from the water. It was held that each owner was entitled to compensation for the loss in value to his tract by interfering with the privileges secured by a contract.¹⁶

The party condemning is bound to take notice of what the entire tract is and be prepared to meet any claim for damages thereto.¹⁷

§ 476. What are special benefits?—Special benefits are such as affect the *actual* use and enjoyment of property, and

¹⁴ *Flemming v. Chicago etc. R. R. Co.* 34 Ia. 353; *In matter of New York Central etc. R. R. Co.*, 6 Hun, 149.

¹⁵ *Matter of Poughkeepsie etc. R. R. Co.*, 63 Barb. 151.

¹⁶ *Board of Comrs. v. Labore*, 37 Kans. 480.

¹⁷ *First Church in Boston v. Boston*, 14 Gray, 214; *Minnesota Valley R. R. Co. v. Doran*, 15 Minn. 230; *Wyandotte etc. R. R. Co. v. Waldo*, 70 Mo. 629; *Springfield & Southern Ry. Co. v. Calkins*, 90 Mo. 538.

thereby render it more valuable in the market. The matter is very well put by the Supreme Court of Kansas in an opinion from which we quote as follows :

"We think the court below erred in several particulars ; but all the errors probably arose from the erroneous opinion seemingly entertained by the court, 'that *all conveniences and benefits* are proper subjects for the jury to take into consideration in arriving at a proper conclusion as to what damages should be allowed to the plaintiff.'

"Now, 'all conveniences and benefits' are not proper subjects for the jury to consider in awarding damages to a land-owner who is seeking damages for supposed injuries to his land, claimed to have been caused by the location of a road over his premises. It has already been decided by this court that 'in the appropriation of the right of way for a public road, the public has a right, in the absence of any special statutory or constitutional restrictions, to reduce the damages to be awarded to the land-owner by the amount of benefits which inure to him as the *direct* and *special* result of the proposed road, *but not by any which he received in common with the rest of the public*' (Pottowatomie Co. v. O'Sullivan, 17 Kan. 58.) That is, the benefits which may be taken into consideration for the purpose of reducing the damages to be awarded to the land-owner are such as are direct and special as to him and his land, and not such as are received in common by the whole community ; and with reference to cause and affect, they are such as are direct, certain and proximate, and not such as are indirect, contingent or remote. It is true, that increased value of the land is often taken into consideration in fixing the amount of the damages ; but this is done only where such increased value arises from such direct, special and proximate cause, such as the draining of the land, or building bridges across streams running through the land, or making some other valuable improvement on or near the land, by means of which the owner will be enabled to enjoy his land with greater advan-

tage. That is, the increased value must be founded upon something which affects the land itself directly and proximately. It must be founded upon something which increases the *actual* or *usable* value of the land, as well as the market or salable value thereof, and not such as increase merely the market or salable value alone. Increased value founded upon merely increased facilities for travel and transportation by the public in general, is not the kind of increased value which may be taken into consideration in reducing the damages to be awarded to the land-owner. That kind of increased value is too indirect and too remote from the original cause, which cause is the laying out of the road. Besides, it is a kind of increased value which is common to the whole community in general, and to each individual thereof to a greater or less extent ; and it has no relation to the *use* of the land as land, but it is merely an increased market value founded upon the extraneous circumstances of increased facilities for public travel and transportation.”¹

The benefits resulting from opening a street through property, whereby additional frontage is created or it is rendered more accessible, are special.² So, when a street is widened, any increase in value in the part not taken, by reason of fronting on a wider street, is a special benefit.³ Benefits resulting from the location of a depot near the property in question have been held to be special in Massa-

§ 476.

Allegheny v. Black's Heirs, 99 Pa. S. 152.

¹ *Roberts v. Comrs. of Brown Co.*, 21 Kan. 247, 251-2. See also *Springfield v. Schmoock*, 68 Mo. 394; *Palmer Company v. Ferrill*, 17 Pick. 58.

² *Trosper v. Comrs. of Saline Co.*, 27 Kan. 391; *Allen v. Charlestown*, 109 Mass. 243; *Sexton v. North Bridgewater*, 116 Mass. 200;

³ *Hilbourne v. County of Suffolk*, 120 Mass. 393; *Cross v. Plymouth*, 125 Mass. 557; but see *Farwell v. Cambridge*, 11 Gray, 413; *Parks v. County of Hampden*, 120 Mass. 395; *Abbott v. Cottage City*, 143 Mass. 521.

chusetts⁴ and Pennsylvania,⁵ but otherwise in Wisconsin.⁶ Where land was taken for a sewer, the construction of which would relieve the owner from the easement of maintaining an old sewer, the benefits resulting from an extinguishment of the easement were held to be special.⁷ Benefits resulting to the petitioner's land by the removal of a cemetery adjacent to it, by reason of a railroad being laid through it, were held not to be special.⁸ Land was situated on a large pond which was raised in winter by a dam. The owner used the pond for cutting ice. In a proceeding for damages by reason of the dam it was held proper to show that by raising the pond it was rendered more convenient to get ice from it and that this was a special benefit to the land in question.⁹ Other illustrations of special benefits will be found in the cases cited in the preceding sections. Where part of a tract was taken on which there was chestnut timber it was held that it could not be shown that the railroad would create a demand for chestnut ties and thereby enhance the value of the property.¹⁰

§ 477. Time with reference to which damages should be estimated.—To be exactly just the compensation should be estimated as of the time of the taking. In those States in which it is held that compensation need not precede or be concurrent with the taking, the time of the taking is usually fixed upon as the date for estimating the damages. In those States the title is held to vest upon filing a certain instrument of location or appropriation, and the compensation is permitted to be adjusted afterwards. The title would prob-

⁴ *Shattuck v. Stoneham Branch R. R. Co.*, 6 Allen, 115.

⁷ *French v. Lowell*, 117 Mass. 363.

⁵ *Pittsburg and Lake Erie R. R. Co. v. Robinson*, 95 Pa. S. 426.

⁸ *Minnesota Central R. R. Co. v. McNamara*, 13 Minn. 508.

⁶ *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364; and see *Hayes v. Ottawa etc. R. R. Co.*, 54 Ills. 373.

⁹ *Paine v. Woods*, 108 Mass. 160.

¹⁰ *Childs v. New Haven & Northampton R. R. Co.* 133 Mass. 253.

ably be held to vest upon the condition of making compensation, and, when made, the title would be perfect from the date of the appropriation. Whenever the compensation is estimated, therefore, it should be estimated as of this date.¹ In *Parks v. Boston*, the court say: "The defendants are not wrong-doers. They are withholding nothing from the plaintiff; not the estate taken, for that the public have acquired; not the compensation, for the city could not pay or tender that, till liquidated by the course of proceedings which is now going on. It is not strictly speaking an action for damages; but rather a valuation or appraisement of an incumbrance created on the plaintiff's estate, for the use of the public. It is the purchase of a public easement, the consideration for which is settled by such appraisement only because the parties are unable to agree upon it. The true rule would be, as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not especially agreed upon. And if a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the ax with the other; and this rule is departed from only because some time is necessary, by the forms of law, to conduct the inquiry; and this delay must be compensated by interest. But in other respects the damages must be appraised upon the same rule as they would have been on the day of the taking. Besides, the alienation of the plaintiff's property, so far as it was alienated at all, for the public easement, was definitive, complete, and perpetual, on the day of taking; and what difference can it make to the plaintiff, that his particu-

§ 477.

¹ *Logansport etc. Ry. Co. v. Buchanan*, 52 Ind. 163; *Lafayette etc. R. R. Co. v. Murdock*, 68 Ind. 137; *Parks v. Boston*, 15 Pick. 198; *Reed v. Hannover Branch R. R. Co.*,

105 Mass. 303; *Cobb v. Boston*, 109 Mass. 438; *Cobb v. Boston*, 112 Mass. 181; *Pitkin v. Springfield*, 112 Mass. 509; *Stafford v. Providence*, 10 R. I. 567.

lar estate would have been worth more or less, if he could have kept it to an after period? Besides, it would be extremely difficult to determine, where a great public improvement has been made in a street, how far the enhancement of the value of the estate has been occasioned by a change in the market value from general causes and how far by the improvement itself. On the whole, independently of the authorities applicable to the case of an action for damages for the unlawful detention of property, the jury were correctly instructed, that in the estimate of damages done to an estate partly taken for the public use, the value of the estate on the day of the taking was the true value to be taken by the jury, in their appraisement of the damages."² If the property is entered upon before the instrument of appropriation is filed, nevertheless the compensation is to be estimated as of the date of filing the instrument of appropriation and not as of the date of entry.³

In those States in which it is held that an entry for the purposes of permanently appropriating the property may precede the making of compensation, though title does not vest until compensation is made, the date of entry would seem to be the proper time for estimating the value of the property, as the title relates back to that time when the compensation is paid over.

In the States which hold or in which the constitution provides that compensation must be made before the property is taken or entered upon, it becomes a matter of considerable practical difficulty to say with reference to what time the compensation should be estimated. The date of filing the petition or of commencing proceedings is fixed upon in some States.⁴ A law to this effect was held valid in Cali-

² Parks *v.* Boston, 15 Pick. 198, Paint Co. *v.* Springfield, etc. R. R. 208-209. Co., 124 Mass. 118.

³ Graham *v.* Connersville etc. R. ⁴ Cook *v.* South Park Comrs., 61 R. Co., 36 Ind. 463; Hampden Ills. 115; South Park Comrs. *v.*

fornia.⁵ The reasons upon which these decisions are based are that the filing of the petition affords a convenient, definite and invariable point of time in every case to which to refer the question of compensation, that the filing of the petition is a designation of the property and a declaration that it is desired for public use, that the petition is filed upon the basis of values as they then are, and that it would be unjust to one party or the other to estimate the value as of some subsequent time. The Supreme Court of Illinois reasons as follows:

“But, independent of the statute, the evident object and import of filing a petition where parties cannot agree, is to ascertain the just and true amount of compensation for property to be taken, not five years before the petition is filed, or three or five years thereafter, but at the time of filing the petition. Suppose the property in question was worth, at the time the petition was filed, \$100,000, and the commissioners, knowing that to be its true value, had provided themselves with money necessary to pay that amount of damages, and filed a petition to condemn the property, but owing to delays, which are sometimes incident to legal proceedings, over which the commissioners had no control, a trial was not had until three years after the petition was filed, and in the meantime the property had increased in value to

Dunlevy, 91 Ills. 49; *Du Puis v. Chicago & North Wis. Ry. Co.*, 115 Ills. 97; *Chicago, Evanston & Lake Superior R. R. Co. v. Catholic Bishop of Chicago*, 119 Ills. 525; *Burt v. Merchants' Ins. Co.*, 115 Mass. 1; *Same v. Wigglesworth*, 117 Mass. 302. The last two were suits on the part of an agent of the United States to condemn land in Berlin for a post office. They are not inconsistent with the cases heretofore cited in this section from the same State, as they were

for the purpose of fixing the compensation for property not already taken but to be taken in the future. *Missouri Pacific Ry. Co. v. Hays*, 15 Neb. 224; *Oregon & California R. R. Co. v. Barlow*, 3 Or. 311 (Circ. Ct.)

⁵ *California Southern R. R. Co. v. Kimball*, 61 Cal. 90; *Tehama County v. Bryan*, 68 Cal. 57; *Arcata & Mad River R. R. Co. v. Murphy*, 71 Cal. 122; see *San Francisco & San Jose R. R. Co. v. Mahoney*, 29 Cal. 112.

\$200,000, would it be reasonable to hold that this increased valuation could be proven, and the commissioners compelled to take the property at double its value when they instituted proceedings to condemn and take it? We apprehend a rule of this character would neither be reasonable nor just, and yet the principle contended for by the commissioners would lead to this result.

"In an action for a breach of contract for a failure to deliver goods, the true measure of damages is the value of the goods at the time required by the contract for delivery, and in an action for a conversion of property, the evidence is confined to the value at the time of conversion, and in neither case can proof be introduced of the value of the property after suit commenced, as was aptly illustrated by counsel for the defendants. The same principle may be applied to a case of this character. The filing of the petition is the commencement of the action. Those interested in the land by that act are brought into court, and the inquiry is, what amount shall be then allowed as a just compensation for the property described in the petition."⁶

Similar language is found in the Massachusetts cases: "But the compensation to be paid by the government and received by the owners of the land must be estimated according to the value of the land at the time of the filing of the petition. This affords a definite and invariable rule, which has relation to the time at which the property is designated and set apart for the public use, the owners ascertained who are entitled to be compensated, and the judicial proceedings instituted for the purpose of determining such compensation; and is not liable to be affected by the duration of these proceedings, or by increase or diminution in value, whether occasioned by the taking itself, or by acts of the owners, lapse of time, or other circumstances. In all these respects, it is a juster measure of compensation than a

⁶ South Park Comrs. v. Dunlevy, 91 Ills. 49, 51, 53.

valuation of the estate at any subsequent point of time. And it accords with the rule as settled in this commonwealth in the analogous cases of lands taken for highways and railroads."⁷

Other cases fix upon the date of the award of commissioners as the time with reference to which to estimate the compensation, that is that the commissioners are to estimate the compensation as of the time of the hearing before them, and in case of any further trial on appeal the date of their award is the date taken for estimating the compensation.⁸ If the compensation is assessed in the first instance by a jury, the time of trial would by the same rule be the proper time with reference to which to estimate it. These cases usually proceed upon the ground that as soon as the compensation is assessed the petitioner may pay or deposit it and at once be entitled to the property, and that this fixes the time of the taking. Some courts hold that, if the compensation awarded by the commissioners is not paid or deposited, but an appeal is taken and the case is tried *de novo*, then, as the property has not been taken, the compensation should be assessed as of the time of such trial on appeal.⁹

Where property was wrongfully entered upon by a railroad company, and years after the owner instituted pro-

⁷ *Burt v. Merchants' Ins. Co.*, 155 Mass. 1, 14.

⁸ *St. Joseph & Denver City R. R. Co. v. Orr*, 8 Kan. 419; *Winona & St. Peter R. R. Co. v. Denman*, 10 Minn. 267; *Carli v. Stillwater & St. Paul R. R. Co.*, 16 Minn. 260; *Warren v. First Division St. Paul & Pacific R. R. Co.*, 21 Minn. 424; *Knauft v. St. Paul etc. R. R. Co.*, 22 Minn. 173; *Conter v. St. Paul & Sioux City R. R. Co.*, 22 Minn. 342; *Whitacre v. Same*, 24 Minn. 311; *Mont Clair R. R. Co. v. Benson*, 36 N. J. L. 557; *Metler v. Easton & Amboy R. R. Co.*, 37 N. J. L. 222;

Chesapeake & Ohio Canal Co. v. Tyree, 7 W. Va. 693; *Milwaukee & Miss. R. R. Co. v. Eble*, 4 Chand. 72; *Driver v. Western Union R. R. Co.*, 32 Wis. 569, 579; *Lyon v. Green Bay & Minn. Ry. Co.*, 42 Wis. 538; *West v. Milwaukee etc. Ry. Co.*, 56 Wis. 318; *Uniacke v. Chicago, Mil. & St. Paul Ry. Co.*, 67 Wis. 108; *Reed v. Chicago, Mil. & St. Paul Ry. Co.*, 25 Fed. R. 886.

⁹ *Galveston etc. Ry. Co. v. Lyons*, 2 Tex. App. Civil Cases, 183; *Arnold v. Covington & Cincinnati Bridge Co.*, 1 Duvall, (Ky.) 372.

ceedings for damages which the company converted into condemnation proceedings, it was held the compensation should be estimated as of the time of trial.¹⁰ A law providing that, where property has been entered upon by a railroad without acquiring title, and proceedings are subsequently instituted, the compensation shall be estimated as of the date of entry, was held valid in Wisconsin.¹¹

In proceedings to obtain damages to property by a dam¹² or by a railroad in a street,¹³ it has been held the damages should be assessed as of the date of the injury.

In all cases interest should be allowed from the time with reference to which the compensation is assessed, less the actual value of the use to the owner for so much of that time as he has had possession.¹⁴

§ 478. General principles in estimating value.—In estimating the value of property taken for public use it is the *market* value of the property which is to be considered.¹ The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no

¹⁰ County of Blue Earth *v.* St. Paul & Sioux City R. R. Co., 28 Minn. 503; Morin *v.* St. Paul etc. Ry. Co., 30 Minn. 100. To same effect, Lyon *v.* Green Bay & Minn. Ry. Co., 42 Wis. 538.

¹¹ Kennedy *v.* Milwaukee & St. Paul Ry. Co., 22 Wis. 581; Aspinwall *v.* Chicago & Northwestern Ry. Co., 41 Wis. 474.

¹² Zimmerman *v.* Union Canal Co., 1 W. & S. 346; Schuylkill Navigation Co. *v.* Thoburn, 7 S. & R. 411.

¹³ Central Branch U. P. R. R. Co. *v.* Andrews, 26 Kan. 702.

¹⁴ Reed *v.* Hannover Branch R. R. Co., 105 Mass. 303; Warren *v.* First Division of St. Paul & Pa-

cific R. R. Co., 21 Minn. 424; Metler *v.* Easton & Amboy R. R. Co., 37 N. J. L. 222; West *v.* Milwaukee etc. Ry. Co., 56 Wis. 318; *post*, § 499.

§ 478.

¹ Everett *v.* Union Pacific Ry. Co., 59 Ia. 243; Central Branch U. P. R. R. Co. *v.* Andrews, 26 Kan. 702; Burt *v.* Wigglesworth, 117 Mass. 302; Mississippi River Bridge Co. *v.* Ring, 58 Mo. 491; Virginia & Truckee R. R. Co. *v.* Elliott, 5 Nev. 358; Shenango & Allegheny R. R. Co. *v.* Braham, 79 Pa. S. 447; Cummings *v.* Williamsport, 84 Pa. S. 472; Woodfolk *v.* Nashville & Chattanooga R. R. Co., 2 Swan, 422.

necessity of having it.² In estimating its value all the capabilities of the property,³ and all the uses to which it may be applied or for which it is adapted, are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner.⁴ It is not a question of the value of the property to the owner.⁵ Nor

² *Pittsburgh, Va. etc. Ry. Co. v. Vance*, 115 Pa. S. 325. "Market value means the fair value of the property as between one who wants to purchase and one who wants to sell an article, not what could be obtained for it under peculiar circumstances; not its speculative value; not a value obtained from the necessities of another. Nor on the other hand is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale when one party wanted to sell and the other to buy." The above instruction was held correct in *Lawrence v. Boston*, 119 Mass. 126. See also *Little Rock Junction Ry. Co. v. Woodruff*, 49 Ark. 381.

³ *Ellington v. Bennett*, 59 Ga. 286; *Central Branch U. P. R. R. Co. v. Andrews*, 26 Kan. 702; *Hasslam v. Galena etc. R. R. Co.*, 64 Ills. 358.

⁴ "The correct rule to be applied relates to the value of the land to be appropriated, which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be put, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it." *Mississippi Bridge Co. v. Ring*, 58 Mo. 491; also *Little Rock Junction Ry. Co., v. Wood-*

ruff

49 Ark. 381; *Matter of Firman St.*, 17 Wend. 649; and see cases cited in first note to this section.

⁵ In *Robb v. Maysville & Mt. Sterling Turnpike Road Co.*, 3 Met. (Ky) 117, it appeared that the owner offered to prove the value of the property to himself. The trial court rejected this evidence and ruled that the fair market value of the property was the proper criterion for estimating the damages. The Supreme Court held this to be erroneous, and approved the rule laid down in *Henderson & Nashville R. R. v. Dickerson*, 17 B. Mon. 173, 179, in which the court say:

"The constitution secures to the owner of the land just compensation for his property before he can be deprived of it. Its value to him, considering its relative position to his other land, and the other circumstances which may diminish or enhance that value, can alone afford him a just compensation for its loss. To third persons, the same quantity of land of equal quality, on one of the boundaries of the farm might be of as much value as if it were situated in the middle of the farm, but at the same time its value, thus ascertained, might be a very inadequate compensation to the owner, if the land were taken out of the middle of his farm, so as to separate it into different parts, instead of being taken on one of

can the damages be enhanced by his unwillingness to sell.⁶ On the other hand, the damages cannot be measured by the value of the property to the party condemning it, nor by its need of the particular property.⁷ All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value.⁸

§ 479. Value for particular uses.—The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural ad-

its boundary lines. The real value of the land to the owner, as it is actually situated, and not merely its value regarding it as a separate and independent piece of land he has a right to demand, and nothing less can secure him a just compensation for his property. In making such an estimate, however, the inquiry should not be what price would induce him to sell the ten acres of land thus situated, because he might not be willing to sell it at any price, but the inquiry should rather be, what would be its value to him, situated as it is, if he were not the owner of it, but owned the adjacent property on both sides of it, under the same circumstances precisely that now exist? Its actual value to him in that condition would be as much as he has a right to demand, and would afford him that just compensation for his property secured to him by the constitution."

It will be seen that this does not go to the extent that the former case would seem to imply, and the doctrine is contrary to the principles of nearly all of the cases upon damages. And see *Elizabethtown*

& Paducah R. R. Co. v. Helms' Heirs, 8 Bush. 681.

⁶ *Harrison v. Iowa Midland R. R. Co.*, 36 Ia. 323.

⁷ *Selma etc. R. R. Co. v. Keith*, 53 Ga. 178; *Molton v. Newburyport Water Co.*, 187 Mass. 163; *Union Depot Street Ry. & Transfer Co. v. Brunswick*, 31 Minn. 297; *Virginia & Truckee R. R. Co. v. Elliott*, 5 Nev. 358; *Matter of Boston, Hoosac Tunnel & W. R. R. Co.*, 22 Hun, 176; *Montgomery Co. v. Schuylkill Bridge Co.*, 110 Pa. S. 54.

⁸ "Whatever in its location, surroundings, and appurtenances contributed to the availability of the land for valuable uses, was proper evidence to be considered by the jury in estimating its salable character, and ascertaining its market value." *Low v. Railroad*, 63 N. H. 557. To the same effect, *Hyde Park v. Washington Ice Co.*, 117 Ills. 233; *Dickenson v. Fitchburg*, 13 Gray, 546; *Louisville etc. R. R. Co. v. Ryan*, 64 Miss. 399; *Pittsburgh, Va. & C. Ry. Co. v. Vance*, 115 Pa. S. 325; *Weyer v. Chicago, Wis. & N. W. R. R. Co.*, 68 Wis. 180.

vantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation.¹ Some of the cases hold that its value for a particular use may be proved,² but the proper inquiry is, what is its market value in view of any use to which it may be applied and of all the uses to which it is adapted?³

In *Boom Co. v. Patterson*⁴ the defendant owned the greater part of three islands in the Mississippi river above the Falls of St. Anthony, which were so situated with reference to the west shore of the river as to be admirably adapted for boom purposes. In a proceeding to condemn these islands by a boom company the jury found a general verdict for \$9358.33, and also found specially that the value of the land taken, aside from any consideration of its value for boom purposes, was \$300, and, in view of its adaptability for those purposes, was worth the further sum of \$9058.33. The Supreme Court of the United States sustained the general verdict, and in giving their decision say :

“ In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted ; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste,

§ 479.

¹ *Boom Co. v. Patterson*, 98 U. S. 403; and see other cases cited in this section.

² *Chicago & Evanston R. R. Co. v. Jacobs*, 110 Ills. 414; *Johnson v. Freeport & Mississippi River Ry.*

³ *Co., 111 Ills. 413; Gardner v. Brookline*, 127 Mass. 358; *Trustees of College Point v. Dennett*, 5 N. Y. Supreme Ct. 217.

⁴ *Goodwin v. Cincinnati & White-water Canal Co.*, 18 Ohio St. 169. * 98 U. S. 403.

or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

"The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his land."

So it is proper to show that property possesses a peculiar value for railroad purposes,⁵ for market garden-

⁵ *Johnson v. Freeport & Mississippi River Ry. Co.*, 111 Ills. 413; *Cohen v. St. Louis etc. R. R. Co.*, 34 Kan. 158; *Matter of New York, L. & W. R. R. Co.*, 27 Hun, 116. The latter case was a proceeding to condemn a strip of land about thirty miles long, belonging to the Junction Canal and R. R. Co. which had formerly been used for a canal. It was especially valuable for railroad purposes and was held by the company with a view to its use for that purpose at some time. It was

ing,⁶ for raising cranberries,⁷ for warehouse purposes,⁸ or for a bridge site.⁹ It is proper to show that the property is suitable for division into village lots and that it is valuable for that purpose.¹⁰

In a proceeding to condemn a pond for a water supply for a village it was held that the owner might show that there was no other pond within six miles suitable for the purpose, and he was held to be entitled to its value for any purpose, including its value for the purpose in question and not merely its value for a mill-pond or for ice.¹¹ In a proceeding to condemn land on the bank of a stream, to be used for a reservoir in connection with works for supplying a village with water, it was held that evidence was inadmissible to show the value of the land for the purpose in question. The court say: "The damage must be measured by the market value of the land at the time it was taken; not its value to the petitioners, nor to the respondent; not the value which it

of little or no value for any use except a railroad. It was held proper to show its value for railroad purposes and an award of about \$60,000 was sustained. In *Stinson v. Chicago etc. Ry. Co.*, 27 Minn. 284, it was held to be improper to ask a witness the value of property for railroad purposes. See *Union Depot, Street Ry. & Transfer Co. v. Brunswick*, 31 Minn. 297; *Matter of Boston etc. R. R. Co.*, 22 Hun, 176.

⁶ *Chicago & Evanston R. R. Co. v. Jacobs*, 110 Ills. 414.

⁷ *Gardner v. Brookline*, 127 Mass. 358.

⁸ *Russell v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 33 Minn. 210.

⁹ *Young v. Harrison*, 17 Ga. 30; *Little Rock Junction Ry. Co. v. Woodruff*, 49 Ark. 381. But see

Sullivan v. La Fayette Co., 61 Miss. 271.

¹⁰ *South Park Commissioners v. Dunlevy*, 91 Ills. 49; *Sherman v. St. Paul etc. Ry. Co.*, 30 Minn. 227; *Matter of New York etc. Ry. Co.*, 27 Hun, 151; *Cincinnati Railway Co. v. Longworth*, 30 Ohio St. 108; *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332; *Queen v. Brown*, 2 L. R. Q. B. 630; *Montana Ry. Co. v. Warren*, 6 Mon. 275. *Contra*: *Everett v. Union Pacific Ry. Co.*, 59 Ia. 243. In *Railway Co. v. Longworth*, 30 Ohio St. 108, it was held that the owner might give in evidence a plat which he had made although not recorded, for the purpose of showing how the property might be subdivided.

¹¹ *Trustees of College Point v. Dennett*, 5 N. Y. Supreme Court, 217.

might have under different circumstances from those then existing. The petitioners were not entitled to swell the damages beyond the actual fair market value of the land at the time, by any consideration of the chance or probability that, in the future, authority might be acquired, by legislation or purchase, to carry the water in pipes to neighboring towns. Such chance or probability must need enter to some extent into the market value itself; and, so far as the market value might be enhanced thereby, the petitioners were entitled to the full benefit of it. If there were different customers who were ready to give more for the land on account of this chance, or if there were any other circumstances affecting the price which it would bring upon a fair sale in the market, these elements would necessarily be considered by the jury, or by a witness, in forming an opinion of the market value. Nevertheless the value for these especial and possible purposes is not the test, but the fair market value of the land in view of all the purposes to which it was naturally adapted.”¹²

The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But, when all the facts and circumstances have been shown, the question at last is, what is it worth in the market.

§ 480. Speculative inquiries as to a possible use or improvement of the property are improper.—Proof must be limited to showing the present condition of the property

¹² *Moulton v. Newburyport Water Co.*, 137 Mass. 163, 167.

and the uses to which it is naturally adapted.¹ It is not competent for the owner to show to what use he *intended* to put the property,² nor the probable future use of the property.³ If, for instance, the property has a water power on it, this fact may be shown, but it would be incompetent to go on and show what mills might be constructed and furnished with power therefrom and what profits could be made from the operation of such mills.⁴ So it may be shown that land is suitable for raising cranberries, but it is not competent to go into the price of cranberries, the quantity which might be raised, and the like.⁵ It has been held that it was incompetent to show the probable rental value of a lot with a suitable building on it,⁶ but in another case the owner was allowed to exhibit a plan of proposed improvements on the property in question for the purpose merely of showing the capabilities of the property.⁷ It is proper to show the business actually carried on upon the property but not to go into the profits of such business.⁸ In a case in Wisconsin it was held proper to show that property was suitable for division into village lots *and the probable value of such lots.*⁹ But this is clearly going one step too far. The probable value of village lots which do not exist is too speculative.¹⁰

§ 480.

¹ Central Pacific R. R. Co. v. Pearson, 35 Cal. 247.

² Pinkham v. Chelmsford, 109 Mass. 225.

³ Fairbanks v. Fitchburg, 110 Mass. 224.

⁴ Dorlan v. East Brandywine etc. R. R. Co., 46 Pa. S. 520; Tide Water Canal Co. v. Archer, 9 Gill & J. 479; Haslam v. Galena etc. R. R. Co., 64 Ills. 353.

⁵ Gardner v. Brookline, 127 Mass. 358.

⁶ Burt v. Wigglesworth, 117 Mass. 302.

⁷ Chicago & Evanston R. R. Co. v. Blake, 116 Ills. 163.

⁸ Dupuis v. Chicago & North Wis. Ry. Co. 115 Ills. 97; Whitman v. Boston & Maine R. R. Co., 3 Allen, 133; Pittsburgh & Western R. R. Co. v. Patterson, 107 Pa. S. 461.

⁹ Watson v. Milwaukee & Madison Ry. Co., 57 Wis. 332.

¹⁰ New Jersey R. R. etc. Co. v. Suydam, 17 N. J. L. 25; Sedalia, Warsaw & Southern Ry. Co. v. Abell, 18 Mo. App. 632.

In a proceeding to condemn the right of way for a railroad through a ravine it appeared that this ravine was the only available outlet for certain coal lands belonging to the defendants and others and that the defendants had a private railroad through the ravine over which they transported coal for themselves and others. It was held that evidence as to the probable extent of coal in the lands which had their outlet through this ravine and the probable rents which would be paid defendants for transportation was incompetent, as these matters were too speculative and contingent. The coal might not be mined, or it might find other outlets.¹¹ Part of a tract of land, mostly under water, was taken for railway purposes; \$4000 damages were awarded, based upon the theory that the railroad would prevent building a canal or slip the length of the tract, whereby the same might be filled up and made available. But the slip could not be built unless the South Menominee Canal was extended, which depended upon the action of third parties and the public. The damages were held to be too remote and speculative.¹²

§ 481. Whether it is proper to consider how the work is to be constructed.—It is apparent that, where part of a tract is taken, the damages to the remainder can never be satisfactorily estimated without knowing how the works on the part taken are to be constructed. Take the case of a railroad through a piece of property. It may make a great difference whether it is built at the natural grade or in a deep cut or on a high embankment or trestle. If the works have actually been constructed before the damages are assessed, it has been held proper to take into consideration

¹¹ Powers *v.* Railway Co., 33 Ohio St. 429.

¹² Munkwitz *v.* Chicago, Mil. & St. Paul Ry. Co., 64 Wis. 403. For a peculiar case in which the measure of damages and mode of arriv-

ing at the amount was regulated in part by a contract between the parties, see Matter of New York L. & W. Ry. Co., 33 Hun, 639; 98 N. Y. 447; 2 How. Pr. N. S. 225; 102 N. Y. 704.

the actual condition of the works as affecting the damages.¹ Where a street has been ordered to be opened and graded, it has been held proper in proceedings to assess the damages for property taken for the street, to show how the street was to be graded and to estimate the damages accordingly.² So, when a street is widened, it has been held proper to include any damages which will be occasioned by bringing the new part to the grade of the old.³ In Illinois it has been repeatedly held in case of railroads that it is proper to show how the road is to be constructed through the property in question, that the company may be compelled by order of court to produce or file in the case a plan showing the manner of construction, and that the company cannot afterwards substantially deviate from the plan on the basis of which the compensation was estimated without being liable to the owner for any damage which results from such change.⁴ In a case in New Jersey a railroad was located over the plaintiff's land. Upon the assessment of damages the company represented that it would build a bridge over a certain lane which the road crossed. The damages were assessed on this basis and paid by the company. Afterwards the company changed its plan and was proceeding to construct a high embankment at the place in question. At the suit of plaintiff the com-

§ 481.

¹ Union Railroad, Transfer & Stock Yard Co. v. More, 80 Ind. 458; Cummins v. Des Moines & St. Louis Ry. Co., 63 Ia. 397; Thompson v. Milwaukee & St. Paul Ry. Co., 27 Wis. 93; Price v. Same, 27 Wis. 98. See also Hayes v. Ottawa etc. R. R. Co., 54 Ills. 373; Van Blaricum v. State, 7 Blackf. 209.

² Portland v. Kamm, 10 Or. 383; Purcy v. Allegheny, 98 Pa. S. 522; *contra*: *In re Ridge St.*, 29 Pa. S. 391.

³ Van Riper v. Essex Road Board, 38 N. J. L. 23.

* Jacksonville etc. R. R. Co. v. Kidder, 21 Ills. 131; St. Louis etc. R. R. Co. v. Mitchell, 47 Ills. 165; Peoria etc. R. R. Co. v. Birkett, 62 Ills. 332; Peoria etc. Ry. Co. v. Peoria & Farmington Ry. Co., 105 Ills. 110; Chicago & North Western Ry. Co. v. Chicago & Evanston R. R. Co., 112 Ills. 589; Illinois & St. Louis R. R. & Coal Co. v. Switzer, 117 Ills. 399; Wabash, St. Louis & Pacific Ry. Co. v. McDougall, 118 Ills. 229; also, to same effect, Kansas City & Emporia R. R. Co. v. Kregelo, 32 Kan. 608.

pany was enjoined until additional compensation was assessed and paid.⁵ In an opinion of the Court of Appeals of New York by Gardiner, J., a similar view is announced as follows: "The plan of the road and the mode of its construction must always be before the appraisers, and enter into and modify the assessment of damages. If the grade is subsequently changed to the injury of the owners of the land, they of course would be entitled to an additional compensation for the damages thus incurred."⁶ But this expression was *dictum*, and we do not find that it has ever been applied in any subsequent case. In a New Hampshire case, it was held that it was proper to show by the engineer how the railroad was to be constructed, because the amount of the damages would depend upon the grade of the road, but that the jury should understand that the company would have a right to change the grade.⁷ In this connection the chapter on "The damages presumed to be included in the award or judgment" should be consulted.⁸

§ 482. Damages from improper construction or use to be excluded.—Damages are to be assessed on the basis that the work will be constructed and operated in a skillful and proper manner.¹ Thus in case of railroads it must be assumed that they will construct necessary and proper culverts,² and that, in bridging streams, they will make waterways of sufficient capacity and so place the piers and abut-

⁵ Carpenter *v.* Easton & Amboy R. R. Co., 24 N. J. Eq. 249, S. C., *ibid.*, p. 408; S. C., 26 N. J. Eq. 168.

⁶ Hill *v.* Mohawk & Hudson R. R. Co., 7 N. Y. 152, 157.

⁷ March *v.* Portsmouth & Concord R. R. Co., 19 N. H. 372.

⁸ Post, chap. xxiv.

63 Me. 55; Freemont etc. R. R. Co. *v.* Whalen, 11 Neb. 585; Wheeler *v.* Rochester & Syracuse R. R. Co., 12 Barb. 227; Setzler *v.* Pennsylvania & Schuylkill Valley R. R. Co., 112 Pa. S. 56; Nason *v.* Woonsocket Union R. R. Co., 4 R. I. 377; Neilson *v.* Chicago, Mil. & N. W. Ry. Co., 58 Wis. 516.

² March *v.* Portsmouth & Concord R. R. Co., 19 N. H. 372; Nason *v.* Woonsocket Union R. R. Co. 4 R. I. 377.

§ 482.

¹ Jones *v.* Chicago etc. R. R. Co., 63 Ills. 380; Jackson *v.* Portland,

ments as not to do any unnecessary injury to the adjacent lands.³ All damages resulting from neglect in these respects or from negligence in the use of the property or works may be recovered by appropriate actions by the parties damaged when such damages occur.⁴

§ 483. When there are different interests or estates, such as life estates, leases, etc.—When there are different interests or estates in the property, the proper course is to ascertain the entire compensation as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights.¹ The value of property cannot be enhanced by any distribution of the title or estate among different persons or by any contract arrangements among the owners of different interests.² Whatever advantage is secured to one interest must be taken from another, and the sum of all the parts cannot exceed the whole.

In estimating the compensation to the owner of any particular interest or estate less than the whole, the same general rules apply as in estimating the compensation when the entire interest is in one person. In those rules we have only to substitute in place of the premises or property such an estate or interest in the property as may be in question. The difficulty consists in applying the general rules to particular cases. In regard to a life estate it has been held that the net annual value of the premises multiplied by the years of the life tenant's expectancy of life and reduced by calculation to a present cash value was a correct mode of determining its

³ *Spencer v. Hartford. Providence & Fishkill R R. Co.*, 10 R. I. 14.

§ 483.

¹ *Burt v. Merchants' Ins. Co.*, 109 Mass. 1; *Coutant v. Catlin*, 3 Sandf. 485; *Wiggin v. New York*, 9 Paige, 16; *Matter of the New Reservoir*, 1 Sheldon (N. Y.) 408.

² *Ibid.*

⁴ *Union Springs v. Jones*, 58 Ala. 654; *North Vernon v. Voegler*, 103 Ind. 314; *Miller v. Keokuk & Des Moines Ry. Co.*, 63 Ia. 680; *Spencer v. Hartford, Providence & Fishkill R. R. Co.*, 10 R. I. 14; consult also chapter xxiv.

value.³ In Massachusetts a statute which provided that, where there was an estate for years or for life, the entire damages should be assessed and paid to a trustee to be agreed upon by the parties or appointed by the court, who should invest the same and pay the income to the tenant for years or life, and upon the termination of such tenancy pay the principal to the reversioner, has been held valid and applied in various cases.⁴ In Missouri, in the absence of any statute, it appears to be held that the life tenant is entitled to the use of the entire damages for life, instead of the present estimated value of his interest.⁵

In apportioning the damages between landlord and tenant an important question arises as to the effect of the taking upon the covenant to pay rent. Some courts hold that the covenant remains in force even though the whole property is taken.⁶ Other courts hold that where the whole property is taken the rent is extinguished.⁷ Where a part of the demised premises is taken the authorities are likewise conflicting, some holding that the covenant to pay rent is not affected and that there can be no apportionment,⁸ and others holding the reverse.⁹

Undoubtedly the conclusion which is practically the most satisfactory and which can be applied with the least injury to the parties is that the taking operates to extinguish the obligation to pay rent, in whole or in part, as the case may be.

³ *Pittsburg etc. Ry. Co. v. Bentley*, 88 Pa. S. 178.

⁴ *Boston v. Robbins*, 121 Mass. 453; *Turner v. Robbins*, 133 Mass. 207.

⁵ *Kansas City, Springfield & Memphis R. R. Co. v. Weaver*, 86 Mo. 473. See also *Craugh v. Harrisburg*, 1 Pa. S. 132.

⁶ *Foote v. Cincinnati*, 11 Ohio, 408; *Foltz v. Huntley*, 7 Wend. 210; *Chicago v. Garrity*, 7 Ills. App. 474.

⁷ *Barclay v. Pickles*, 38 Mo. 143;

O'Brien v. Ball, 119 Mass. 28; *Dyer v. Wightman*, 66 Pa. S. 425; *Taylor, Landlord & Tenant* § 519.

⁸ *Parks v. Boston*, 15 Pick. 198; *Patterson v. Boston*, 20 Pick. 159; *Workman v. Mifflin*, 30 Pa. S. 362.

⁹ *Biddle v. Hussman*, 23 Mo. 579; *Same v. Same*, 23 Mo. 602; *Kingsland v. Clark*, 24 Mo. 24. See also *Cuthvert v. Kuhn*, 3 Whart. 357; *Voegely v. Pittsburg etc. R. R. Co*, 2 Grant's Cas. 243. See *Taylor, Landlord & Ten.* §§ 386, 519.

It is a rule of law that if the demised premises are entirely destroyed, the lease is extinguished.¹⁰ It is also a rule that an eviction by title paramount works an extinguishment or apportionment of the rent, as the case may be.¹¹ While the taking of the premises for public use is not a destruction of land in the literal sense, it is a destruction of the right and title of the parties in and to the land; while it is not an eviction by paramount title, it is an eviction by paramount right. A very slight modification or extension of the rules referred to would be sufficient to make them embrace the case of a taking for public use.

The lessee is entitled to such compensation as will make him whole in respect to his interest in the land, irrespective of any general benefits conferred by the taking.¹² Any covenants which give value to the lease, such as a covenant for renewal,¹³ are to be taken into consideration; also any conditions which might diminish its value.¹⁴ The lessee is entitled to the value of buildings put on by him, although the lessor may elect to purchase them at the end of the term.¹⁵ In *Schriber v. Chicago & Evanston R. R. Co.*,¹⁶ a petition was filed to condemn certain property, March 1, 1883. The property was subject to a lease which expired December 15, 1883. The buildings on the premises belonged to the tenants. The tenants held till the end of their term and then held over and continued business, paying rent as before. Upon a trial of the case after the latter date, it was held that the tenants could recover nothing, that having held out their

¹⁰ *Taylor, L. & T.* § 520 and cases cited.

¹¹ *Taylor, L. & T.* §§ 377, 378; *Blair v. Claxton*, 18 N. Y. 529; *Fillebrown v. Hoar*, 124 Mass. 580.

¹² *Renwick v. D. & N. R. R. Co.*, 49 Ia. 664; *Matter of Morgan R. R. etc. Co.*, 32 La. An. 371.

¹³ *Matter of William & Anthony St.*, 19 Wend. 678; *North Pennsyl-*

vania R. R. Co. v. Davis, 26 Pa. S. 238; *Bourne v. Liverpool*, 32 L. J. Q. B. 15.

¹⁴ *Penny v. Penny*, L. R. 5 Eq. Cas. 227.

¹⁵ *Matter of Morgan etc. Co.*, 32 La. An. 371; *Livingston v. Sulzer*, 19 Hun, 375; *Muller v. Earle*, 35 N. Y. Supr. Ct. 461.

¹⁶ 115 Ills. 340.

term they were deprived of nothing, and that they could not acquire any new interest in the property except subject to the petition for condemnation, and that, as to the buildings, they should have removed them before the term expired.¹⁷ One who takes a lease and puts improvements upon the property after the petition to condemn the property is filed can recover no compensation.¹⁸ Where the entire damages were assessed and paid to the landlord, it was held that the tenant might recover his equitable proportion less his ratable portion of the cost of prosecuting the claim, in an action for money had and received.¹⁹ But in New York, where part of a leased building was taken and an item of \$500 was allowed to the landlord for putting in a new wall which the tenant was obliged to and did build, it was held that the tenant could not recover the cost from the landlord to the extent of the \$500, and that to allow this would be to impeach the award.²⁰

As to the right of tenants to recover for cost of removing goods, machinery, etc., from the premises taken, and for injury to business, reference is made to the cases cited below.²¹ The effect of the taking upon contracts, whether of lease or otherwise, is frequently regulated by statute. A statute of New York provided that "all leases and other contracts in

¹⁷ See also Lawrence and other's Appeal, 78 Pa. S. 365.

¹⁸ Chicago, Evanston & L. S. R. Co. v. Catholic Bishop of Chicago, 119 Ills. 525.

¹⁹ Harris v. Hawes, 75 Me. 436.

²⁰ Turner v. Williams, 10 Wend. 140.

²¹ Brooks v. Boston, 19 Pick. 174; Patterson v. Boston, 20 Pick. 159; S. C., 23 Pick. 425; Getz v. Philadelphia & Reading R. R. Co., 105 Pa. S. 547; S. C., Second Appeal, 113 Pa. S. 214; and see *post*, §§ 487, 488. See also a number of miscellaneous cases touching on

the subject. Burbridge v. New Albany & Salem R. R. Co., 9 Ind. 546; Blythe v. Pratt, 62 Miss. 707; Demold v. Drake, 46 N. Y. 318; Strang v. New York Rubber Co., 1 Sweeney, 78; Frost v. Earnest, 4 Whart. 86; Green v. Eales, 2 A. & E. N. S. 225; 42 E. C. L. R. 648; Wainwright v. Ramsden, 5 M. & W. 602; Slipper v. Totterham & Hampstead Junction Ry. Co., 36 L. J. Eq. 841; Queen v. Vaughan, 38 L. J. Q. B. 71; Regina v. Stone, L. R. 1 Q. B. 529; Penny v. Penny, L. R. 5 Eq. Cas. 227; *In re King's Leasehold Estates*, L. R. 16 Eq. Cas. 521.

regard to said lands so taken for said park or park-ways or any part thereof, and all covenants, contracts or agreements between landlord and tenant, or any other contracting parties, shall, upon the confirmation of such report, respectively cease and determine and be absolutely discharged according to law." This act was applied and held valid in *Matter of Application of the Mayor etc. of New York.*²²

§ 484. Damages to franchises connected with property.—Plaintiff owned a strip of land extending for twelve hundred feet along a river bank which he used for wharf purposes, and as a landing for a ferry which he operated. Twenty-six feet of this strip was taken for a bridge pier. The bridge was three hundred and seventy-five feet from the ferry, and would in no way interfere with the operation of the ferry, but would destroy its value. It was held that the plaintiff was not entitled to recover for damages to the ferry franchise.¹ The same doctrine is held in a Kentucky case.² But if the taking interfered with the exercise of the franchise the rule would doubtless be otherwise.

§ 485. When the title is subject to restrictions, conditions, etc.—It was held in Massachusetts that the owner of a base or determinable fee was entitled to the same damages as though his estate was subject to no qualification.¹ But in another case in the same State, where an early deed of the property in question provided that it should only be used for a three-story brick dwelling, it was held proper to take this fact into consideration in fixing the damages.² Where the property can be used only for a particular purpose, the dam-

²² 34 Hun, 441; affd. in 99 N. Y. 569. See also *Gillespie v. Thomas*, 15 Wend. 464.

§ 484.

¹ *Moses v. Stanford*, 11 Lea, 731.

² *Richmond & Lexington Turnpike Road Co. v. Rogers*, 1 Duvall,

135. See also *Mills v. County Comrs.*, 3 Scam. 53; *Pittsburgh & Lake Erie R. R. Co. v. Jones*, 111 Pa. S. 204.

§ 485.

¹ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

² *Allen v. Boston*, 137 Mass. 319

ages to the remainder are measured by the extent to which it is rendered less valuable for the uses to which it is devoted.³

§ 486. Value of trees, crops, minerals, etc.—The compensation should be estimated for the land *as land*, and not for the materials which compose it.¹ But it is proper to show the value of crops on the land,² though it is not competent to go into the question of the profits which might have been made therefrom but for the taking.³ So it is proper to consider the value of trees,⁴ or peat on the land.⁵ But it is not competent to go into the value of coal claimed to be underneath the surface, no mine having been opened and the existence and extent of coal in the land being wholly a matter of opinion.⁶

§ 487. Injury to business, loss of profits, etc.—While it is proper to show how the property is used, it is incompetent to go into the profits of the business carried on upon the property. No damages can be allowed for injury to business.¹ The reason is that the owner is entitled only to

³ First Parish in Woburn *v.* County of Middlesex, 7 Gray, 106; see also Matter of Albany Street, 11 Wend. 149; Chicago, Evanston & Lake Superior R. R. Co. *v.* Catholic Bishop of Chicago, 119 Ills. 525; see Matter of Ninth Avenue, 45 N. Y. 729.

§ 486.

¹ Matter of Water Commissioners, 3 Edwards, Ch. 552: Texas & St. Louis R. R. Co. *v.* Matthews, 60 Tex. 215.

² Lance *v.* Chicago, Mil. & St. P. Ry. Co., 57 Ia. 636; Gilmore *v.* Pittsburgh, Va. & C. R. R. Co., 104 Pa. S. 275; Fort Worth & Denver City Ry. Co. *v.* Scott, 2 Tex. App. Civil Cas. p. 137; Telephone

Telegraph Co. *v.* Forke, 2 *ibid.*, p. 318.

⁵ Schuylkill Navigation Co. *v.* Freedley, 6 Whart. 109.

⁴ St. Louis etc. R. R. Co. *v.* Molllett, 59 Ills. 235.

⁶ Gile, Admr. *v.* Stevens, 13 Gray, 146.

⁶ Searle *v.* Lackawana & Bloomsburg R. R. Co., 33 Pa. S. 57.

§ 487.

¹ Central Pacific R. R. Co. *v.* Pearson, 35 Cal. 247; Jacksonville & S. E. Ry. Co. *v.* Walsh, 106 Ills. 253; Chicago & Evanston R. R. Co. *v.* Dressel, 110 Ills. 89; DeBuol *v.* Freeport & Mississippi River Ry. Co., 111 Ills. 499; Whitman *v.* Boston & Maine R. R. Co., 3 Allen, 133; Cobb *v.* Boston, 109 Mass. 438;

the value of the property taken and damages to the remainder, if any. The owner can remove his business or continue it on the property which remains. Any incidental loss or inconvenience in business, which may result from a removal or change consequent upon the taking, must be borne by the owner for the sake of the general good in which he participates.²

The profits of a business do not tend to prove the value of the property upon which it is conducted. The profits of a business depend upon its extent and character and the manner in which it is conducted. One man will get rich while another will become bankrupt in conducting the same business upon the same property. It is proper, however, to show how the taking will interfere with the use of the property, either for the purpose to which it is actually devoted or for any purpose to which it is adapted.³

In a case in Massachusetts the tenant of a store, part of which was taken for widening a street, was allowed to recover the reasonable cost of removing his goods to another store and back again, loss of profits while making such removals and reasonable rent of the new store during such time as necessary to put the premises in a tenable condition.⁴

But the profits derived from the use of the property itself may be shown, whenever such profits would be an indication

Petition of Mt. Washington Road Co., 35 N. H. 134; Schuylkill Navigation Co. v. Farr, 4 W. & S. 362; Same v. Thoburn, 7 S. & R. 411; Pittsburgh & Western R. R. Co. v. Patterson, 107 Pa. S. 461; Fuller v. Edings, 11 Rich. 239; Eddings v. Seabrook, 12 Rich. 504; Studler v. Milwaukee, 34 Wis. 98; Queen v. Vaughn, 4 L. R. Q. B. 190.

² In Chicago, Mil. & St. Paul Ry. Co. v. Hock, 118 Ills. 587, an allowance for the removal of the busi-

ness from the premises was held proper.

³ Boston & Maine R. R. Co. v. Old Colony & Fall River R. R. Co., 3 Allen, 142; Schuylkill Navigation Co. v. Farr, 4 W. & S. 362; Driver v. Western Union R. R. Co., 32 Wis. 569.

⁴ Patterson v. Boston, 20 Pick. 159; S. C., 23 Pick. 425; but see Brooks v. Boston, 19 Pick. 174; and see also *In re Barbadoes Street*, 8 Phila. 498.

of value.⁵ If a valuable city lot is devoted to gardening purposes, the profits derived from it may be no indication of its value. But if it is improved to correspond with its locality and surroundings, the rents derived from it, after deducting taxes and expenses, will be a very important factor in determining what it is worth. Where a toll-bridge was taken, it was held proper to show the income from it during a series of years preceding the taking.⁶ So the profits derived from farming afford a criterion of the value of the farm.⁷

If the particular use to which the property is devoted has continued for a long time and has imparted to the property a peculiar value for that use, as for a hotel, it is proper to show the fact and to take it into consideration in fixing the damages.⁸

⁵ *Dupuis v. Chicago & North Wisconsin Ry. Co.*, 115 Ills. 97; *Pittsburgh & Western R. R. Co. v. Patterson*, 107 Pa. S. 461.

⁶ *Montgomery County v. Schuylkill Bridge Co.*, 110 Pa. S. 54.

⁷ But see *Stockton etc. R. R. Co. v. Galgiani*, 49 Cal. 139.

⁸ In the following case the entire property, which had been in use for fourteen years, was taken. Upon the point in question the court say: "The evidence minutely described the situation of the premises, the size of the buildings, the nature and character of the machinery, and the uses to which it was adapted. Witnesses were also called to prove the value of the respondent's leasehold interest, including the buildings and machinery. While the exceptions to the admission of evidence as well as to the charge of the court vary somewhat in form, and present the matter in different shapes, yet the

general question raised by all of them really is whether it was proper, in determining the value of this property, to take into account the fact that there was a manufacturing business established and in operation upon the premises. That this was allowed is really the alleged error here urged, and which we have to consider. We think it may be stated as elementary that a person is entitled to the fair value of his property for any use to which it is adapted and for which it is available, and for which it may be sold. He is entitled to the value of his property for any use to which it may be applied, and for which it would ordinarily sell in the market, whether that use be the one to which it is presently applied, or some other to which it is adapted. It is, we think, equally true that any evidence is competent and any fact is proper to be considered which legitimately

§ 488. Personal property: Fixtures: Cost of removal.

—Fixtures upon the property taken must be valued and paid for as part of the real estate,¹ and any depreciation in the value of fixtures upon the part not taken is to be taken into consideration, the same as damage to the soil itself. Where a railroad was laid through premises which had been fitted up for a water cure, so as to render it unsuitable for that purpose, it was held that the owner was entitled to the difference between what the fixtures and appurtenances were worth in connection with the property as a water cure (not

bears upon the question of the marketable value of the property. In this case evidence was introduced tending to prove that the fact of a business having been established and carried on on the premises for so long atime materially increased the market value of this property. If this was the fact, it was competent to prove it; and, if proved, we cannot see why it was not proper to take it into consideration in estimating the value. Who can say that this circumstance would not affect its value; that is, what a purchaser would ordinarily be willing to pay? When we speak of the market value of property as being what purchasers generally would pay for it, we do not mean what men would pay who had no particular object in view in purchasing, and no definite plan as to the use to which to put it. The owner has a right to its value for the use for which it would bring the most in the market. This property was expressly built for a plow factory, and was especially suited for such a use. And it is not unreasonable to suppose that a purchaser would give more for it than he would if the business had

been suspended for a time or had never been established there. Take, for example, a hotel built expressly as a public house, and not capable for advantageous use for anything else; might it not be worth more, that is, bring more in the market, by reason of the fact that it had been for years run as a hotel? So with a stand long used for some branch of mercantile business. From that very fact it might be worth more for that kind of business than any other, and a man who wished to buy might give more for it than he otherwise would. If so, why is not that a proper element to take into account in determining its value? To do so is not, as counsel seems to argue, to pay the owner for his loss of business or loss of future profits, but simply to give him the marketable value of his property for the use for which it is best adapted, and for which it would bring the most." *King v. Minneapolis Union Railway Co.*, 32 Minn. 224, 225-6.

§ 488.

¹ *Edmunds v. Boston*, 108 Mass. 535, 549; *Gibson v. Hammersmith & City Ry. Co.*, 2 Drewry & Smale, 603.

exceeding their reasonable cost) and what they were worth to be removed from the premises and applied to other purposes.² In a case in Pennsylvania it was held proper to show the expense of removal of machinery and fixtures as bearing upon the value of the property as it stood.³

But the damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid.⁴

§ 489. When one railroad crosses another.—The question of what is just compensation where one railroad condemns the right to cross another presents many points of difficulty. In Massachusetts the rule of damages is laid down as follows: “A railroad corporation, across whose road another railroad or a highway is laid out, has the like right as all individuals or bodies politic and corporate, owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition. But it is not entitled to damages for the interrup-

² *Price v. Milwaukee & St. Paul Ry. Co.*, 27 Wis. 98.

³ *Philadelphia & Reading R. R. Co. v. Getz*, 113 Pa. S. 214; S. C., 105 Pa. S. 547. In the latter decision the court say: “If the location of the railroad so affected the property as to compel the removal of the business conducted by the tenants to another place, and there was some evidence to that effect, and the machinery, fixtures, etc., were in consequence depreciated as they stood, it is clear, as was said when the case was here before (9 Out. 547), that the difference be-

tween the value of the machinery in connection with the business conducted on the property, and its value to be removed and applied to the same or other use, was a proper element of damage to be considered by the jury.”

⁴ *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *Matter of New York Central & Hudson River R. R. Co.*, 35 Hun, 306; *Matter of New York, West Shore & Buffalo Ry. Co.*, 35 Hun, 633. But see *Chicago, Mil. & St. Paul Ry. Co. v. Hock*, 118 Ills. 587.

tion and inconvenience occasioned to its business, nor for the increased liability to damages from accidents, nor for increased expense for ringing bell, nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safe-guards for travelers crossing its railroad.”¹ In the case in question the new road crossed on a bridge twenty feet above the grade of the old road. The abutments of the bridge obscured the view of the old road at a highway crossing, and the old road had been required to keep a flagman at this crossing. It was held that the expense of maintaining this flagman was not a proper element of damages.

A statute of Ohio provided that when two railroads crossed each other at grade the crossing should be made, kept up and a watchman maintained, at the joint expense of the two companies owning the tracks. In *Railway v. Railway*² the plaintiff company instituted proceedings to obtain the privilege of crossing the tracks of the defendant company at grade. The defendant company claimed the right to recover the cost of maintaining the crossing and such a sum as would cover the annual expense to it for watchman, lights, watch-house, etc., in order to comply with the statute, and also any injury to their property and franchises by reason of the increased expense of operating its road. In a very elaborate opinion the Supreme Court ruled that these claims could not be allowed, and virtually ruled that only nominal damages could be recovered. It is held that the first road took nothing by its priority, and that the legislature, by virtue of the police power and of the fact that the property and franchises of the first company were held for public use, had a right to impose upon it one-half the burden of building and maintaining the crossing, and of providing for the

§ 489.

v. Boston, Clinton & Fitchburg R.

¹ *Massachusetts Central R. R. Co. v. R. Co.*, 121 Mass. 124, 126.

² 30 Ohio St. 604.

safety of the public thereat, without compensation. The only intimation as to the damages which the first company would be entitled to receive is contained in the following language: "If, in any given case, there are other consequential injuries, not provided for by the act of 1860, incident to the appropriation, they may be considered if they are the cause of present and direct damages to the remaining property."

A series of cases in Illinois establish a more liberal rule of compensation. Where a railroad crossed another by cutting an embankment and going underneath the tracks of the first, it was held that the first road was entitled to such a sum as would enable it to build and maintain a suitable and safe bridge with necessary abutments, etc.³ Where the crossing is at the same grade, the rule of damages is laid down as follows: "The defendant companies were the owners of this right of way, and although the right is limited to the use of the land for the construction, maintenance and operation of a railroad upon it, this limited use is property, and as much so as if the use were an absolute one. This use was exclusive in the defendants, and had the petitioner entered upon the right of way and placed any obstruction upon it, it would have been a trespasser. By the present proceeding the petitioner acquires the right to enter upon the premises described, and construct and operate thereon four main tracks of a railway. Property is thereby taken from the defendants, and they must have just compensation. Their use, which was before exclusive, is now reduced, it only being a right to use the premises when petitioner is not using them; so the use is impaired. The record discloses that all evidence as to damage to any of the right of way, or railroad property, beyond the boundaries of blocks 34 and 35, was excluded, and the damages allowed restricted to these blocks.

³ Chicago etc. R. R. Co. v. Springfield etc. R. R. Co., 67 Ills. 142; S. C., 96 Ills. 274.

The right of way is a right of user extending the whole length of the railroad, and any interference with it at any point, we think, may be considered in connection with and as affecting it as an entirety. We think it was competent to show, as was attempted, and to recover for, damages to which the companies would be subjected by placing obstructions upon their right of way, whereby access to different parts of their lines would be interfered with, and their capacity for the transaction of business impaired or destroyed. We do not see why it may not be admitted as well as in a case of a farm, where a railroad interferes with access between its different portions.

“ Some of the rulings of the court are attempted to be justified on the ground that the subject matter involved the business of the roads. Evidence as to the amount of traffic was legitimate, to show the extent of the use to which this strip of land would be subjected in the operation of the road, and to what extent it would injure the adaptability of the blocks for transfer uses, as affecting the questions of depreciation of their value, and damage to the other railroad property. There evidently was no claim for or purpose to show mere damage to business, but damage to the capacity of the property for the use. The franchise in these blocks is a property right held with regard to them, and the volume of the use of the franchise is material in ascertaining its value, and the damage which interference with it will cause.”⁴ If the petitioner stipulates in the proceedings to construct and maintain the crossing at its own expense, the same court holds that this is binding upon itself and its successors and assigns, and precludes any allowance for this purpose to the first

⁴ *Lake Shore & Michigan Southern Ry. Co. v. Chicago & Western Indiana R. R. Co.*, 100 Ills. 21, 31. Same principles affirmed in *Chicago & Alton R. R. Co. v. Joliet, L. & A. Ry. Co.*, 105 Ills. 388, and Chi-

cago & Western Indiana R. R. Co. v. Englewood Connecting Ry. Co., 115 Ills. 375. See also *Matter of Lockport & Buffalo R. R. Co.*, 19 Hun, 38.

company.⁵ No damages can be allowed because the defendant will have to stop its trains at the crossing in obedience to the statute.⁶ If no evidence is given as to actual damages, an award of nominal damages will be sustained.⁷

§ 490. When one railroad takes the use of another's tracks.—One railroad company cannot take the use of another's tracks without making compensation therefor.¹ The principles upon which such compensation should be estimated have not yet been settled by adjudication. Where the right to repeal, alter or amend the charter of a railroad company is reserved it has been held that the legislature could authorize another company to use a portion of its tracks without any compensation for the diminution of profits or of the value of the franchise, and that the terms and conditions of making such use and the compensation to be paid could be left entirely to the discretion of the commissioners.² Where the right to lay tracks in a street is granted upon condition that the right to use them by another company may be granted upon compensation to be fixed by the council in case the companies cannot agree, the condition is binding.³

§ 491. When a highway crosses a railroad.—In New York a statute has been held valid which authorizes the laying out of highways over the tracks of a railroad without compensation and although it compelled the railroad company to make

⁵ *Chicago & Alton R. R. Co. v. Joliet L. & A. R. R. Co.*, 105 Ills. 388; *Chicago & Western Indiana R. R. Co. v. Englewood Connecting Ry. Co.*, 115 Ills. 375.

⁶ *Chicago & Alton R. R. Co. v. Joliet L. & A. R. R. Co.*, 105 Ills. 388.

⁷ *Matter of Cortland & Homer Horse R. R. Co.*, 98 N. Y. 336.

§ 490.

¹ *Railroad Co. v. Railroad Co.*, 36 Ohio St. 239; *Jersey City & Ber-*

gen R. R. Co. v. Jersey City & Hoboken Horse R. R. Co., 5 C. E. Green (20 N. J. Eq.), 61.

² *Metropolitan R. R. Co. v. Highland Street R. R. Co.*, 118 Mass. 290; see also *Same v. Quincy R. R. Co.*, 12 Allen, 262.

³ *Railroad Co. v. Railroad Co.*, 36 Ohio St. 239. See also *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken Horse R. R. Co.*, 5 C. E. Green (20 N. J. Eq.), 61.

the necessary excavations or embankments to take the highway across.¹ This is put upon the reserved power to repeal, alter or amend the incorporation acts. The act in question only provided for crossing the "track" of any railroad, and it was held not to apply to grounds taken for a station house, etc., or to tracks used simply for storing cars.² Substantially the same ruling has been made in Maine, though the right to repeal, alter or amend the charter was not reserved.³ In other States it is held that, in such cases, the railroad company is entitled to compensation for taking its land for a highway subject to its right to use the same for railroad purposes, and to such a sum as will enable it to make and maintain the crossing with suitable signs, cattle-guards, planking, etc.⁴ Nothing can be allowed on account of the possibility of the company being compelled to pay damages for accidents at the crossing, and evidence of what the company has paid for accidents at other crossings is incompetent.⁵ Nor can anything be allowed for the expense of ringing a bell at the crossing nor in view of the contingency of its having to build a bridge.⁶

§ 492. When a railroad is laid across or along a turnpike.

—The same principles apply as in the preceding cases. It is held that nothing can be allowed for injury to the franchise or business of the turnpike company by reason of the

§ 491.

¹ Albany Northern R. R. Co. v. Brownell, 24 N. Y. 345; Boston & Albany R. R. Co. v. Greenbush, 52 N. Y. 510.

² *Ibid.*

³ Boston & Maine R. R. Co. v. County Comrs., 79 Me. 386. See also cases cited in last section.

⁴ Old Colony & Fall River R. R. Co. v. County of Plymouth, 14 Gray, 155; Boston & Maine R. R. Co. v. County of Middlesex, 1

Allen, 324; Grand Rapids v. Grand Rapids & Indiana R. R. Co., 58 Mich. 641; Chicago & Grand Trunk Ry. Co. v. Hough, 61 Mich. 507.

⁵ Old Colony & Fall River R. R. Co. v. County of Plymouth, 14 Gray, 155; Boston & Maine R. R. Co. v. County Comrs., 79 Me. 386.

⁶ *Ibid.*: and Portland and Rochester R. R. Co. v. Deering, 78 Me. 61.

competition of the railroad.¹ If the railroad company is required to restore the turnpike to its former condition, or so as not to impair its usefulness, it is error to make an allowance to the turnpike company on this account.² Where a railroad was laid along a turnpike which still continued to be used as a turnpike with but a slight diminution of tolls, it was held the turnpike company was only entitled to its actual damages, not to the value of the land or road occupied.³

§ 493. **Railroads in streets.**—A great deal of litigation has arisen from the laying of railroads in the public streets. The cases have already been examined in former chapters with reference to the questions there discussed. In considering these cases with reference to the measure and elements of damages, great care must be taken to observe the circumstances of each case, the nature of the action, the statutory or constitutional provisions which may be involved and the principles upon which a recovery is based. The *right* of abutting owners to recover compensation for damages occasioned by laying a railroad in front of their property has already been considered.¹ If the fee of the street is in the adjacent owner, the measure of damages is precisely the same as in other cases of partial taking; that is, the value of the land taken, subject to the easement for a public street, and damages to the remainder of the tract by reason of taking a part for railroad purposes.² Where the compen-

§ 492.

¹ *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Cincinnati & Indiana R. R. Co. v. Zinn*, 18 Ohio St. 417.

² *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100.

³ *Stockton & Linden Gravel Co. v. Stodden & Copperopolis R. R. Co.*, 53 Cal. 11.

§ 493.

¹ *Ante*, §§ 110-125.

² *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; *Kucheman v. C. C. & D. Ry. Co.*, 46 Ia. 366; *Jeffersonville etc. R. R. Co. v. Esterle*, 13 Bush, 667; *Matter of Prospect Park & Coney Island R. R. Co.*, 13 Hun, 345; *S. C.*, 16 Hun, 261; *Matter of New York Central & Hudson River R. R. Co.*, 15 Hun,

sation is assessed under a statute providing for the payment of compensation or damages in such cases, the measure of damages is such a sum as will make the owner whole and embraces the depreciation of his property by reason of the construction and operation of the road;³ and this would be the rule where a recovery is based upon those recent constitutional provisions providing that property shall not be *damaged or injured* without just compensation.⁴ Where the fee of the street is in the public and the right to recover is worked out on the basis of an interference with the rights of access and of light and air which amounts to a taking, the authorities generally hold that the damages should be limited to the injury caused by such interference and should not include the total depreciation caused by having the railroad in the street.⁵ The cases, however, are not very accurate upon the question of damages, and no general rule can be drawn from them. The New York elevated railroad cases belong to this class. The right to recover is based upon the existence of an easement of access, light and air in the street, which is appurtenant to the adjacent lot, and is property within the meaning of the constitution. When this ease-

63; *Henderson v. New York Central R. R. Co.*, 78 N. Y. 423; *Hegar v. Chicago & North Western Ry. Co.*, 26 Wis. 624.

³ *McClean v. Chicago, Iowa & Dakota Ry. Co.*, 67 Ia. 568; *Grand Rapids & Indiana R. R. Co. v. Heissel*, 47 Mich. 393; *Grafton v. Baltimore & Ohio R. R. Co.*, 21 Fed. R. 309.

⁴ *Denver v. Bayer*, 7 Col. 113; *Guess v. Stone Mountain Granite etc. Co.*, 72 Ga. 320; *Galveston etc. Ry. Co. v. Fuller*, 63 Tex. 467; *Same v. Bock*, 63 Tex. 245; *Same v. Edidins*, 60 Tex. 656; *Belt Line Street Ry. Co. v. Crabtree*, 2 Tex. App. Civil Cas. p. 579; *Spencer v. Point*

Pleasant & Ohio R. R. Co., 23 W. Va. 406; *Smith v. Same*, *ibid.* 451; *Hale v. Same*, *ibid.* 454. But see *Chicago & Western Indiana R. R. Co. v. Berg*, 10 Ills. App. 607; *Same v. George*, *ibid.* 646; *Same v. Phillips*, *ibid.* 648.

⁵ *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Central Branch Union Pacific R. R. Co. v. Andrews*, 30 Kan. 590; *Elizabethtown etc. R. R. Co. v. Combs*, 10 Bush, 382; *Randle v. Pacific R. R. Co.*, 65 Mo. 325; *Parrott v. Cincinnati etc. R. R. Co.*, 10 Ohio St. 624; and see *Mix v. La Fayette etc. Ry. Co.*, 67 Ills. 319.

ment is interfered with, it is a *taking*, and the owner is entitled to compensation to the extent of the taking, that is to the extent that the interference with the easements in question depreciates the value of the property. Some of the cases limit the recovery to such depreciation, and deny the right to recover the entire depreciation due to the railroad in the street.⁶ Other cases permit a recovery to the extent of the difference in value before and after the construction of the railroad as affected by the railroad.⁷ The Court of Appeals, though divided on the question, appear to have settled the question in favor of the latter cases and of the larger right to compensation.⁸ This rule of damages may be justified on the ground that an interference with an easement appurtenant to property, whereby the same is impaired or destroyed, should be treated like any other case of partial taking, and, therefore, as entitling the owner of the property to which the easement is appurtenant, and of which it is parcel, to recover not only the value of the easement to the property but damages to the property by reason of the taking or interfering with the easement, *for the purpose proposed*.

There is a class of common law suits for damages by reason of railroads in streets in which the recovery is limited to the damages which have accrued up to the time of bringing suit.⁹ The measure of damages in these cases is held to

⁶ Matter of the New York Elevated R. R. Co., 36 Hun, 427; Matter of New York El. R. R. Co., 41 Hun, 502; Fifth National Bank v. Same, 28 Fed. R. 231.

⁷ Matter of Gilbert Elevated Ry. Co., 38 Hun, 438; Pond v. Metropolitan El. Ry. Co., 42 Hun, 567; Drucker v. Manhattan R. R. Co., 51 N. Y. Supr. Ct. 429; Ireland v. Metropolitan El. R. R. Co., 52 N. Y. Supr. Ct. 450; Falker v. New York, West Shore & Buffalo Ry. Co., 17 Abb. New Cas. 279; Peyser

v. Metropolitan El. R. R. Co., 13 N. Y. C. P. 122.

⁸ Lahr v. Metropolitan El. R. R. Co., 104 N. Y. 268; Drucker v. Manhattan Ry. Co., 106 N. Y. 157.

⁹ Ford v. Santa Cruz R. R. Co., 59 Cal. 290; Drady v. Des Moines etc. R. R. Co., 57 Ia. 393; Stange v. Dubuque, 62 Ia. 303; Wilson v. Des Moines etc. Ry. Co., 67 Ia. 509; Adams v. Hastings & Dakota R. R. Co., 18 Minn. 260; Hartz v. St. Paul & Sioux City R. R. Co., 21 Minn. 359; Brakken v. Minneapolis & St.

be the difference in the rental value of the property up to the commencement of the suit. It is to be borne in mind that these cases are not for the just compensation guaranteed by the constitution, but simply for the wrong in the nature of a trespass by laying the railroad in the street, and consequently are not applicable to that measure of damages which is now under consideration. The principles of these and similar actions are discussed in a subsequent chapter.¹⁰

In Iowa it has been held that, where the right to recover was based upon the ownership of the fee of the street, and the track was only partly on the plaintiff's land, the plaintiff could recover only such a proportion of the total damage to his property by reason of the railroad in the street as the part of the track on his land bore to the entire track.¹¹ This decision has been severely criticised by other courts which hold that there can be no such division of the damages.¹²

The question of damages from the operation of the road and from the noise, smoke, cinders and jarring produced thereby has been much discussed in the cases and decided differently by different courts.¹³

Louis Ry. Co., 32 Minn. 425; S. C., 31 Minn. 45 and 29 Minn. 41; Carli *v.* Union Depot, Street Ry. & Transfer Co., 32 Minn. 101; Taylor *v.* Metropolitan Elevated Ry. Co., 50 N. Y. Supr. Ct. 311; Uline *v.* New York Central & Hudson River R. R. Co., 101 N. Y. 98; Blesch *v.* Chicago & Northwestern Ry. Co., S. C. 43 Wis. 183; S. C., 48 Wis. 168; Carl *v.* Sheboygan & Fond du Lac R. R. Co., 46 Wis. 625.

¹⁰ *Post*, chap. xxviii.

¹¹ Kucheman *v.* C. C. & D. Ry. Co., 46 Ia. 366.

¹² Blesch *v.* Chicago & North-

western Ry. Co., 48 Wis. 168; S. C. 43 Wis. 183; Spencer *v.* Point Pleasant & Ohio R. R. Co., 23 W. Va. 406.

¹³ South Carolina R. R. Co. *v.* Steiner, 44 Ga. 546; Mix *v.* La Fayette etc. Ry. Co., 67 Ills. 319; Wilson *v.* Des Moines etc. Ry. Co., 67 Ia. 509; Elizabethtown etc. R. R. Co. *v.* Combs, 10 Bush, 382; Randle *v.* Pacific R. R. Co., 65 Mo. 325; Matter of New York Elevated R. R. Co., 36 Hun, 427; Parrott *v.* Cincinnati & C. R. R. Co., 16 Ohio St. 624; G. C. & S. F. R. R. Co. *v.* Eddins, 60 Tex. 656.

§ 494. Change of grade.—Many statutes give damages to abutting owners in case of change of grade in front of their property. As this is a right conferred by statute, it is necessary to consult the particular statute in order to determine the extent of the recovery. The right however is usually given in general terms requiring compensation to be made for damages caused by such change. Under the recent constitutional provisions which prohibit the damaging or injuring of property without compensation, there may be a recovery in such cases.¹ The correct measure of damages, in all such cases, is undoubtedly the diminution in value of the property by reason of the change.² The owner should receive such a sum as will make him whole. It is proper to consider the expense of adjusting the property to the new grade,³ the cost of filling⁴ and the cost of a retaining wall, if necessary.⁵ But these items cannot be recovered specifically. They are only elements tending to show damages.⁶ In Wisconsin it is held that the cost of filling, grading and paving the street itself, which is made a charge upon the lot, may also be recovered.⁷ Any benefits to the property by reason of the change may be considered in reduction of damages,⁸ and, if the benefits equal

§ 494.

¹ *Ante*, § 223.² *Montgomery v. Townsend*, 80 Ala. 489; *Moore v. Atlanta*, 70 Ga. 611; *Hempstead v. Des Moines*, 52 Ia. 303; *Meyer v. Burlington*, 52 Ia. 560; *Thompson v. Keokuk*, 61 Ia. 187; *Karst v. St. Paul etc. R. R. Co.*, 22 Minn. 118; S. C., 23 Minn. 401; *Stowell v. Milwaukee*, 31 Wis. 523; *Church v. Same*, 31 Wis. 512; *Tyson v. Same*, 50 Wis. 78.³ *Thompson v. Keokuk*, 61 Ia. 187; *Plympton v. Woburn*, 11 Gray, 415; *Hartshorn v. Worcester*, 113Mass. 111; *Buell v. Same*, 119 Mass. 372; *McCarthy v. St. Paul*, 22 Minn. 527; *Church v. Milwaukee*, 31 Wis. 512; *French v. Same*, 49 Wis. 584; *Tyson v. Same*, 50 Wis. 78.⁴ Last two cases of last note.⁵ *McCarthy v. St. Paul*, 22 Minn. 527; *Thompson v. Milwaukee & St. Paul Ry. Co.*, 27 Wis. 93, 98.⁶ *Springfield v. Griffith*, 21 Ills. App. 93.⁷ *Stowell v. Milwaukee*, 31 Wis. 523; *French v. Same*, 49 Wis. 584; *Tyson v. Same*, 50 Wis. 78.⁸ *Chattanooga v. Geiler*, 13 Lea,

the damages, no recovery can be had, although the owner may have to incur expense in order to use his property.⁹ In determining the relative amount of damages and benefits the whole tract must be considered and not merely the part which borders on the street.¹⁰

§ 495. In case of viaducts, causeways and the like in streets.—These cases are governed by precisely the same principles as those in the preceding section, both as to the right of recovery and the measure of damages,¹ and any further consideration of them is unnecessary.

§ 496. Various elements of damages when part of a tract is taken.—It would be difficult to enumerate the various elements of damages proper to be considered when part of a tract is taken. The shape and size of the parcel or parcels which remain,¹ the difficulty of access and of communication between the different parts,² any interference with the drain-

611; *Church v. Milwaukee*, 31 Wis. 512; *Geneva v. Patterson*, 21 Ills. App. 454.

⁹ *Tyson v. Milwaukee*, 50 Wis. 78. Consult also, on the question of damages *Dixon v. Baker*, 65 Ills. 518; *Ryan v. Boston*, 118 Mass. 248; *Greggs v. Baltimore*, 56 Md. 256; *Winchester v. Stevens' Point*, 58 Wis. 350.

¹⁰ *Shawneetown v. Mason*, 82 Ills. 337.

§ 495.

¹ *Chouteau v. St. Louis*, 8 Mo. App. 48; *Chicago v. McDonough*, 112 Ills. 85; *East St. Louis v. Wiggins Ferry Co.*, 11 Ills. App. 254; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. R. 415.

§ 496.

¹ *St. Louis etc. R. R. Co. v. Anderson*, 39 Ark. 167; *Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 258; *North Pacific R. R. Co. v. Rey-*

nolds, 50 Cal. 90; *Tonica etc. R. R. Co. v. Unsicker*, 22 Ills. 221; *Keithsburg & East R. R. Co. v. Henry*, 79 Ills. 290; *White Water Valley R. R. Co. v. McClure*, 29 Ind. 536; *Baltimore & Ohio R. R. Co. v. Lansing*, 52 Ind. 229; *Hagaman v. Moore*, 84 Ind. 496; *Brooks v. Davenport & St. Paul R. R. Co.*, 37 Ia. 99; *Missouri Pacific Ry. Co. v. Hays*, 15 Neb. 224; *Plank Road Co. v. Ramage*, 20 Pa. S. 95.

² *Ibid.*, and *Brunswick & Albany R. R. Co. v. McLaren*, 47 Ga. 546; *Galena etc. R. R. Co. v. Birkbeck*, 70 Ills. 208; *Peoria etc. R. R. Co. v. Sawyer*, 71 Ills. 361; *Chicago & Iowa Ry. Co. v. Hopkins*, 90 Ills. 316; *Hagaman v. Moore*, 84 Ind. 496; *Dreher v. Iowa etc. R. R. Co.*, 59 Ia. 599; *Hardin v. Funk*, 8 Kan. 315; *Vicksburg, Shreveport & Pacific R. R. Co. v. Dillard*, 35 La. An. 1045; *New Orleans Pacific Ry. Co.*

age of the land or with the flow of surface water,³ or with the water supply,⁴ are recognized by all authorities as proper items to be taken into account in assessing the damages. Where a railroad is laid through a farm, it is proper to consider the expense of constructing necessary farm crossings⁵ unless it is made the duty of the company to build such crossings;⁶ also the danger to which the occupants of the farm and the stock thereon will be exposed, so far as the same affects the value of the farm.⁷ Injury to grass from

v. Murrell, 36 La. An. 344; *Bates v. Ray*, 102 Mass. 453; *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500; *Hatch v. Cincinnati & Indiana R. R. Co.*, 18 Ohio St. 92; *East Pennsylvania R. R. Co. v. Hiester*, 40 Pa. S. 53; *Texas & P. Ry. Co. v. Durett*, 57 Tex. 48; *Snyder v. Western Union R. R. Co.*, 25 Wis. 60.

³ *Springfield & Memphis Ry Co. v. Rhea*, 44 Ark. 253; *Bentonville R. R. Co. v. Baker*, 45 Ark. 252; *Vicksburg, Shreveport & Pacific R. R. Co. v. Dillard*, 35 La. An. 1045; *New Orleans & Pacific Ry. Co. v. Murrell*, 36 La. An. 344; *Walker v. Old Colony & Newpo. t R. R. Co.*, 103 Mass. 10; *Levee Commrs. v. Harkleroads*, 62 Miss. 807; *Pflegar v. Hastings & Dakota Ry. Co.*, 28 Minn. 510; *Steele v. Western Inland Lock Nav. Co.*, 2 Johns. 283; *Matter of Boston, Hoosac Tunnel & Western Ry. Co.*, 31 Hun. 461; *Bloomfield v. Calkins*, 1 N. Y. Supreme Ct. Rep. 549; *G. C. & S. F. Ry. Co. v. Donahoo*, 59 Tex. 128.

⁴ *Peoria etc. R. R. Co. v. Sawyer*, 71 Ills. 361; *Keithsburg & East R. R. Co. v. Henry*, 79 Ills. 290; *Peoria etc. Ry. Co. v. Bryant*, 57 Ills. 473; *White Water Valley R. R.*

Co. v. McClure, 29 Ind. 536; *Baltimore & Ohio R. R. Co. v. Lansing*, 53 Ind. 229; *McDough v. Clark*, 7 B. Mon. 448; *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500; *Readington v. Dilley*, 24 N. J. L. 209; *Matter of Boston, Hoosac Tunnel & Western Ry. Co.*, 31 Hun. 461; *Lehigh Valley R. R. Co. v. Trone*, 28 Pa. S. 206.

⁵ *Atchison & Nebraska R. R. Co. v. Gough*, 29 Kan. 94; *Mason v. Kennebec & Portland R. R. Co.*, 31 Me. 215; *Silver Creek etc. Co. v. Mangum*, 64 Miss. 682; *Marsh v. Portsmouth & Concord R. R. Co.*, 19 N. H. 372. But see *Atchison & Denver Ry. Co. v. Lyon*, 24 Kan. 745.

⁶ *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500; *Philadelphia etc. R. R. Co. v. Trimble*, 4 Wharton, 47.

⁷ *St. Louis etc. Ry. Co. v. Teters*, 68 Ills. 144; *Peoria etc. R. R. Co. v. Sawyer*, 71 Ills. 361; *Curtis v. St. Paul etc. R. R. Co.*, 20 Minn. 28; *Weyer v. Chicago, Wis. & N. R. R. Co.*, 68 Wis. 180; *County of Blue Earth v. St. Paul & Sioux City R. R. Co.*, 28 Minn. 503; *Price v. Milwaukee & St. Paul Ry. Co.*, 27 Wis. 98; *Somerville etc. R. R. Co. v. Doughty*, 22 N. J. L. 495.

dirt washed from an embankment was held a proper item of damage.⁸

§ 497. Danger from fire.—When a part of a tract is taken for railroad purposes, danger from fire to buildings, fences, timber or crops upon the remainder, *in so far as it depreciates the value of the property*, may properly be considered.¹ It is immaterial that the railroad company is made absolutely liable for all losses by fire which originate from the operation of the road, whether they result from negligence or otherwise.² Such a liability would doubtless render the depreciation in value less than in cases where the company was liable only for fires resulting from negligence. It is to be borne in mind that compensation is not to be given for increased exposure to fire, nor for increased insurance rates, nor for probable losses by fire in the future for which no recovery can be had, but simply *for depreciation in the value of the property* by reason of the danger from fire. The evidence should, therefore, be limited to showing all the facts in regard to the situation of the property and improvements relatively

⁸ Railroad Co. v. Gilson, 8 Watts, 343.

§ 497.

¹ St. Louis etc. R. R. Co. v. Anderson, 39 Ark. 167; Texas & St. Louis Ry. Co. v. Cella, 42 Ark. 528; Keithsburg & East R. R. Co. v. Henry, 79 Ills. 290; Kansas City & Emporia R. R. Co. v. Kregelo, 32 Kan. 608; Weber v. Eastern R. R. Co., 2 Met. 147; Pierce v. Worcester & Nashua R. R. Co., 105 Mass. 199; Harrington v. St. Paul & Sioux City R. R. Co., 17 Minn. 215; Colville v. St. Paul & Chicago Ry. Co., 19 Minn. 283; Curtis v. St. Paul & C. R. R. Co., 20 Minn. 28; Stillman v. Northern Pacific etc. R. R. Co., 34 Minn. 420; Somerville & C. R. R. Co. v. Doughty, 22 N. J. L. 495; Hatch v. Cincinnati & Indiana R.

R. Co., 18 Ohio St. 92; *In re Stockport, Timperley & Altringham Ry. Co.*, 33 L. J. Q. B. 251. The earlier cases in Pennsylvania hold a contrary doctrine. Sunbury & Erie R. R. Co. v. Hummell, 27 Pa. S. 99; Lehigh Valley R. R. Co. v. Lazarus, 28 Pa. S. 203; but Wilmington & Reading R. R. Co. v. Stauffer, 60 Pa. S. 374; Pittsburgh, Bradford & Buffalo Ry. Co. v. McClosky, 110 Pa. S. 436, establish the law in accordance with the text. Railroad Co. v. Yeiser, 8 Pa. S. 366, depends upon the language of the statute. *Contra:* Fleming v. Chicago etc. R. R. Co., 34 Ia. 353; *In Matter of Union etc. R. R. Co.*, 53 Barb. 457.

² Bangor & Piscataquis R. R. Co. v. McComb, 60 Me. 290; Adden v. Railroad Co., 55 N. H. 413.

to the railroad³ and perhaps to showing the distance from the road to which the danger extends. Evidence of actual damages by fire before the assessment of damages should be excluded.⁴

§ 498. Cost of fencing.—Where, by taking a part of a tract, additional fencing will be rendered necessary in order to the reasonable use and enjoyment of the remainder, as it probably will be used in the future, and the burden of constructing such additional fence is cast upon the owner of the land; then the burden of constructing and maintaining such fence in so far as it depreciates the value of the land, is a proper element to be considered in estimating the damages.¹ In some of the cases cited an allowance was made for the cost of fencing as a specific item, and the language of many of the decisions seems to warrant the same view. But this is clearly not correct, unless such an allowance is required by

³ *Lance v. Chicago, M. & St. P. R. R. Co.*, 57 Ia. 636; *Gilmore v. Pittsburgh etc. R. R. Co.*, 104 Pa. S. 275.

⁴ *Gilmore v. Pittsburgh etc. R. R. Co.*, 104 Pa. S. 275.

§ 498.

¹ *St. Louis etc. R. R. Co. v. Anderson*, 39 Ark. 167; *Texas & St. Louis Ry. Co. v. Cella*, 42 Ark. 528; *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 74; *Butte Co. v. Boydston*, 64 Cal. 110; *Leavenworth etc. Ry. Co. v. Paul*, 28 Kan. 816; *Louisville & Nashville R. R. Co. v. Glazebrook*, 1 Bush, 325; *Alton & Sangamon R. R. Co. v. Baugh*, 14 Ills. 211; *Tonica etc. R. R. Co. v. Unsicker*, 22 Ills. 221; *Evansville etc. R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Same v. Stringer*, 10 Ind. 551; *Montmorency Gravel Road*

Co. v. Rock, 41 Ind. 263; *Baltimore & Ohio R. R. Co. v. Lansing*, 52 Ind. 229; *Hagaman v. Moore*, 84 Ind. 496; *Commonwealth v. Comrs.*, 2 Mass. 489; *Stone v. Heath*, 135 Mass. 561; *Winona & St. Peter R. R. Co. v. Denman*, 10 Minn. 267; *Readington v. Dilley*, 24 N. J. L. 209; *New York & Greenwood Lake R. R. Co. v. Heirs of Stanley*, 39 N. J. Eq. 361; *Plank Road Co. v. Rammage*, 20 Pa. S. 95; *Pittsburgh, Bradford & Buffalo Ry. Co. v. McClosky*, 110 Pa. S. 436; *Greenville & Columbia R. R. Co. v. Partlow*, 5 Rich. (S. C.) 428; *Eddings v. Seabrook*, 12 Rich. (S. C.) 504; *Milwaukee & Mississippi R. R. Co. v. Eble*, 4 Chand. Wis. 72; *Robbins v. Milwaukee Horicon R. R. Co.*, 6 Wis. 636. But see *Alabama & Florida R. R. Co. v. Burkett*, 46 Ala. 569.

the statute under which the proceedings are had.² It is a question of damage to the land, *as land*. If, in view of the probable future use of the land, additional fencing will be necessary, of which the jury or commissioners are to judge,³ and the owner must construct the fence if he has it, then the land is depreciated in proportion to the expense of constructing and maintaining such fencing. Nothing can be allowed for fence, *as fence*.⁴ The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it.⁵ Evidence of the cost of suitable fencing is competent as affording a means of arriving at the extent of the burden.⁶ Where by statute a railroad is bound to fence its right of way, no allowance can be made to the owner for that purpose.⁷ So, where by general law the railroad is bound to construct half the fence, damages should be assessed accordingly.⁸ Where the railroad company was not bound to fence its track for six months, an instruction that the jury might consider the damage which would result from keeping open the road during that time was held proper.⁹ And where the law required the railroad company to fence its track it was held proper to instruct the jury that they might consider whether the owner would not be damaged more by a road *with* fences than by one *without* them.¹⁰ In Illinois it has been

² See Opening of 15th St., 10 Phila. 214.

⁶ Butte Co. v. Boydston, 64 Cal. 110; Stone v. Heath, 135 Mass. 561.

³ Milwaukee & Mississippi R. R. Co. v. Eble, 4 Chand. Wis. 72; First Parish v. County of Plymouth, 8 Cush. 475. If no additional fencing will be necessary, no allowance can be made on that basis. North Eastern R. R. Co. v. Sineath, 8 Rich. L. 185; Lockie v. Mutual Union Tel. Co., 103 Ills. 401.

⁷ Winona & St. Peter R. R. Co. v. Waldron, 11 Minn. 515; Sedalia, Warsaw & Southern Ry. Co. v. Abell, 18 Mo. App. 622.

⁴ Hanrahan v. Fox, 47 Ia. 102.

⁸ Winona & St. Peter R. R. Co. v. Denman, 10 Minn. 267; Matter of Rennsalaer & Saratoga R. R. Co., 4 Paige, 553.

⁵ Delaware etc. R. R. Co. v. Burson, 61 Pa. S. 369; Pennsylvania & New York R. R. Co. v. Bunnell, 81 Pa. S. 414.

⁹ St. Louis etc. R. R. Co. v. Kirby, 104 Ills. 345.

¹⁰ Minnesota Valley R. R. Co. v. Doran, 17 Minn. 188.

held that, if the company has built a fence, or procures the damage to be assessed on the basis that it will do so, the owner may compel it to do so,¹¹ and that the record should show whether or not an allowance is made for that purpose, in order that there may be no doubt about the future obligations of the parties.¹² If the statute requires an allowance for fencing through improved lands, the record should show, when an allowance is made, that the lands are improved.¹³ It has been held that where the owner claimed damages for additional fencing required in case of laying out a highway, the county might show that a hedge on the part taken could be moved at much less expense than the cost of a new fence.¹⁴ Where a strip half a rod wide was taken next to a railroad right of way, it was held error to make an allowance for additional fencing, because none was necessary.¹⁵ Where the owner conveys to a railroad, he can recover nothing from it for having to fence the right of way, though this would have been an element of damages in case of condemnation.¹⁶

§ 499. The question of interest.—The question of interest in condemnation cases has been the subject of much diversity of opinion. In the absence of any statutory provisions controlling the subject, the rules in respect to interest must be derived from the constitutional provision requiring just compensation. Where damages are assessed for property which has already been lawfully appropriated to public use, interest should be allowed from the time of the appropriation, or entry on the property.¹ And where property is taken

¹¹ *St. Louis etc. R. R. Co. v. Mitchell*, 47 Ills. 165.

¹⁶ *St. Louis etc. Ry. Co. v. Walbrink*, 47 Ark. 330.

¹² *Rock Island etc. R. R. Co. v. Lynch*, 23 Ills. 645.

§ 499.

¹³ *New Jersey etc. R. R. Co. v. Suydam*, 17 N. J. L. 25.

¹ *Missouri River, Fort Scott & Gulf R. R. Co. v. Owen*, 8 Kan. 409; *Lawrence v. Second Municipality*, 2 La. An. 651; *Gay v. Gardner*, 54 Me. 477; *Bangor & Piscataquis R. R. Co. v. McComb*, 60 Me. 290; *Whitman v. Boston &*

¹⁴ *Commissioners of Shawnee Co. v. Beckwith*, 10 Kan. 603.

¹⁵ *Lockie v. Mutual Union Tel. Co.*, 103 Ills. 401.

possession of for public use, though wrongfully, and a suit or proceeding is commenced for the just compensation, interest should be allowed from the date of the entry.² And where damages are assessed for property to be afterwards taken, the award or verdict should include interest from the time with reference to which the damages are estimated, to be reduced by the value of the use of the property to the owner while he continues to have such use.³ As we have before observed, the estimating and payment of the compensation should be concurrent with the taking. As this is impossible in practice, a time must be selected with reference to which the compensation shall be assessed and to which the title will relate when the compensation is paid. This point of time must necessarily be before the compensation can be paid. Between that time and the payment the owner has only a qualified use of his property. He may use it as it is, but he cannot improve or sell it except subject to rights acquired by the condemnation. As his just compensation is withheld from him, though necessarily, he should have an equivalent for such withholding, and that, in law, is legal interest. This is just to the owner. But he should not have more than is just, and justice to the party condemning requires that the value of the possession to the owner should be deducted from the interest.

Maine R. R. Co., 7 Allen, 313; Reed v. Hannover Branch R. R. Co., 105 Mass. 303; Edmunds v. Boston, 108 Mass. 535; Kidder v. Oxford, 116 Mass. 165; Chandler v. Jamaica Pond Aqueduct Co., 125 Mass. 544; Drury v. Midland R. R. Co., 127 Mass. 571; Railroad Co. v. Gesner, 20 Pa. S. 240; Delaware etc. R. R. Co. v. Burson, 61 Pa. S. 369.

² Phillips v. South Park Commissioners, 119 Ills. 626; Cohen v. St. Louis, Ft. Scott & Wichita R. R. Co., 34 Kan. 158.

³ Warren v. First Division of St. Paul & Pacific R. R. Co., 21 Minn. 424; Knauft v. St. Paul etc. R. R. Co., 22 Minn. 173; Whitacre v. St. Paul & Sioux City R. R. Co., 24 Minn. 311; Minneapolis v. Wilkin, 30 Minn. 145; Mont Clair R. R. Co. v. Benson, 36 N. J. Eq. 557; Metler v. Easton & Amboy R. R. Co., 37 N. J. L. 222; West v. Milwaukee etc. Ry. Co., 56 Wis. 318; and see *ante*, § 477.

"While the assessed value, if paid at the date taken for the assessment, might be just compensation, it certainly would not be, if payment be delayed, as might happen in many cases, and as did happen in this case, till several years after that time. This difference is the same as between a sale for cash in hand and a sale on time.

"It is true that, until the company actually takes possession, at the end of the proceedings, the owner has the legal right to possess and use the land. It cannot be assumed that the value of this legal right is equivalent to the interest on the assessed value of the land. From the time of the award, he is practically deprived of his right to dispose of the land. His possession is precarious, liable to be terminated at any time; he cannot safely rent; he cannot safely improve; if he sows, he cannot be sure that he will reap. As he is not placed in this position by any act of his own, is not in as a wrong-doer, nor under any contract, there would be no justice in charging him with any *assumed value* of the use. Where the owner has actually derived benefit and value from his possession and use, between the filing of the award and the assessment by the jury, the value of such possession and use may be ascertained by the jury, and the amount of it deducted from the interest allowed."⁴

Where, pending an appeal, the party condemning deposits the damages awarded and takes possession, if the owner secures an increase of the award, he should have interest on the whole award from the date of possession.⁵ Some cases hold that interest should be allowed only on the excess.⁶ In either case the interest should be included in the award, as a

⁴ Warren v. First Division St. Paul & Pacific R. R. Co., 21 Minn. 424, 427. Approved in Minneapolis v. Wilkin, 30 Minn. 145. See also Philadelphia v. Miskey, 68 Pa. S. 49; Uniacke v. Chicago, Mil. & St. Paul Ry. Co., 67 Wis. 108; Seefeld v. Same, 67 Wis. 96.

⁵ Selma, Rome & Dalton R. R. Co. v. Gammage, 63 Ga. 604; Hayes v. Chicago, Milwaukee & St. Paul Ry. Co., 64 Ia. 753; Sioux City etc. R. R. Co. v. Brown, 13 Neb. 317; Atlantic & Great Western R. R. Co. v. Koblentz, 21 Ohio St. 384.

⁶ Hollingsworth v. Des Moines &

distinct action cannot be maintained for its recovery.⁷ If the damages are not increased on appeal, the owner is not entitled to interest.⁸

As to interest on the award or judgment for compensation, some of the cases hold that it bears interest from the date of confirmation or entry, like an ordinary judgment;⁹ others that interest should only be computed from the date of possession by the party condemning,¹⁰ or from the time when the owner can enforce payment,¹¹ or from the time of demand.¹² If the award is accepted without demanding interest, though under protest, interest cannot be recovered afterwards.¹³

§ 500. When property is taken for a street which is subject to a public easement of way by dedication or prescription.—In such cases the owner of the fee is entitled to

St. Louis Ry. Co., 63 Ia. 443; Shattuck *v.* Wilton R. R. Co., 23 N. H. 269.

⁷ Hayes *v.* Chicago, Mil. & St. P. Ry. Co., 64 Ia. 753.

⁸ March *v.* Portsmouth & Concord R. R. Co., 19 N. H. 372; Reisner *v.* Union Depot & R. R. Co., 27 Kau. 382.

⁹ Cooke *v.* South Park Comrs., 61 Ills. 115; Morris *v.* Baltimore, 44 Md. 598; Mississippi River Bridge Co. *v.* Ring, 58 Mo. 491; Pennsylvania R. R. Co. *v.* Cooper, 58 Pa. S. 408; Haley *v.* Philadelphia, 68 Pa. S. 45; Miskey *v.* Same, 68 Pa. S. 48; Philadelphia *v.* Miskey, 68 Pa. S. 49; Morris *v.* Philadelphia, 70 Pa. S. 333; Davis *v.* North Pennsylvania R. R. Co., 2 Phila. 146; Millick *v.* Philadelphia, 11 Phila. 354.

¹⁰ Illinois & St. Louis R. R. Co. *v.* McClintock, 68 Ills. 296; South Park Comrs. *v.* Dunlevy, 91 Ills. 49;

Beveridge *v.* West Park Comrs., 7 Ills. App. 460; Fiske *v.* Chesterfield, 14 N. H. 240; Hammersley *v.* New York, 67 Barb. 35; S. C., 56 N. Y. 533; Stewart *v.* County, 2 Pa. S. 340; Second Street, Harrisburg, 66 Pa. S. 132.

¹¹ Phillip *v.* Pease, 39 Cal. 582; Chicago *v.* Wheeler, 25 Ills. 478; Dyer *v.* Philadelphia, 4 Phila. 328; Fink *v.* Newark, 40 N. J. L. 11.

¹² Beveridge *v.* South Park Comrs., 100 Ills. 75; Barnes *v.* New York, 27 Hun, 236. Consult also, on the subject of interest, People *v.* Township Board of La Grange, 2 Mich. 187; Metler *v.* Easton & Amboy R. R. Co., 25 N. J. Eq. 214; Railroad Co. *v.* Cobb, 35 Ohio St. 94; Attorney General *v.* Turpin, 3 Hen. & Mun. 548; Tyson *v.* Milwaukee, 50 Wis. 78.

¹³ Cutler *v.* New York, 92 N. Y. 166.

only nominal damages.¹ The same is true where the land is subject to a prescriptive right of way in the public.² But, if the dedication has not been accepted by the public, the owner is entitled to the full value of the property.³ If there is a private easement of way over the property taken, this should be taken into consideration in fixing the damages, and the value subject to such easement should be awarded.⁴ The mere fact that the owner of land has permitted the public to travel over it for a number of years without hindrance, is immaterial if there has been no dedication.⁵ If, in a proceeding to condemn land for a street which has already been dedicated for that purpose, a person is alleged to be the owner, it is held to estop the petitioner from showing the dedication.⁶ Where a road had been used by the public across the plaintiff's land for more than twenty years, but he had kept it enclosed by fences and gates, it was held that the gates could not be removed, or the road thereon opened absolutely without compensation to the plaintiff.⁷

§ 501. Enhancement caused by the work or improvement.—Whatever the time fixed upon with reference to which the compensation shall be estimated, the owner is entitled to

§ 500.

¹ Valentine *v.* Boston, 22 Pick. 75; Stetson *v.* Bangor, 60 Me. 313; S. C., 73 Me. 357; Bartlett *v.* Same, 67 Me. 460; Walker *v.* Manchester, 58 N. H. 438; Clark *v.* Elizabeth, 37 N. J. L. 120; Matter of Seventeenth Street, 1 Wend. 262; Matter of Lewis Street, 2 Wend. 472; Wyman *v.* New York, 11 Wend. 486; Matter of Furman Street, 17 Wend. 649; Matter of Thirty-second Street, 19 Wend. 128; Matter of Twenty-ninth Street, 1 Hill, 189; Matter of Opening Sixty-seventh Street, 60 How. Pr. 264; Matter of Department of Public Works, 6 Hun, 486; Baldwin *v.* Buffalo, 35 N. Y. 376;

Matter of City of Brooklyn, 73 N. Y. 179; *In re* Story St., 11 Phila. 456; *In re* Opening of Berks St., 15 Phila. 381.

² Matter of Commissioners of Central Park, 54 How. Pr. 313.

³ Matter of Brooklyn Heights, 48 Barb. 288.

⁴ Tufts *v.* Charlestown, 2 Gray, 271; Tufts *v.* Charlestown, 4 Gray, 537; Abbott *v.* Stewartstown, 47 N. H. 228; Case of Private Road, 1 Ashmead, 417.

⁵ Ayres *v.* Richards, 41 Mich. 680.

⁶ San Jose *v.* Freyschlog, 56 Cal. 8; Princeton *v.* Templeton, 71 Ills. 68.

⁷ Green *v.* Bethea, 30 Ga. 896.

the actual value of the land at that time, even though it may have been enhanced by reason of the projected improvement for which it is taken.¹ This is not really making the condemning party pay for an enhancement caused by its own work. Such enhancement does not come from the mere projection of the work, but from the existence of circumstances which create a demand for the work, and render it probable that such a work will sooner or later be built. It is not proper, however, to consider what the property would have been worth if it could have had the benefit of the proposed improvement without being taken.² The same rules would apply with reference to an actual depreciation caused by the projected work.

§ 502. The right or estate acquired for the public use should be considered.—Where a perpetual easement is taken for a use which is in its nature exclusive, as for railroad purposes, it amounts practically to a fee, and the owner is entitled to the full value of the land.¹ And it has been held in Iowa not to be error to refuse to call the attention of the jury to the fact that the fee remains in the owner, it being of merely nominal value.² It would, of course, not be *improper* to call their attention to the fact, if it is done in such a way as not to mislead them.³ And in Kansas it has been held error to refuse to instruct the jury in this regard.⁴ Where there was only taken the right to construct a water conduit seventy feet underneath the surface, and the right to use the surface

§ 501.

¹ *Texas & St. Louis Ry. Co. v. Cella*, 42 Ark. 428; *Union Depot Street Ry. & Transfer Co. v. Brunswick*, 31 Minn. 297; *Virginia & Truckee R. R. Co. v. Lovejoy*, 8 Nev. 100; *Stafford v. Providence*, 10 R. I. 567.

² *Matter of the Water Comrs.*, 3 Edwards, Ch. 552; *Dorgan v. Boston*, 12 Allen, 223.

§ 502.

¹ *Robbins v. St. Paul etc. R. R. Co.*, 22 Minn. 286.

² *Cummins v. Des Moines & St. Louis Ry. Co.*, 63 Ia. 396.

³ *Alabama & Florida R. R. Co. v. Buckett*, 42 Ala. 83.

⁴ *Kansas City & Emporia R. R. Co. v. Kregelo*, 32 Kan. 608.

remained in the owner, it was held he was not entitled to the value of the land, but only to the damages caused by the proposed use.⁵ Where a street was filled and the filling sloped upon the plaintiff's land, it was held that only an easement of support was taken and that the plaintiff was only entitled to recover the damages caused by taking such an easement, and not the value of the land occupied by the slope.⁶ So in all cases regard should be had to what is taken by the one party and what is left to the other in the property in question, and the damages adjusted with reference thereto. The rights of the respective parties in the property taken are discussed in a future chapter.⁷

§ 503. **The extent of the use may be considered.**—In case of property taken for a railroad or similar purpose it is proper to consider the extent to which it is likely to be used. Thus in one case it was held proper to show that there was a junction on the land in question, and that engines and cars were standing on the tracks a great deal of the time;¹ and in another case that the freight depot was on the next block, and the number of tracks on the property taken.² Where a town condemned the right to take the waters of a pond to supply a village, it was held that the damages should be assessed on the basis that the town *could* take all the water if necessary, but not on the basis that all *was* taken; that the probable use must be estimated as near as possible, and damages fixed accordingly.³ In case of a railroad right of way it has been held improper to consider or assume that the owner will have any beneficial use of it.⁴

⁵ *Taylor v. Baltimore*, 45 Md. 576.

² *Cummins v. Des Moines & St.*

⁶ *Dodson v. Cincinnati*, 34 Ohio St. 276.

³ *Louis Ry. Co.*, 63 Ia. 397.

⁷ *Post*, chap. xxv.

⁴ *Bailey v. Woburn*, 126 Mass. 416.

§ 503.

⁴ *Lake Superior & Miss R. R. Co.*

¹ *Union R. R. & C. Co. v. Moore*, 80 Ind. 458.

⁵ *v. Greve*, 17 Minn. 322; and see last section.

§ 504. Miscellaneous items of damages held not allowable.

—It has been held that no damages can be allowed for depriving the owner of the use of a well and ram situated on another's land and placed there under a parol license, revocable at pleasure;¹ nor for the legal expense of proceedings;² nor for structures unlawfully placed upon public highways.³ In laying out a highway the cost of improvements which may be ordered and assessed upon the property cannot be considered or included as part of the damages.⁴ Where a highway was laid through a farm alongside a railroad it was held that the liability of injury to crops by reason of teams being frightened by the cars and running into the fields was too remote.⁵ So, where a railroad was laid through an orchard, it was held that the risk of having fruit stolen by truants and persons on the road was too speculative to be considered.⁶

§ 505. Reserving rights or easements, or requiring things to be done in lieu of money.—The commissioners or other tribunal to assess damages have no authority to give compensation in anything but money.¹ It is erroneous, therefore, for them in their award to reserve to the owner certain easements or privileges in the property condemned, such as the right to construct a way over it or drains through it,² or the right to leave buildings or parts of buildings standing thereon and use them as before.³ So it is erroneous for the tribunal to award that the party condemning

§ 504.

¹ Clapp *v.* Boston, 133 Mass. 367.

² Canal Bank *v.* Albany, 9 Wend. 244; *In re Moyer Street*, 6 Phila. 81.

³ Thebodereaux *v.* Maggioli, 4 La. An. 73; Harvey *v.* Lackawana etc. R. R. Co., 47 Pa. S. 428.

⁴ Lewis *v.* New Britain, 52 Conn. 568; Cushing *v.* Boston, 144 Mass. 317; Antoinette Street, 8 Phila. 461; Holton *v.* Milwaukee, 31 Wis. 27.

⁵ Otoe County *v.* Heye, 19 Neb. 289.

⁶ Kansas City & Emporia R. R. Co. *v.* Kregelo, 32 Kan. 608.

§ 505.

¹ *Ante*, § 460; also New Orleans Pacific Ry. Co. *v.* Murrell, 34 La. An. 536.

² Hill *v.* Mohawk & Hudson R. R. Co., 5 Denio, 206; S. C., 7 N. Y. 152; Chesapeake & Ohio R. R. Co. *v.* Halstead, 7 W. Va. 301.

³ Hyde *v.* County of Middlesex, 2

shall do certain things for the benefit of the owner, and to reduce the damages accordingly.⁴ Thus an award that a railroad company shall build fences, and maintain crossing and cattle-guards,⁵ or construct culverts and water-ways⁶ is bad. Where a new highway is laid out compensation cannot be made to the owner of land taken by awarding him the land occupied by an old way which is discontinued.⁷ A dam was taken in widening a street, and a new dam constructed on land acquired of a third party, in lieu of compensation. It was held to be wholly unauthorized.⁸ Where a highway was laid out over a railroad, an award of a sum of money and a provision that the railroad company should not be required to grade or macadamize the road was held to be wholly void as to the latter provision.⁹ Where a railroad company agreed with the owner to pay the expense of moving a building from the right of way, and the owner has moved the building, it was held erroneous in a subsequent assessment of damages for the land taken to include the expense of moving.¹⁰ The owner's remedy was by action on the agreement. So, where commissioners by authority of law required a railroad company to make a way for the convenience of a particular proprietor, which the company failed to do, it was held the expense of such a way could not be in-

Gray, 267; Brown *v.* Worcester, 13 Gray, 31; Colburn *v.* Kittridge, 131 Mass. 470; Riker *v.* New York, 3 Daly, 174. But see Commonwealth *v.* Noxon, 121 Mass. 42; Schuchardt *v.* New York, 59 Barb. 295; Omaha & N. W. R. R. Co. *v.* Menk, 4 Neb. 21.

⁴ New Orleans Pacific Ry. Co. *v.* Murrell, 34 La. An. 536; McCord *v.* Sylvester, 32 Wis. 451.

⁵ Vanderbright *v.* Delaware R. R. Co., 2 Houst. Del. 287; Jeffries *v.* Philadelphia etc. R. R. Co., 3 Houst. Del. 447; Chicago, Mil. & St. Paul Ry. Co. *v.* Melville, 66 Ills. 329;

Toledo etc. R. R. Co. *v.* Munson, 57 Mich. 42; Chesapeake & Ohio R. R. Co., *v.* Patton, 6 W. Va. 147.

⁶ Morss, Petitioner, 18 Pick. 443; Winchester & Potomac R. R. Co. *v.* Washington, 1 Rob. (Va.) 67.

⁷ Commonwealth *v.* Peters, 2 Mass. 125; Barrickman *v.* Commissioners, 11 G. & J. 50.

⁸ Wheeler *v.* Essex Public Road Board, 39 N. J. L. 29.

⁹ Sedalia *v.* Missouri, Kansas & Texas Ry. Co., 17 Mo. App. 105.

¹⁰ Sherwood *v.* St. Paul & Chicago Ry. Co., 21 Minn. 122.

cluded in the damages, but the owner must pursue his special remedy under the statute.¹¹ A city condemned property for the purpose of constructing a sewer or drain through it, and passed an ordinance giving the owners a right to build on the land taken, provided they did not interfere with the drain. It was held the damages could not be diminished by this fact, unless the owner agreed to the condition.¹²

Awards of this character are not, however, void unless repugnant to the legal effect of the condemnation, as where the statute vests a fee in the party condemning, and the award reserves an easement to the owner,¹³ or is contrary to a provision of positive law, as in *Sedalia v. Missouri, Kansas & Texas Ry. Co.*¹⁴ In other cases the parties may ratify such provisions in such a way as to make a binding contract between them capable of being enforced in the usual way.¹⁵

§ 506. **Mill cases.**—The same principles apply to these as to other cases of taking. Where the petition for damages is by the owner, his recovery will be limited to such damages as are claimed in the petition.¹ If the land not flowed is diminished in value by reason of being rendered unhealthy in consequence of noxious vapors rising from the mill-pond, this may be considered in estimating damages.² Where water is ponded back upon the petitioner's water-

¹¹ *White v. Boston & Providence R. R. Co.*, 6 *Cush.* 420.

Boston & Maine R. R. Co., 2 *Cush.* 536.

¹² *Roanoke City v. Berkowitz*, 80 *Va.* 616.

§ 506.

¹³ *Hill v. Mohawk & Hudson R. R. Co.*, 7 *N. Y.* 152.

¹ *Underwood v. North Wayne Sythe Co.*, 38 *Me.* 75; *Bridgers v. Purcell*, 1 *Ired. Law*, 232.

¹⁴ 17 *Mo. App.* 105.

² *Gillet v. Jones*, 1 *Dev. & B. (N. C.)* 339. The weight of authority would seem to be opposed to the text. *Eames v. New England Worsted Co.*, 11 *Met.* 570; *Fuller v. Chicago Manuf. Co.*, 16 *Gray*, 46; *Rooker v. Perkins*, 14 *Wis.* 79. These cases proceed upon the theory that the mill acts do not author-

¹⁵ *Pennsylvania R. R. Co. v. Reichert*, 58 *Md.* 261; *Morss, Petitioner*, 18 *Pick.* 443; *Chicago & Alton R. R. Co. v. Joliet etc. R. R. Co.*, 105 *Ills.* 388. As to by and against whom such agreements may be enforced, see *Piper v. Union Pacific Ry. Co.*, 14 *Kan.* 568; *Morss v.*

whee', he is entitled to nominal damages, though he sustains no actual injury.³

§ 507. Where entry is made and works constructed before obtaining title.—Persons and corporations vested with the power of eminent domain have no more right than natural persons to enter upon private property before taking the steps prescribed by law to obtain possession. If they do, the owner may have his common law remedies of trespass or ejectment, or he may resort to equity, and enjoin the invasion or use of his land.¹ But, in all such cases, the persons making the entry may, by proper proceedings, condemn the property entered upon, and so perfect their right to its possession and enjoyment. The question now to be considered is, whether in proceedings for this purpose the owner of the land is entitled to the value of improvements which have been put upon it by the party condemning. If the entry has been made by consent of the owner, express or implied, it is clear that the owner should not have the value of what has been put upon the land. He has let the condemning party in for the very purpose of making these improvements, and with the expectation that the right permanently to enjoy the land with the improvements would be acquired by agreement or otherwise. The cases all concur upon this point, without much discussion of principles.² In such cases the award in-

ize a nuisance, and hence, if mill-ponds diffuse noxious vapors, the persons injured may have the usual remedies for damages or abatement.

³ *Little v. Standback*, 63 N. C. 285.

§ 507.

¹ *Post*, chap. xxviii.

² *California Southern R. R. Co. v. Southern Pacific R. R. Co.*, 67 Cal. 59; *Emerson v. Western Union R. R. Co.*, 75 Ills. 176; *Chicago &*

Alton R. R. Co. v. Goodwin, 111 Ills. 273; *Indiana, Bloomington & Western Ry. Co. v. Allen*; 100 Ind. 409; *Cohen v. St. Louis etc. R. R. Co.*, 34 Kan. 158; *Morgan's Appeal*, 39 Mich. 675; *Sullivan v. Board of Supervisors*, 58 Miss. 790; *Coster v. New Jersey R. R. etc. Co.*, 24 N. J. L. 730; *North Hudson R. R. Co. v. Boorem*, 28 N. J. Eq. 450; *Price v. Weehawken Ferry Co.*, 31 N. J. Eq. 31.

cludes all damages from the entry.³ Such consent may be given by the life tenant so as to bind the reversioner,⁴ or by the mortgagor in possession so as to bind the mortgagee.⁵ If the owner brings a suit to recover the just compensation, such a suit operates as a consent to the occupation which relates back to the entry, and, upon the principles above stated, the value of the works put upon the property must be excluded in estimating the damages⁶

When the entry is made without consent, express or implied, the case presents more difficulty, but we think it clear that the owner in a proceeding to ascertain the just compensation is not entitled to the value of works placed upon the property, though without right, for the purpose of adapting the property to the public use intended.⁷ The few cases which hold the contrary proceed upon a strict and technical application of the rule of the common law, that structures placed upon land by a trespasser become a part of the realty and cannot be removed.⁸ In a common law proceeding this rule of the common law would perhaps apply, but the proceeding to ascertain the *just* compensation to be paid for property taken for public use is *not* a common law proceed-

³ *Harlow v. Marquette, H. & O. R. R. Co.*, 41 Mich. 336.

⁴ *Chicago & Alton R. R. Co. v. Goodwin*, 111 Ills. 273.

⁵ *North Hudson R. R. Co. v. Booraem*, 28 N. J. Eq. 450.

⁶ *Cohen v. St. Louis, Fort Scott & Wichita R. R. Co.*, 34 Kan. 158.

⁷ *Jones v. New Orleans etc. Co.*, 70 Ala. 227; *California Pacific R. R. Co. v. Armstrong*, 46 Cal. 85; *Chicago & Alton R. R. Co. v. Goodwin*, 111 Ills. 273; *Daniels v. Chicago etc. R. R. Co.*, 41 Ia. 52; *Toledo etc. Ry. Co. v. Dunlap*, 47 Mich. 456; *Greve v. First Division of the St. Paul etc. R. R. Co.*, 26 Minn. 66; *Louisville etc. R. R. Co. v. Dickson*,

63 Miss. 380; *Burgess v. Clark*, 13 Iredel Law, 109; *Oregon Ry. & Nav. Co. v. Mosier*, 14 Or. 519; *Justice v. Nesquehoning Valley R. R. Co.*, 87 Pa. S. 28; *Lyon v. Green Bay & Minnesota Ry. Co.*, 42 Wis. 538.

⁸ *United States v. Land in Monterey County*, 47 Cal. 515; *Graham v. Connersville & New Castle Junction R. R. Co.*, 36 Ind. 463; *Matter of Long Island R. R. Co.*, 6 N. Y. Supreme Ct. 298; *New York, West Shore & Buffalo Ry. Co. v. Gennet*, 37 Hun, 317; and see *Meriam v. Brown*, 128 Mass. 391; *Dietrich v. Murdock*, 42 Mo. 279.

ing. The principles to be applied are broad and liberal, and such as are just to both parties. It is *just* compensation, no more and no less, which the constitution requires to be paid. In determining what is *just* the courts are not hampered by any of the hard and fast rules of the common law. As we have already shown, *just compensation* to the owner is an indemnity for the loss he sustains, irrespective of those general advantages and disadvantages which affect the community at large.⁹ Indemnity, in the case supposed, does not include the value of the works prematurely placed upon the property. The owner has not *lost* the value of such works, but, if their value is given to him, it is so much in excess of his loss; which is something never contemplated by the constitution. These and other considerations are ably enforced in an opinion of the Supreme Court of Pennsylvania, from which we quote as follows:

“This is not the case of a mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a public use—materials essential to the very purpose which the State has declared in the grant of the charter. It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to-wit: to make compensation or give security for it. For this injury the citizen is entitled to redress. But this redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the land holder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser, the owner of the land may take and keep his structures *nolens volens*, but not so in this case; for though the original entry

⁹ *Ante*, § 462.

was a trespass, it is well settled, that the company can proceed in due course of law to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon. *Harrisburg v. Crangle*, 3 W. & S. 460; *McClinton v. Railroad Co.*, 16 P. F. Smith, 409; *Railroad Co. v. Burson*, 11 *Id.* 379. And in *Harvey v. Thomas*, 10 Watts, 63, it was held that the subsequent proceeding to assess compensation was a protection against a recovery of vindictive damages.

“Another evident difference between a mere *tort-feasor* and a railroad company is this—the former necessarily attaches his structure to the freehold, for he has no less estate in himself, but the latter can take an easement only, and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title, and when its proper use of the easement ceases the franchise is at an end. There is no intention in fact to attach the structure to the freehold. We have therefore these salient features to characterize the case before us, to-wit: The right to enter on the land under authority of law, to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purpose; and, lastly, the power to retain and possess these chattels and the structures they compose, by a valid proceeding at law, notwithstanding the original illegality of the entry. For the latter the owner has his appropriate remedy; his action of ejectment to recover and retain his land and its use, until the company shall proceed according to law, and his action of trespass to recover damages for the injury sustained by the unlawful entry and holding possession, and whatever loss has been caused by these illegal acts.

“There are some analogies remotely on the question before us, showing that property is not gained by the owner of the land because found upon it. Thus in the case of property

carried off by a flood and stranded on the premises of another, the owner may follow it, enter and take it, or, if the owner of the land convert it, may recover its value. *Forster v. Bridge Co.*, 4 Harris, 393; *Etter v. Edwards*, 4 Watts, 63. And even a sale will not carry unknown secreted valuables. *Hutlacher v. Harris*, Adm'r, 2 Wright, 491.

“But a case bearing a close analogy, indeed deciding the principle on which this case rests, is *Meigs' Appeal*, 12 P. F. Smith, 28. In the year 1862, the United States, in the prosecution of the war, erected buildings on the public common of New York for military barracks and hospitals. After the close of the war the government was about removing the materials, when the borough authorities proceeded to enjoin the removal, on the ground that the buildings had been affixed to the realty. In that case we said, referring to *Hill v. Sewald*, 3 P. F. Smith, 271, that the old notion of a physical attachment had long since been exploded in this State, and that the question of fixture, or not, depends on the nature and character of the act by which the structure is put in place, the policy of law connected with its purpose and the intentions of those concerned in the act. This language applies emphatically to the case now under consideration. It was further said then, the nature and character of the structures are also to be considered. They were not improvements made for objects connected with the soil—neither intended to give value to it, nor to receive value from it; so, precisely here, the railroad having no connection with the improvement of the land or its uses. ‘The act’ (says the opinion), ‘is distinguishable from that of an ordinary trespasser. There was no intent to improve the ground, or to make it accessory to some business or employment. It was not an assertion of title in the soil, or of an intention to hold adverse possession. Indeed there was not a single element in the case which characterizes the act of a *tort-feasor*, who annexes a structure to the freehold, and is therefore presumed to intend to alter the nature of the chattel and convert it

into realty, and thereby to make a gift of it to the owner of the freehold.' This language strongly characterizes the case before us. Here as there the purpose is a public use; there was no intent to hold adversely as a trespasser, nor to improve the ground or make it useful and valuable by the erection. The rails and ties were not intended to be attached to the freehold, but were laid down as part of an easement under a franchise of the State. There was no intent to use the land as an owner would, and no intent to abandon the materials to the use of the owner, but they were subject to a legal proceeding resulting in maintaining both ownership and use for the charter purpose. We think therefore the ownership of the rails, ties, etc., did not vest in the plaintiff in error by the mere trespass in the original entry."¹⁰

In all cases of unlawful entry the owner may secure in trespass such damages as he has sustained thereby.¹¹ Whether the recovery in trespass should be deducted from the amount to be allowed for just compensation in a subsequent assessment of damages will depend upon the principles upon which such damages are assessed. Some courts hold that the damages should be estimated with reference to the date of the

¹⁰Justice *v.* Nesquehoning Valley R. R. Co., 87 Pa. S. 28, 31. So in Jones *v.* New Orleans etc. Co., 70 Ala. 227, 232, the court say: "Though the appellee was a trespasser, by reason of the neglect to pursue the proper remedy for acquiring the lands—acquiring them without the consent of the owner—there is in the right continuing in him to pursue the remedy, rendering the possession rightful, and by which title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser, the proprietor can keep the lands, and keeping them, hold the improvements he may have

annexed to the soil. No remedy is given the trespasser, by which he may acquire the use and enjoyment of, or title to, the lands. There is, also, another distinguishing fact: the structures of the appellee were dedicated, not to the use and enjoyment of the freehold, but to public uses, which are the consideration for the grant to the appellee of corporate franchises, and of the right, in the exercise of these franchises, to take and appropriate private property."

¹¹Bethlehem South Gas & Water Co. *v.* Yoder, 112 Pa. S. 136; Leber *v.* Minneapolis & Northwestern Ry. Co., 29 Minn. 256.

entry, and interest allowed from that date.¹² If this is done, the amount of a previous recovery in trespass ought to be deducted.¹³

But there is no reason why the date of an unlawful entry should be fixed upon as the date with reference to which damages should be estimated. There is no reason why it should be different in such cases than in others, unless by consent of the owner.¹⁴ The damages should then be estimated with reference to the date of filing the petition, or of the commissioners' award, or of the filing of the instrument of appropriation, according to the practice of the different States. Damages accruing prior to that time by reason of the unlawful entry should be recovered in trespass.¹⁵ But, if such prior damages are actually litigated and included in the award, it will be a bar to any recovery in trespass therefore, and may be so pleaded.¹⁶

§ 508. When the owner is estopped to claim damages.—
The fact that one has signed a petition for the laying out of a street or highway, or for any public improvement, does not estop him from recovering for property taken or damaged thereby.¹ An agreement by the owner to waive damages has been held to operate as an estoppel after being acted

¹² *Daniels v. Chicago etc. R. R. Co.*, 41 Ia. 52; *North Hudson R. R. Co. v. Booraem*; 28 N. J. Eq. 450.

¹³ *Ibid.*; and see *Pomeroy v. Chicago & North Western Ry. Co.*, 25 Wis. 641.

¹⁴ As to the time with reference to which damages should be estimated, see *ante*, § 477.

¹⁵ *La Fayette, Muncie etc. R. R. Co. v. Murdock*, 68 Ind. 187; *Missouri, Kan. & Tex. R. R. Co. v. Ward*, 10 Kan. 325; *Proetz v. St. Paul Water Co.*, 17 Minn. 163; *Louisville, N. O. & Tex. R. R. Co.*

v. Dickson, 63 Miss. 380; *Blodgett v. Utica etc. R. R. Co.*, 64 Barb. 580; *Callaman v. Port Huron & N. W. Ry. Co.*, 61 Mich. 15; *Liber v. Minneapolis & North Western Ry. Co.*, 29 Minn. 256.

¹⁶ *Liber v. Minneapolis & North Western R. R. Co.*, 29 Minn. 256; *Bethlehem South Gas & Water Co. v. Yoder*, 112 Pa. S. 136.

§ 508.

¹ *Barker v. Taunton*, 119 Mass. 392; *Turner v. Stanton*, 42 Mich. 506; *Newville Road Case*, 8 Watts, 172.

upon,² but it may be revoked until then.³ Where the estoppel has taken effect as to the owner, his subsequent grantee will also be estopped.⁴ A grantee in an unrecorded deed, who was present at the hearing and failed to make known his title or to claim damages, was held estopped to assert an independent claim for damages.⁵ Where a street was opened through a certain block, an owner whose land was taken was held not estopped by a deed, by his grantor, of lands in the next block, which recognized the street in the latter block.⁶ A waiver of one item of damages cannot be construed into a waiver of damages generally.⁷

² *Macon & Augusta R. R. Co. v. Bowen*, 45 Ga. 531; *Foster v. Boston*, 22 Pick. 33; *Conwell v. Springfield & North Western R. R. Co.*, 81 Ills. 232.

³ *Turner v. Village of Stanton*, 42 Mich. 506.

⁴ *Haskell v. New Bedford*, 108 Mass. 208.

⁵ *Brown v. County Comrs.*, 12 Met. 208.

⁶ *Easton Borough v. Rinek*, 116 Pa. S. 1.

⁷ *Mitchell v. Bridgewater*, 10 Cush. 411.

CHAPTER XXI.

THE REPORT OR VERDICT, AND ACTION THEREON.

§ 509. **Requisites generally.**—The report should show a compliance in all respects with the statute,¹ but a substantial compliance is sufficient.² Especial care should be taken to set forth the facts upon which the jurisdiction of the tribunal depends.³ If the statute particularly requires a thing to be stated in the report, its omission is fatal.⁴ The report should contain a finding upon all the questions required to be passed upon and the omission of any one will be sufficient ground for setting the report aside.⁵ Thus, where the statute required the jury of inquest, in case of proceedings to establish a mill-dam, to report the effect upon the health of the neighborhood, the omission to do so was held to be fatal.⁶ But the report need not go beyond the requirements of the statute in this respect, and it can never be a valid ob-

§ 509.

¹ *Martin v. Rushton*, 42 Ala. 289; *State v. Van Geison*, 15 N. J. L. 339; *Griscom v. Gilmore*, 15 N. J. L. 475; *State v. Lord*, 26 N. J. L. 140; *State v. Essex Public Road Board*, 37 N. J. L. 273. But see *Middle Creek Road*, 9 Pa. S. 69.

² *Shaw v. Mills*, 9 Cush. 503.

³ *State v. Scott*, 9 N. J. L. 17; *State v. Yauger*, 29 N. J. L. 384; *Thompson v. Multnomah Co.*, 2 Or. 34.

⁴ *O'Hara v. Pennsylvania R. R. Co.*, 25 Pa. S. 445; *State v. Jersey City*, 25 N. J. L. 309; *United States v. Dumplin Island*, 1 Barb. 24.

⁵ *Owen v. Jordan*, 27 Ala. 608; *Martin v. Rushton*, 42 Ala. 289;

Damrell v. Board of Supervisors, 40 Cal. 154; *Pueblo & Arkansas Valley R. R. Co. v. Rudd*, 5 Col. 270; *Windson v. Field*, 1 Conn. 279; *Bibb v. Mountjoy*, 2 Bibb, 1; *Neale v. Cogar*, 1 A. K. Marsh. 589; *Schackleford's Heirs v. Coffey*, 4 J. J. Marsh. 40; *Robinson v. Robinson*, 1 Duvall, 162; *Bryant v. Glidden*, 36 Me. 36; *Pierce v. County Comrs.*, 63 Me. 252; *Philadelphia & Erie R. R. Co. v. Cake*, 95 Pa. S. 139; *Matter of New York etc. Ry. Co.*, 35 Hun, 232; *Matter of Opening 28th St.*, 11 Phila. 436.

⁶ *Gherkey v. Haines*, 4 Blackf. 159; *Mountjoy v. Oldham*, 1 A. K. Marsh. 535; *Major v. Taylor*, 1 A. K. Marsh. 552; *Enbank v. Pence*, 5

jection that the jury have failed to pass upon a question which they were not required to determine.⁷ The form of the report should be clear, explicit and certain, so as to leave no doubt as to what has been done or decided.⁸

Where the statute requires commissioners to include with their report minutes of the testimony taken before them,⁹ or a plat or draft showing courses and distances,¹⁰ it is mandatory and must be complied with. A statute required the jury, where a canal crossed a private or public road, to find whether a bridge or ford was necessary. A report that neither was necessary was held bad.¹¹ Where the quantity and quality of the land taken are required to be stated in the report, it is sufficient to give the dimensions, so that the quantity can be computed, and where the property taken is a town lot the quality is sufficiently described by showing how it is used and improved.¹²

If the statute requires the jurors to affix their seals to their report, and they fail to do so, the report will be set aside.¹³ It is said that a "too astute criticism" is not to be applied to such reports.¹⁴

Litt. 338; Epps *v.* Crath, 1 Munf. 258; Kownslar *v.* Ward, Gilmer, Va. 127.

⁷ Aken *v.* Parfrey, 35 Wis. 249.

⁸ Wood *v.* Campbell, 14 B. Mon. 339; Connecticut River R. R. Co. *v.* Clapp, 1 Cush. 559; Feree *v.* Meily, 3 Yeates, 153; Reitenbaugh *v.* Chester Valley R. R. Co., 21 Pa. S. 100.

⁹ Matter of New York, West Shore & Buffalo R. R. Co., 33 Hun, 293. The correctness of the minutes must be settled before the commissioners and not by the court to which the report is made. *Ibid.* Testimony taken by commissioners and attached to their report was held to be part of it, in

Matter of Rondout etc. R. R. Co. *v.* Deyo, 5 Lans. 298.

¹⁰ Warrior Run Road, 3 Binn. 3. In State *v.* English, 22 N. J. L. 291 and 713, it was held that the commissioners could not leave the plat to be made and attached to their report by a practical surveyor after signing.

¹¹ President etc. *v.* Mifflin, 1 Yeats, 430.

¹² Pennsylvania R. R. Co. *v.* Bruner, 55 Pa. S. 318.

¹³ Rout *v.* Mountjoy, 3 B. Mon. 300.

¹⁴ Case of Spear's Road, 4 Binn. 174, and see Hunt *v.* Smith, 9 Kan. 137.

§ 510. Describing the property to be taken, or location of the improvement.—Much must depend, in this respect upon the requirements of the statute under which the proceedings are had. If the statute requires the report to contain a description of the property taken, such description is indispensable.¹ The report ought to contain such a description upon general principles, in order to show the property to which it relates and for which damages are awarded.² If the sum awarded is intended to cover damages to the part not taken, the report or verdict should so state.³ It has been held sufficient to refer to a description in the warrant or petition,⁴ or to a plat or survey attached to or filed with the report or otherwise identified.⁵ Where a plan was referred to but no plan was filed, the lay-out of a highway was held void.⁶ But where the report referred to a plan, and the description in the report and in the plan differed, but the way could be made out from the two with reasonable certainty, the lay-out was sustained.⁷ A description of a certain number of feet on each side of the center line of a railroad, as located, staked and marked, was held sufficient.⁸ But a ditch or way cannot be properly described as a line.⁹ Leave to

§ 510.

¹ *O'Bannan v. Jackson, Sneed, 201; Missouri Pacific Ry. Co. v. Carter, 85 Mo. 448; Anderson v. Pemberton, 89 Mo. 61; Vail v. Morris and Essex R. R. Co., 21 N. J. L. 189; Commonwealth v. Fisher, 1 P. & W. 462; Poston v. Terry, 5 J. J. Marsh. 220; Chesapeake & Ohio Canal Co. v. Union Bank, 4 Cranch C. C. 75.*

² *Matter of New York & Jamaica R. R. Co., 21 How. Pr. 434; Smith v. Connelly's Heirs, 1 T. B. Mon. 58.*

³ *Bloomington v. Miller, 84 Ills. 621.*

⁴ *Ruston v. Grimwood, 30 Ind.*

364; Ohio River R. R. Co. v. Harness, 24 W. Va. 511; Chesapeake & Ohio Canal Co. v. Binney, 4 Cranch C. C. 68.

⁵ *State v. Schilb, 47 Ia. 611; Stone v. Cambridge, 6 Cush. 270; Andover v. County Commsrs., 5 Gray, 393; Hall v. Manchester, 39 N. H. 295.*

⁶ *Jeffries v. Swampscott, 105 Mass. 535.*

⁷ *Gilkey v. Watertown, 141 Mass. 317.*

⁸ *Lower v. Chicago, Burlington & Quincy R. R. Co., 59 Ia. 563.*

⁹ *Koop v. Forman, 31 Mich. 144; Milton v. Wacker, 40 Mich. 229.*

erect a mill upon section seven, township nineteen, in Macon County, was held too indefinite.¹⁰

§ 511. Description of location in case of highways.—The statutes in respect to the establishment of highways are exceedingly various, and the duties cast upon commissioners in such cases sometimes involve the location of the way and sometimes merely the determination of the amount of damages. Where the statute requires the width to be fixed in the report, the omission to do so renders the lay-out void.¹ If the report describes a single line and states the quantity of land taken, the width can be ascertained and the report will be sufficient.² If the statute does not require the width to be stated, it has been held unnecessary to do so, and that a reasonable and proper width will be understood.³ But the width of a road ought certainly to be fixed, either by statute or by the proceedings to establish it, and the location of a road without any width should be declared void for uncertainty. If a maximum width is fixed by law, it is error to exceed the limit,⁴ but it has been held to be simply an error and not to render the lay-out void.⁵ A statute required the road to be described by metes and bounds and by courses and distances. A strict compliance was held necessary.⁶ The “beginning, course and termination” were required to be given. It was held sufficient to give the termini and describe the course as along the bank of the Ohio River.⁷ A statute required the commissioners to return a

¹⁰ *Macon v. Owen*, 3 Ala. 116.

§ 511.

¹ *Carlton v. State*, 8 Blackf. 208; *Barnard v. Haworth*, 9 Ind. 103; *Erwin v. Fulk*, 94 Ind. 235; *Strong v. Makeever*, 102 Ind. 578; *Hays v. Shackford*, 3 N. H. 10; *Road Case*, 4 W. & S. 39. In the following cases such a report is held erroneous but not void. *Pearce v. Gilmer*, 54 Ills. 25; *Sidener v. Essex*. 22 Ind. 201.

² *People v. Commissioners of Highways*, 13 Wend. 310.

³ *Kennet's Petition*, 24 N. H. 139.

⁴ *Killbuck Private Road*, 77 Pa. S. 39.

⁵ *Knowles v. Muscatine*, 20 Ia. 248.

⁶ *Wood v. Campbell*, 14 B. Mon. 339; *Phillips v. Tucker*, 3 Met. (Ky.) 69; *State v. Clark*, 1 N. J. L. 226.

⁷ *Hays v. State*, 8 Ind. 425.

plat showing the courses and distances of the road and references to the most remarkable places and to the improvements through which it passed. The phrase *remarkable places* was held to mean such places as would serve to fix the location of the road.⁸ It does not require a specification of town and county lines.⁹ The word *improvements* was held to mean enclosed fields, and that the plat should show the fence lines, the distance through each field and the name of the owner.¹⁰ Barns and houses were held not to be such improvements as were intended by the statute.¹¹ An omission to comply with the statute was held fatal.¹² Under a similar statute in Pennsylvania it was held that, if the road did not pass through any improvements, the negative fact need not be stated.¹³

In general the description should be such that a person conversant with such matters can locate the road upon the ground,¹⁴ otherwise it will be void for uncertainty.¹⁵ But the whole report must be considered, and that is certain which can be rendered certain by the report itself.¹⁶ The termini should be definitely stated.¹⁷ The following are descriptions held void for uncertainty: "Commencing at or near the residence of S.;"¹⁸ "beginning near the New Jer-

⁸ Hoffman *v.* Rodman, 39 N. J. L. 252.

162; Bean's Road, 35 Pa. S. 280; Isham *v.* Smith, 21 Wis. 32; Moll *v.* Benckler, 30 Wis. 584. So in a railroad location. Northern R. R Co. *v.* Concord & Clarmount R. R. Co., 27 N. H. 183.

⁹ Public Road, 4 N. J. L. 290.

¹⁶ St. Paul & Sioux City R. R Co. *v.* Matthews, 16 Minn. 341; McConnell's Mill Road, 32 Pa. S. 285; Springfield Road, 73 Pa. S. 127.

¹⁰ State *v.* Hulick, 33 N. J. L. 307;

¹⁷ Road in Lower Merion, 58 Pa. S. 66.

State *v.* Hopping, 18 N. J. L. 423.

¹⁸ DeLong *v.* Schimmel, 58 Ind. 64. But the same description of a terminus was held good. *In re* Road in Sterrett Township, 114 Pa. S. 627.

¹¹ State *v.* Smith, 21 N. J. L. 91.

¹² State *v.* Lippincott, 25 N. J. L. 434.

¹³ Case of Road from McCord's, 13 S. & R. 83.

¹⁴ Todemier *v.* Aspinwall, 43 Ills. 401; Spohr *v.* Schofield, 66 Ind. 168;

Lewiston *v.* County Commrs., 30 Me. 19; Jackson *v.* Rankin, 67 Wis. 285; Woolsey *v.* Tompkins, 23 Wend. 324.

¹⁵ Hinkley *v.* Hastings, 2 Pick.

sey Central Railroad depot and in a line of road known as Chestnut Street;"¹⁹ or "near the old Chase garden and nearly opposite the tenement house owned by S. S. Stevens;"²⁰ over land of A B to the H Road and there to end;"²¹ "running nearly in a northwesterly direction near where the travel is now seeking to get the best route;"²² "northwardly about one hundred yards;"²³ "the *north side* of said road to begin at," etc., (here describing point of beginning and courses and distances) "which said lines of course are in the middle of the public road now laid out."²⁴ A terminus described as "beginning in the public road from G to H one rod distant easterly from the line of B," was held sufficient.²⁵ A lay-out giving width and describing a single line was held good, the line described being taken in law as the center line of the road.²⁶ If a point is defined by a monument the monument will control, though it does not correspond to the courses and distances.²⁷ Stating the courses as *according to the compass of the surveyor on a given date* was held not to vitiate.²⁸ It has been held that, where the road can be located from what is stated and from facts judicially noted, such as the geography of the country and the government surveys, it would be sufficient.²⁹ Where the description of the commissioners was defective but they reported that they had laid out the road pursuant to the application, it was held sufficient.³⁰

¹⁹ State *v.* Woodruff, 36 N. J. L. 204.

²⁶ Tingle *v.* Tingle, 12 Bush, 160; see §§ 350-352.

²⁰ People *v.* Diver, 19 Hun, 263.

²⁷ Knowles' Petition, 22 N. H. 361.

²¹ State *v.* Hart, 17 N. J. L. 185.

²⁸ State *v.* Schanck, 9 N. J. L. 107.

²² Blodgett *v.* Whaley, 47 Mich. 469.

²⁹ Mossman *v.* Forrest, 27 Ind.

²³ Craig *v.* North, 3 Met. (Ky.) 187.

³⁰ For long descriptions held sufficient see Suits *v.* Murdock, 63 Ind. 73; Rochester *v.* Sledge, 82 Ky. 344.

²⁴ State *v.* Green, 15 N. J. L. 88.

³¹ Satterly *v.* Winne, 101 N. Y. 218.

²⁵ State *v.* Emmons, 24 N. J. L. 45.

§ 512. What is a sufficient finding on the question of damages.—The report ought properly to contain an explicit finding, on the question of damages, as to every piece of property taken or affected, and as to every party or interest.¹ The items of damages should not be specified² unless required by statute or unless an allowance is required to be made for some specific matter.³ In some States it is held that, if the report is silent as to any tract or owner, it is equivalent to an express award of no damages, and the owner's only remedy is by appeal.⁴ But in other States it is held that there should be an express finding of no damages.⁵ A report that certain owners made no claim for damages was held insufficient.⁶ An award of damages to the owner of certain lots and stating that in all other cases the benefits equaled the damages was held good without specifying each

§ 512.

¹ New Washington Road, 23 Pa. S. 485; Fitzpatrick *v.* Pennsylvania R. R. Co., 10 Phila. 107; Dolphin *v.* Pedley, 27 Wis. 469.

² Michigan Air Line Ry. Co. *v.* Barnes, 44 Mich. 222; Ford *v.* County Comrs., 64 Me. 408; Philadelphia etc. R. R. Co. *v.* Trimble, 4 Whart. 47; Ohio & Penn. R. R. Co. *v.* Wallace, 14 Pa. S. 245.

³ California Pacific R. R. Co. *v.* Frisbie, 41 Cal. 356; Robinson *v.* Robinson, 1 Duvall, 162; Lodge *v.* Railroad Co., 9 Phila. 548.

⁴ Clifford *v.* Town of Eagle, 35 Ills. 444; Howland *v.* County Comrs., 49 Me. 143; North Reading *v.* County Comrs. 7 Gray, 109; Hildreth *v.* Lowell, 11 Gray, 345; Childs *v.* County of Franklin, 128 Mass. 97; Case of Road, 2 S. & R. 277. A verdict that plaintiffs were damaged, and allowing damages to each as follows, to-wit: to A. B.

nothing, etc., is not void for repugnancy, but is a good verdict of no damages. Chace *v.* Fall River, 2 Allen, 533. So of a report that damages are appraised as follows, where no appraisal follows. Reed *v.* Acton, 117 Mass. 384. So the dismissal of a petition for damages was held to be an adjudication of no damages sustained. Smith *v.* Boston, 1 Gray, 72. A decision that no damages be awarded is a compliance with a statute requiring an estimate of damages. Cambridge *v.* County Comrs., 117 Mass. 79.

⁵ Commissioners *v.* Durham, 43 Ills. 86; State *v.* Cooper, 23 N. J. L. 381; State *v.* Bennett, 25 N. J. L. 329; Washington *v.* Fisher, 43 N. J. L. 377; Kearsley *v.* Gibbs, 44 N. J. L. 169; and see also Fitzpatrick *v.* Pennsylvania R. R. Co., 10 Phila. 107.

⁶ State *v.* Runyan, 24 N. J. L. 256

lot.⁷ A verdict that the owner was entitled to “ \$420.00 as compensation and to \$411.25 as damages, a total sum of \$831.25,” was held good.⁸ Where the commissioners inserted directions as to payment, they were treated as surplusage and the report sustained.⁹

§ 513. What is a sufficient finding on the question of necessity, public utility, etc.—Where, by the constitution or statute, the commissioners are required to pass upon the necessity or public utility of the proposed taking, their failure to do so will vitiate the proceedings.¹ A finding that the taking would be *for public use* is not equivalent to finding that it is *necessary*.² But a finding “that the public convenience requires that the highway should be laid out” was held equivalent to finding that it was necessary.³ A finding that a highway “ought to be laid out,”⁴ or that it will be convenient and necessary,⁵ is a sufficient finding that it is of common convenience and necessity as required by statute. Where viewers were required to state whether the taking was necessary for a public or private road, a report that they had laid the way out for a public use was held a sufficient designation of it as a public road.⁶ Where the question of necessity or public use is submitted by statute to the commissioners or jury, the court cannot disregard their finding and decide differently.⁷ A statute of Kentucky requires the viewers in road cases to report the conveniences and inconveniences that will result to the public or individuals by reason of the proposed improvement. The omission to make

⁷ State v. Leslie, 30 Minn. 533.

² McClary v. Hartwell, 25 Mich.

⁸ Illinois etc. R. R. Co. v. Mayrand, 93 Ills. 591.

139.

³ Hunter v. Newport, 5 R. I. 325.

⁹ In re Road in O’Hara Township, 87 Pa. S. 366.

⁴ Price v. Southbury, 29 Conn. 490.

§ 513.

⁵ Cushing v. Gay, 23 Me. 9.

¹ Bass v. Elliott, 105 Ind. 517; Arnold v. Decatur, 29 Mich. 77.

⁶ Road in Norriston & Whitpain,

4 Pa. S. 337.

⁷ Wilmington etc. Co. v. Dominguez, 50 Cal. 505.

such report will vitiate the proceedings.⁸ The inconveniences to individuals should be *specifically* stated. Merely reporting that certain individuals will suffer inconveniences is not sufficient.⁹ It is sufficient to designate the individuals who will suffer the inconveniences as the heirs of A, without naming them.¹⁰ The public conveniences and inconveniences should in like manner be specifically stated.¹¹

§ 514. Of naming and describing the owners of property taken or affected.—The award or report should properly state the names of the owners of the property taken or affected, and the amount allowed to each, if the names are known,¹ and if not known that fact should be stated.² If the statute requires the names of the owners to be stated, the omission will be fatal to the proceedings.³ But in a prosecution for obstructing a highway it was held that the defendant was estopped from insisting upon such an omission by the fact that himself and his grantor had moved their fences to correspond with the highway, and had recognized its existence for years.⁴ Owners should be designated by their appropriate names. Awards to “Mrs. Kearsley;”⁵ to persons by their firm name,⁶

⁸ *Grimes v. Doyle, Sneed*, 58; *Daviess v. County Court*, 1 Bibb, 514; *Fletcher's Heirs v. Fugate*, 3 J. J. Marsh. 631; *Winston v. Waggoner*, 5 J. J. Marsh. 41; *Peck v. Whitney*, 6 B. Mon. 117.

⁹ *Wood v. Campbell*, 14 B. Mon. 339.

¹⁰ *Gashweller's Heirs v. McIlvoy*, 1 A. K. Marsh. 84.

¹¹ *Foreman's Heirs v. Allen*, 2 Bibb, 581.

§ 514.

¹ *Honenstine v. Vaughn*, 7 Blackf. 520; *Commonwealth v. Combs*, 2 Mass. 489; *Commonwealth v. Great Barrington*, 6 Mass. 492.

² *Commonwealth v. Great Barrington*, 6 Mass. 492. In some States the omission to state the names of the owners of any tract or parcel is held equivalent to an award of no damages, and hence the omission does not vitiate the award. *Cushing v. Gay*, 23 Me. 9; and see cases cited in last section.

³ *Roberts v. Williams*, 15 Ark. 43.

⁴ *State v. Wertzel*, 62 Wis. 184.

⁵ *Kearsley v. Gibbs*, 44 N. J. L. 169.

⁶ *Vawter v. Gilliland*, 55 Ind. 278; *State v. Woodruff*, 36 N. J. L. 204.

to "A and others,"⁷ to the "estate of A,"⁸ to the "devisees of A deceased,"⁹ and to the "heirs of A,"¹⁰ have been held to be bad. An award to the "guardian of A, a minor," was held to be substantially an award to the minor.¹¹ An award to "Adam Sture, Appellant," instead of "Andrew Sture, Appellant," was held good.¹²

§ 515. Whether the award of damages should be joint or several.—A separate award should be made to the owner of each lot or parcel, and an award in gross to the owners of two or more parcels will be erroneous.¹ If one person owns several lots or parcels, it has been held proper to award a gross sum for damages to all,² but the better practice would seem to be to make a separate award for each distinct lot, tract or parcel.³ If a tract is owned by several persons jointly, an award to all jointly is proper.⁴ Where there are distinct estates or interests in the same tract, such as leaseholds, life estates, mortgage interests and the like, there should be a

⁷ *State v. Oliver*, 24 N. J. L. 129.

⁸ *Washington v. Fisher*, 43 N. J. L. 377; *Neal v. Knox & Lincoln R. R. Co.*, 61 Me. 298; *Matter of William & Anthony Streets*, 19 Wend. 678.

⁹ *State v. Blauvelt*, 33 N. J. L. 36.

¹⁰ *State v. Woodruff*, 36 N. J. L. 204; *Oxford v. Brands*, 45 N. J. L. 332. See, *contra*: *Todemier v. Aspinwall*, 43 Ills. 401.

¹¹ *Peavy v. Wolfborough*, 37 N. H. 286.

¹² *Red River & Lake of the Woods R. R. Co. v. Sture*, 32 Minn. 95.

§ 515.

¹ *Smith v. Rogers*, Litt. Select Cas. (Ky.) 117; *Harris v. Howes*, 75 Me. 436; *State v. Fisher*, 26 N. J.

L. 129; *Rusch v. Milwaukee, L. & W. Ry. Co.*, 54 Wis. 136.

² *Kankakee & Ills. River R. R. Co. v. Chester*, 62 Ills. 235; *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 Minn. 122; *Same v. Same*, 21 Minn. 127.

³ *Rentz v. Detroit*, 48 Mich. 544; *Smith v. Trenton Delaware Falls Co.*, 17 N. J. L. 5.

⁴ *East Saginaw etc. R. R. Co. v. Benham*, 28 Mich. 459; *Shoddy v. County of Pettis*, 45 Mo. 361; *State v. Fisher*, 26 N. J. L. 129; *Pittsburgh etc. R. R. Co. v. Hall*, 25 Pa. S. 336; *Thornton v. Town Council of North Providence*, 6 R. I. 433. In Iowa an apportionment of the damages to each according to his interest is commended, as the better practice. *Ruepert v. C. etc. R. R. Co.*, 43 Ia. 490.

separate award to the owner of each estate or interest.⁵ It is the practice in some States to assess a gross sum to be apportioned by the court.⁶ Where a road is laid out partly in two towns, and a person owns a tract partly in both towns, damages should be assessed for the part in each town separately, but this is because each town is separately liable for the cost of the part of the road within its limits.⁷

§ 516. Conditional and alternative awards.—The right of commissioners to award the owner certain easements or privileges in the property taken, or to require the party condemning to do certain things for the benefit of the owner in lieu of money, has been considered in the chapter on damages.¹ The award should be positive and definite, and all awards upon condition or in the alternative are erroneous and, according to some courts, void. An award of \$972 in a railroad case and, if the company refused to make certain culverts, then \$2,000 additional, was held a good award as to the \$972 only.² Damages were claimed for interference with a right of way. The jury found there was no right of way, but reported further that, if they were to take the right of way for granted, they assessed the damages at £150. The award was held bad altogether.³ A conditional report submitting certain questions of law to the court is a nullity.⁴ The lay-out of a highway upon condition that

⁵ *Harris v. Howes*, 75 Me. 436; *Rentz v. Detroit*, 48 Mich. 544; *Chesapeake & Ohio Canal Co. v. Hoye*, 2 Gratt. 511.

⁶ *Tide Water Canal Co. v. Archer*, 9 G. & J. 479; *Ross v. Elizabeth-town etc. R. R. Co.*, 20 N. J. L. 230.

⁷ *State v. Garretson*, 23 N. J. L. 358.

§ 516.

¹ *Ante*, § 505.

² *Winchester & Potomac R. R. Co. v. Washington*, 1 Rob. Va. 67. It

was also held that, though a suit would not lie for the \$2,000, yet, if a proper construction of the road required the culverts, a suit would lie for damages by omitting them.

³ *Queen v. London & Northwestern Ry. Co.*, 3 E. & B. 443; S. C., 77 E. C. L. R. 443. *In re Wright & Cromford Co.*, 1 A. & E. N. S. 98; S. C., 41 E. C. L. R. 454, is a similar case.

⁴ *Germantown etc. Turnpike Road Co.*, 4 Rawle, 191; *Case of a Road*, 2 S. & R. 277.

the applicants should pay for the same was held void in New Hampshire,⁵ but otherwise in Kentucky.⁶

§ 517. As to the time of making report.—A statute limiting the time within which a report must be made is mandatory,¹ and a report made after the time has expired is invalid, even though the delay is sanctioned by an agreement of counsel.² The same is true where the time is fixed by order of court.³ A court which has a general power to fix the time within which a report shall be made may extend the time.⁴ A continuance after the time has expired,⁵ or an order entered *nunc pro tunc* either confirming the report⁶ or extending the time,⁷ will be of no avail. Where the report is to be delivered to an officer who is directed to return it to the *next term* of court in the county, it means the next term after he gets the report.⁸ A statute required the report to be returned to the next regular *session* of court after the proceedings were finished; it was held to mean the next regular *term*, etc.⁹ Where reviewers were appointed at one term,

⁵ Dudley *v.* Butler, 10 N. H. 281.

⁶ McIlvoy *v.* Speed, 4 Bibb, 85; Thurman *v.* Emmerson, 4 Bibb, 279; and see Wilson *v.* Whitsell, 24 Ind. 306.

§ 517.

¹ Breese *v.* Poole, 16 Ills. App. 551; Inhabitants of Windham, Petitioners, 32 Me. 452; Cornville *v.* County Comrs., 33 Me. 237; Matter of Highway, 3 N. J. L. 244; Semon *v.* Trenton, 47 N. J. L. 489; *Ex parte* Teese, 4 Pa. S. 69; Heidelberg Township Road, 47. Pa. S. 536; *Contra:* Allison *v.* Commissioners of Highways, 54 Ills. 170; Matter of Broadway Widening, 63 Barb. 572.

² City of Belfast Appellant, 53 Me. 431.

³ Munson *v.* Blake, 101 Ind. 78; 511.

Claybaugh *v.* Baltimore & Ohio R. R. Co., 108 Ind. 262; Anderson *v.* Pemberton, 89 Mo. 61; Baldwin and Snowden Road, 3 Grant's Cas. 62; Road in Byberry, 6 Phila. 384; Metzler & Hugh's Road, 62 Pa. S. 151; *In re* Road in Salem Township, 103 Pa. S. 250.

⁴ Lipes *v.* Hand, 104 Ind. 503; McMullen *v.* State, 105 Ind. 334.

⁵ Baldwin and Snowden Road, 3 Grant's Cas. 62; Road in Byberry, 6 Phila. 384.

⁶ Road in Reserve Township, 2 Grant's Cas. 204.

⁷ *In re* Road in Salem Township, 103 Pa. S. 250.

⁸ Webb *v.* County Comrs., 77 Me. 180.

⁹ Parsonsfield *v.* Lord, 23 Me. 180.

to report at the next term, it was held that a report filed at the same term at which they were appointed was untimely.¹⁰ A report, left within the time limited, at the office of the town clerk in his absence, to be filed by him, was regarded as filed, though not so marked.¹¹ If the report refers to a plan and is incomplete without it, both must be filed within the time limited.¹² Where the lay-out of a highway was to be reported to and accepted by a town meeting, and the lay-out was required to be filed with the town clerk seven days before the meeting, it was held that, though the lay-out and report might be contained in the same paper, yet they need not be, and that the report need not be filed before presentation to the meeting.¹³

§ 518. Recording the report.—If the statute requires the report to be recorded, it will have no validity until this is done.¹ As to what constitutes recording in the absence of any indication in the statute, it is difficult to say. It has been held that a paper signed by selectmen, setting forth their acts and doings in laying out a highway, and filed with the town clerk, was a sufficient record within the statute.² In another case, where the statute required a record of the laying out of a highway to be made, it was held necessary that the whole proceedings should be copied into a book prepared for that purpose, in order that it might remain as permanent evidence of the public right.³ If, after a report is ordered to be recorded, it is lost, its contents may be proved and a copy recorded.⁴

¹⁰ *Road in Baldwin etc. Townships*, 36 Pa. S. 9.

^{v.} *Town of Northfield*, 6 Ills. App. 356; *Commonwealth v. Merrick*, 2 Mass. 529; *Burns v. Multnomah Ry Co.*, 8 Sawyer, 543.

¹¹ *Reed v. Acton*, 120 Mass. 130.

² *Hardy v. Houston*, 2 N. H. 309.

¹² *Jeffries v. Swampscott*, 105 Mass. 535.

³ *Ohio v. Carman, Tappan (Ohio)*,

¹³ *Carr v. Berkley*, 145 Mass. 539. § 518.

⁴ *Frame v. Boyd*, 35 N. J. L. 457.

¹ *Todd v. Rome*, 2 Me. 55; *Tulley*

§ 519. Confirmation of the report by non-judicial bodies.

—It has been a common practice to have reports of commissioners, especially in highway and drainage cases, acted upon by legislative bodies, such as a board of trustees, or of county commissioners, or a city council, and, in New England, reports laying out highways have been submitted to a general town meeting for approval or rejection. Such bodies usually exercise an absolute discretion, and approve or reject a report according to their view of what the public interests demand.

In the case of town meetings acting in such matters, it is essential that the meeting should be duly called and that the warrant should specify that the particular report will come before it.¹ The meeting must not be called until the road has been laid out.² The meeting, being duly assembled, will proceed as in other cases. It is held in Maine that the report must be accepted or rejected absolutely, and that an acceptance upon conditions is void.³ A contrary doctrine is maintained in Massachusetts, and a vote accepting a highway upon condition that it should be constructed at the expense of the applicant, and that he should defend the town against all prosecutions, was held valid.⁴ All the preliminaries required by statute prior to the action of the town meeting, such as notice, filing the report within a specified time, and the like, must be complied with to make the proceedings legal.⁵

In regard to the acceptance of reports by the legislative authority of cities, villages and counties, similar principles apply. There must be a quorum present, who are qualified to act in the premises.⁶ And, where a board of trustees

§ 519.

¹ State *v.* Taff, 37 Conn. 392.

² Howard *v.* Hutchinson, 10 Me. 335; Mann *v.* Marston, 12 Me. 32.

³ Wardens of Christ Church *v.* Woodward, 26 Me. 172; State *v.* Calais, 48 Me. 456.

⁴ Harrington *v.* Harrington, 1 Met. 404.

⁵ *Ibid.*, and also Blaisdell *v.* Winthrop, 118 Mass. 133; Jeffries *v.* Swampscott, 105 Mass. 535; Commonwealth *v.* Merrick, 2 Mass. 529; Reed *v.* Acton, 120 Mass. 130.

⁶ Mankin *v.* State, 2 Swan, 206.

consisted of five members, and three constituted a quorum, and four were present, two of whom were disqualified, and a report was confirmed by the vote of the other two, it was held void.⁷ The report must be accepted or rejected as an entirety. Part cannot be accepted and part rejected.⁸ Where a city charter provided that, if the city council concluded to make the improvement, they should pass a resolution accepting the report and directing the clerk to deliver a copy of the assessment to the treasurer, it was held that a resolution simply accepting the report was not final, and that the council might afterwards annul the whole proceeding.⁹ The vote need not be recorded unless required by statute.¹⁰ It has been held that the acceptance of a report by county commissioners, at a meeting when they were not authorized to act thereon, was erroneous merely, and not void.¹¹ Where a city council accepted a report recommending that no damages be allowed the plaintiffs, and afterwards at the request of the plaintiffs voted to meet on the premises, but did not, and no further action was had, it was held that the acceptance of the report was not affected by the subsequent vote.¹²

§ 520. Confirmation of the report by a court: General principles.—Where the proceedings are before a court and the tribunal is appointed by the court, a report should be made to the court, though not expressly required by statute, and the court can accept or reject the report as justice may require.¹ As the court acts judicially in such matters, it can only act upon them in term time, unless by express pro-

⁷ *Coles v. Williamsburgh*, 10 Wend. 659.

¹² *Goddard v. Worcester*, 9 Gray, 88.

⁸ *Simmons v. Mumford*, 2 R. I. 172; *Clarke v. Newport*, 5 R. I. 333.

§ 520.

⁹ *Elkhart v. Simonton*, 71 Ind. 7. ¹⁰ *Ford v. Whitaker*, 1 Nott & McCord, 5.

¹ *Pueblo & Arkansas Valley R. R. Co. v. Rudd*, 5 Col. 270; *Hingham & Quincy Bridge & Turnpike Co. v. County of Norfolk*, 6 Allen 353; *State v. McDonald*, 26 Minn. 445.

¹¹ *Wright v. Wilson*, 95 Ind. 408.

vision of the statute.² Though the statute provides that the report of commissioners shall be final and conclusive, it may be set aside for fraud or misconduct.³ It means that, upon matters committed to the charge of the commissioners, their judgment shall be conclusive where lawfully exercised. A statute provided that the court should not set aside the report of surveyors for *illegality* or *irregularity*. It was held to refer to *matters of form* merely, and not to matters of *substance*.⁴

Sometimes statutes provide that the court may set aside reports for good cause shown,⁵ or for sufficient cause.⁶ Under such statutes the practice would be the same as in any case where the court had power to act in the matter of accepting or rejecting the report. And, though the statute authorizes the court to direct a new appraisal before the same or new commissioners, *at its discretion*, it was held that the court should not interfere unless some substantial error had been committed.⁷ In general it may be said that good grounds for setting aside a report are, any defect or insufficiency in the proceedings prior to the appointment of the tribunal which would have been an adequate reason for refusing the appointment and which have not been waived by the objector, or any mistake, irregularity or partiality in the proceedings of the tribunal materially affecting the merits of the case.⁸

² *Pillsbury v. Springfield*, 16 N. H. 565.

³ *Matter of Buffalo, New York & Phila. R. R. Co.*, 32 Hun, 289.

⁴ *State v. Connover*, 7 N. J. L. 203.

⁵ See *Bennett v. Camden & Amboy R. R. Co.*, 14 N. J. L. 145.

⁶ See *Chapman v. Graves*, 8 Blackf. 308.

⁷ *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100.

⁸ In *Bennett v. Camden & Amboy R. R. Co.*, 14 N. J. L. 145, it is said that the report could not be set aside for any irregularities prior to or including the appointment of commissioners, but that the following were good causes: "First. If the commissioners have not taken and subscribed an oath or affirmation before some person duly authorized to administer an oath, faithfully and impartially to examine the matter in question, and to make

§ 521. Defects in the proceedings prior to the appointment of commissioners.—We have already discussed these matters in the chapters upon the Petition, Notice, and Objections to the Application,¹ as well as the waiver of such defects by not insisting upon them at the time or by going to a hearing upon the merits. It will be unnecessary, therefore, to repeat the discussion at this place.²

§ 522. Irregularities on the part of the commissioners, jurors, etc.—Any improper conduct on the part of the tribunal or defect in their appointment or selection, or illegality of procedure materially affecting the merits, will be sufficient cause for setting aside the report.¹ These matters have also been discussed in prior chapters, to which the reader is re-

a true report, etc., as is directed in the act. *Second.* If a notice, such as is required in the act, of the time and place of the meeting of the commissioners, is not given to the party, and for want of which he has been prejudiced in his claims. Or if the commissioners did not meet at the time and place appointed, but at some other time or place, without due notice to, or the consent of the party, so that he had not a fair opportunity of being heard and of presenting his claims. *Third.* If the commissioners did not "view and examine" the lands and materials, but made their report without such view and examination. *Fourth.* If the commissioners or any of them acted with partiality or with corruption. *Fifth.* If mistake of law or fact intervened on the part of the commissioners as to their powers or duty, or in relation to the quantity and value of the land, and such mistake is made manifest; or, *Sixth.* If, upon the whole matter,

there should be reasonable grounds to apprehend that justice *may not* have been done, and the land-holder is willing to take the hazard of paying costs, which by the statute he must pay, if the jury do not assess his damages at more than the commissioners did." See also *McMahon v. Cincinnati & Chicago Short Line R. R. Co.*, 5 Ind. 413; *Tappan's Petition*, 24 N. H. 43; *White v. Landaff*, 35 N. H. 128; *State v. Rye*, 35 N. H. 368; *Shattuck v. Waterville*, 27 Vt. 600.

§ 521.

¹ See chapters 14, 15 and 16.

² In *Matter of Highway*, 18 N. J. L. 291, it was held that, where the court was required to pass upon the sufficiency of the notice and application when it appointed the commissioners, it could not review its decision when their report came in.

§ 522.

¹ *Matter of New York Central & Harlem River R. R. Co.*, 64 N. Y. 60.

fferred. It will be presumed, however, that the tribunal has proceeded rightly and according to the statute until the contrary appears.²

§ 523. Accident, mistake or error of judgment on the part of commissioners.—Where the owner has been prevented by accident or mistake from attending before the commissioners, and has not been guilty of laches, and the award is clearly unjust as to such owner, a rehearing should be granted.¹

The report may be set aside for errors committed in receiving or rejecting testimony,² or because the award is against the evidence,³ or because the tribunal has acted upon erroneous principles,⁴ or proceeded in a careless, negligent or unintelligent manner.⁵

§ 524. Inadequate or excessive damages.—The report or verdict may be set aside on the ground that the damages awarded are too much or too little.¹ In setting aside a re-

² Road in South Abington, 109 Pa. S. 118.

§ 523.

¹ Matter of New York, L. & W. Ry. Co., 29 Hun, 602; S. C., 93 N. Y. 385; Matter of New York Central etc. R. R. Co., 64 N. Y. 60; Matter of New York, L. & W. Ry. Co., 63 How. Pr. 265; Bourgeois v. Mills, 60 Tex. 76.

² Matter of New York, West Shore & Buffalo Ry. Co., 35 Hun, 260; Goodwin v. Milton, 25 N. H. 458. Where the statute provided that the decision of commissioners in receiving or rejecting testimony should be final and conclusive, it was said that the court would interfere if there was fraud, bad faith or gross error or mistake in such rulings. Thompson v. Conway, 53 N. H. 622.

³ Wilson v. Rockford etc. R. R. Co., 59 Ills. 273; Fitchburg R. R. Co. v. Eastern R. R. Co., 6 Allen, 98.

⁴ VanWickle v. Camden & Amboy R. R. Co., 14 N. J. L. 162; Williamson v. East Amwell, 28 N. J. L. 270; Swayze v. New Jersey Midland R. R. Co., 36 N. J. L. 295; Crater v. Fritt, 44 N. J. L. 374; Matter of New York, Lackawanna & Western Ry. Co., 33 Hun, 639; S. C., 98 N. Y. 447; S. C., 102 N. Y. 704; S. C., 2 How. Pr. N. S. 225; Beckett v. Midland Ry. Co., 1 L. R. C. P. 241.

⁵ Walters v. Houck, 7 Ia. 72.

§ 524.

¹ Chapman v. Groves, 8 Blackf. -308; Kansas City etc. R. R. Co. v. Campbell, 62 Mo. 585; Corporation v. Manhatten Co., 1 Caines R. 507; Clarksville etc. Turnpike Co. v. Atkinson, 1 Sneed, 426; Van Wickle

port on the question of damages, the court will be governed by the same principles as obtain in the case of the verdicts of juries in common law suits.² Where there is evidence to sustain the verdict and the testimony is conflicting, the court will not interfere;³ and especially is this the case where the commissioners or jury have viewed the premises.⁴ Where the owner petitions for damages, it is error to allow him more than he claims in his petition.⁵ On a petition to con-

v. Camden & Amboy R. R. Co., 14 N. J. L. 162; *Matter of Commissioners of Central Park*, 51 Barb. 277. Some cases appear to intimate a contrary doctrine, but the language used is to be taken with reference to the propriety of the action rather than with reference to the power of the court in the premises. See *Matter of Boston Road*, 27 Hun. 409; *Matter of the New Reservoir*, 1 Sheldon (N. Y.) 408; *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169; *Willing v. Baltimore R. R. Co.*, 5 Whart. 460; *Allison v. Delaware etc. Canal Co.*, 5 Whart. 482. In the absence of any statutory provisions making the judgment of the jury or commissioners final in the matter, we entertain no doubt of the power of the court to interfere. See cases hereafter cited in this section.

² *Rheimer v. Stillwater Ry. & Transfer Co.*, 29 Minn. 147; *Matter of William and Anthony Streets*, 19 Wend. 678.

³ *Texas & St. Louis Ry. Co. v. Eddy*, 42 Ark. 527; *Same v. Cella*, 42 Ark. 428; *Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 258; *Little Rock Junction Ry. Co. v. Woodruff*, 49 Ark. 381; *Selma, Rome & Dalton R. R. Co. v. Gam-mage*, 63 Ga. 604; *Illinois & Wis-*

consin Ry. Co. v. Van Horn, 18 Ills. 257; *Kyle v. Miller*, 108 Ind. 90; *Morgan's Appeal*, 39 Mich. 675; *Colvill v. St. Paul & Chicago Ry. Co.*, 19 Minn. 283; *Sedalia v. Mis-souri, Kansas & Texas Ry. Co.*, 17 Mo. App. 105; *City of Kansas v. Kansas City etc. R. R. Co.*, 84 Mo. 410; *Hastings & Grand Island R. R. Co. v. Ingalls*, 15 Neb. 123; *Vir-ginia & Truckee R. R. Co. v. El-liott*, 5 Nev. 358; *Somerville etc. R. R. Co. v. Doughty*, 22 N. J. L. 495; *State v. Miller*, 23 N. J. L. 383; *Railroad Co. v. Gesner*, 20 Pa. S. 240. Where correct rules have been adopted, the award will not be set aside unless the amount is palpably erroneous. *Matter of Thompson*, 45 Hun. 261.

⁴ *Western Pacific R. R. Co. v. Reed*, 35 Cal. 621; *McReynolds v. Baltimore etc. Ry. Co.*, 106 Ills. 152; *South Park Comrs. v. Trustees of Schools*, 107 Ills. 489; *Chicago & Evanston R. R. Co. v. Blake*, 116 Ills. 163; *Omaha & Republican Valley R. R. Co. v. Walker*, 17 Neb. 432; *Virginia & Truckee R. R. Co. v. Henry*, 8 Nev. 165; *Matter of 138th Street*, 60 How. Pr. 290; *Supervisors of Doddridge County v. Stout*, 9 W. Va. 703.

⁵ *Houston etc. Ry. Co. v. Milburn*, 34 Tex. 224.

demn a piece of land large enough for a telegraph pole, adjacent to a railroad, every one hundred and fifty feet, across defendant's tract, there being eleven poles on defendant's land, a verdict for \$3,850 was set aside as grossly excessive.⁶ A verdict or award which is more than the amount testified to by the witnesses of one party and less than the amounts testified to by the witnesses for the other, will not be disturbed on the question of amount alone.⁷ Where the award was \$50,000 and the petitioner dismissed the proceedings and commenced anew, and a second award was made of \$18,000, the court, in view of the great discrepancy in the two reports and the conflicting evidence as to value, granted a new trial.⁸ Where the first report was set aside because only nominal damages were awarded, and a second report was made also for nominal damages and no irregularity appeared, the court refused to set it aside.⁹

§ 525. Departure from the petition in laying out a highway.—Sometimes the statute vests in the commissioners or other tribunals appointed to lay out a highway a discretion as to its particular location, the petition or application giving merely a general description of the way desired. In the absence of such a statutory discretion the way as laid out must correspond substantially with the way as described in the petition.¹ Any material departure will vitiate the pro-

⁶ Mutual Union Tel. Co. v. Katamp, 103 Ills. 420.

⁷ Illinois etc. R. R. Co. v. McClintonck, 63 Ills. 514; Somerville etc. R. R. Co. v. Doughty, 22 N. J. L. 495; Matter of New York etc. R. R. Co., 21 Hun, 250.

⁸ New Orleans etc. R. R. Co. v. Zerringue, 23 La. An. 521.

⁹ Matter of Prospect Park & Coney Island R. R. Co., 24 Hun, 199.

§ 525.

1 Brennan v. Mecklenberg, 49 Cal. 672; Orrington v. County Comrs. of Penobscot Co., 51 Me. 570; Bryant v. County Comrs., 79 Me. 128; Cole v. Canaan, 29 N. H. 88; State v. Rye, 35 N. H. 368; Bacheler v. Newhampton, 60 N. H. 207; State v. Pierson, 37 N. J. L. 363. In the following cases it was held that the way laid out might be of a different width: Raymond

ceedings,² but slight variations will be immaterial.³ In applying these general rules to particular cases, considerable variation will be found in the decided cases. A variation of four chains in one of the courses was held material.⁴ Also a variation of from fifty to one hundred links.⁵ A variation of a rod in the point of commencement was held to vitiate.⁶ Where the application is for a way running northwesterly from a certain point, and it is laid out with numerous courses all but one or two of which are northwesterly, the variance will not vitiate.⁷ Under a petition to widen, alter or straighten an existing way, an entirely or substantially new highway cannot be laid out.⁸ Nor can only part of the way petitioned for be laid out.⁹ Where the petition was for a road from the house of George B. and the report was from the house of John B., the report was set aside.¹⁰ Under a petition for a second-class road a first-class road was laid out. It was held erroneous, but not void.¹¹ The location will be presumed to be according to the petition though different terms are used.¹² Under a power to make such changes in the road petitioned for, between the termini, as the commis-

² Griffin, 23 N. H. 340; *In re State St.*, 8 Pa. S. 485.

³ *State v. Molly*, 18 Ia. 525; *Pembroke v. County Comrs.*, 12 Cush. 351; *Bennett v. Cutler*, 44 N. H. 69; *Flanders v. Colebrook*, 51 N. H. 300; *State v. Burnett*, 14 N. J. L. 385; *State v. Vanbuskirk*, 21 N. J. L. 86; *People v. Whitney's Point*, 32 Hun, 508; *S. C.*, 102 N. Y. 81; *Road in Byberry*, 6 Phila. 384.

⁴ *Greene v. East Haddam*, 51 Conn. 547.

⁵ *Powell v. Hitchner*, 32 N. J. L. 211.

⁶ *State v. French*, 24 N. J. L. 736.

⁷ *Shinkle v. Magill*, 58 Ills. 422.

⁸ *State v. Atkinson*, 27 N. J. L.

420; *State v. Hulick*, 33 N. J. L. 307.

⁸ *Lowe v. Brannan*, 105 Ind. 247; *Inhabitants of Livermore, Petitioners*, 11 Me. 275; *State v. Canterbury*, 40 N. H. 307.

⁹ *Thorpe v. County Comrs.*, 9 Gray, 57; *People v. Township Board of Springville*, 12 Mich. 484; *Ford v. Danbury*, 44 N. H. 388; *Robinson v. Logan*, 31 Ohio St. 466.

¹⁰ *Boyer's Road*, 37 Pa. S. 257.

¹¹ *Hamilton County v. Garrett*, 62 Tex. 602.

¹² *Windham v. Cumberland County Comrs.*, 26 Me. 406; *Smith v. Conway*, 17 N. H. 586; *State v. Stiles*, 13 N. J. L. 172.

sioners may deem for the public convenience, they cannot change the termini.^{1 3}

§ 526. Miscellaneous objections.—The court will not upon slight grounds sustain objections which reflect discredit upon the persons who made the report.¹ A delay of three years in asking for confirmation was held sufficient ground for refusing it.² Where damages were assessed for the property and franchises of a bridge corporation, and pending action upon the report the bridge was blown down and destroyed, the court nevertheless confirmed the report.³ Proceedings were commenced to open a street forty feet wide. Pending these, new proceedings were commenced and completed to open a street over the same ground fifty feet wide. It was held to be error to afterwards confirm a report in the former case.⁴

§ 527. The time and manner of objecting.—Where by statute objections are to be first made before the commissioners, and they are authorized to act upon them, a failure to file objections before the commissioners is a waiver of any objections which might be thus made.¹ Where parties have until the next term after the report is presented to file objections, but file them at the same term and consent to a confirmation, this is conclusive and they cannot object at the

^{1 3} Deer *v.* Commissioners of Highways, 109 Ills. 379.

§ 526.

¹ State *v.* Stiles, 13 N. J. L. 172.

² Stearns *v.* Deerfield, 51 N. H. 372.

³ Sunderland Bridge Case, 122 Mass. 459. A similar cause was held good ground for recommittal in Farmer *v.* Hooksett, 28 N. H. 244.

⁴ Case of Noble Street, 5 Whart. 333.

§ 527.

¹ Matter of Clear Lake Water Co., 48 Cal. 586; Thayer *v.* Burger, 100 Ind. 262; Case of the Mayor etc. of New York, 16 Johns. 231; Washington Park, 1 Sandf. 283. See also Windsor *v.* Field, 1 Conn. 219. Where the commissioners were required to give notice so that objections could be made before them, and certain parties did not get the notice until it was too late, the court referred back the same so as to give them an opportunity to object. Mayor etc. of New York *v.* Dover Street, 1 Cow.

next term.² A statute requiring objections to be in writing is mandatory.³ If they are required to be verified by affidavit, a verification by one joint objector is sufficient,⁴ and the verification must be made within the time limited for filing objections or it will be unavailing.⁵ The objections should be definite and specific⁶ and to material matters⁷ or they may be disregarded. And when by statute or the practice of the court written objections are made, the objectors will be confined to the objections specified.⁸ Where a party might except to the confirmation of the report without notice, rule or pleading, and he obtained a rule for a particular cause, it was held he was not limited to that cause on the hearing.⁹ But, if a party has leave to except on one ground, after the time to except has expired he will be strictly limited to the ground specified.¹⁰ Where proceedings are to remain open a month after confirmation, the court cannot confirm *nunc pro tunc* so as to cut off the opportunity to object.¹¹ Where in a highway case the county commissioners, by their misconduct, prevented the filing of remonstrances until after the road was established, it was held that the parties aggrieved could appeal to the Circuit Court and there remonstrate.¹² A statute provided that in railroad proceedings the company, or any defendant, could move to set aside the report as to any tract of land. It was held that this did not authorize

² *In re Kensington & Oxford Turnpike*, 97 Pa. S. 260.

³ *Bryant v. Knox & Lincoln R. R. Co.*, 61 Me. 300.

⁴ *Munson v. Blake*, 101 Ind. 78.

⁵ *Morgan Civil Township v. Hunt*, 104 Ind. 590.

⁶ *Higbee v. Peed*, 98 Ind. 420.

⁷ *Lockwood v. Gregory*, 4 Day, 407.

⁸ *Mevanda v. Spurlin*, 100 Ind. 380; *Updegraff v. Palmer*, 107 Ind. 181.

⁹ *Washington etc. R. R. Co. v. Switzer*, 26 Gratt. 661; and see *Bowen v. Snyder*, 66 Ind. 340.

¹⁰ *United States v. Reed*, 56 Mo. 565.

¹¹ *Road to Ewing's Mill*, 32 Pa. S. 282. See also *Gibson & Guy's Mill Road*, 37 Pa. S. 255.

¹² *Breitweiser v. Fuhrman*, 88 Ind. 28; *Rominger v. Simmons*, 88 Ind. 453.

the court to set aside the report as to an undivided half interest in the tract.^{1 3}

§ 528. The practice in hearing objections.—Where the objections are based upon matters not apparent from the face of the record, the burden of proof is upon the objector.¹ The form of proof is largely, if not entirely, in the discretion of the court.² Proof by affidavits,³ depositions⁴ and oral evidence⁵ has been held proper in different cases. In one case it was held proper to appoint an examiner to take and report the evidence.⁶ The affidavits or testimony of commissioners may be received either to support or impeach their report.⁷

§ 529. Power of the court to amend or modify the report, or confirm it in part.—As a general principle the court cannot act upon the matters which are committed by law to the judgment of the jury or commissioners. Consequently the court cannot change, amend or modify the report unless expressly authorized to do so by statute, but must approve or reject it as a whole.¹ The proper course is, if the court

^{1 3} Southern Pacific R. R. Co. v. Wilson, 49 Cal. 396.

§ 528.

¹ Conwell v. Tate, 107 Ind. 171; Crawford v. Valley R. R. Co., 25 Gratt. 467.

² Marquette, Houghton & Ontonagon R. R. Co. v. Probate Judge, 53 Mich. 217.

³ *Ibid.* and Cole v. Peoria, 18 Ills. 301; New Jersey etc. R. R. Co. v. Suydam, 17 N. J. L. 25; Canal Bank v. Albany, 9 Wend. 244; Matter of Pearl Street, 19 Wend. 651.

⁴ Burgess v. Grafton, 10 Vt. 321.

⁵ Sullivan v. La Fayette County, 61 Miss. 271; Groce v. Zumwalt, 4 Mo. 567; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; St. Louis & Floressant R. R. Co. v. Alme-

roth, 62 Mo. 343; Cape Girardeau etc. Road Co. v. Dennis, 67 Mo. 488; Clarksville etc. Turnpike Co. v. Atkinson, 1 Snead, 426; Chesapeake & Ohio Canal Co. v. Mason, 4 Cranch, C. C. 123. It was held improper to hear evidence in Rochester etc. R. R. Co. v. Beckwith, 10 How. Pr. 168; Rondout & Oswego R. R. Co. v. Field, 38 How. Pr. 187.

⁶ Forbes Street, 70 Pa. S. 125.

⁷ Marquette, Houghton & Ontonagon R. R. Co. v. Probate Judge, 53 Mich. 217; New Jersey etc. R. R. Co. v. Suydam, 17 N. J. L. 25; Canal Bank v. Albany, 9 Wend. 244.

§ 529.

¹ Winchester v. Hinsdale, 12

is not satisfied, to approve or reject it as a whole, to recommit the matter to the same or new commissioners.² The verdict of a jury upon the question of damages merely is several as to each proprietor or parcel, and may be set aside as to one person or parcel and sustained as to others.³ The court may allow commissioners to amend their report as to formal matters within the time limited for filing the same.⁴ Where commissioners reported the total value of property at \$81,120, and apportioned it between landlord and tenant, allowing the tenant \$650 for removing his personal property, the court transferred the latter item from the tenant to the landlord and confirmed the report.⁵

§ 530. Rehearings, recommittals, reviews, etc.—The power of courts in these respects must necessarily depend very much upon the statute. It is a common practice to recommit the report for the correction of errors,¹ or to report upon some matter which has been omitted.² Where an award was to A, and B claimed it, the court referred it back to the committee to inquire and report as to B's right.³ Under a statutory power to refer to the same or new commissioners, the court may refer to commissioners part old

Conn. 88; Inhabitants of Brunswick, Appellants, 37 Me. 446; Application for Widening Roffingnac Street, 4 Rob. La. 357; Matter of Clairborne St., 4 La. An. 7; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; Rochester Water Works Co. v. Wood, 60 Barb. 137; S. C., 41 How. Pr. 53; Herr's Mill Road, 14 S. & R. 204; *In re* Public Road in Bensinger Township, 115 Pa. S. 436. But see Stockton & Copperopolis R. R. Co. v. Galgiani, 49 Cal. 139; Hannibal Bridge Co. v. Schaubacker, 49 Mo. 555; Kersley v. Gibbs, 44 N. J. L. 169.

² Oxford v. Brands, 45 N. J. L. 332; Whitworth v. Puckett, 2 Gratt.

531: and see also cases cited in next section.

³ Anthony v. County Comrs., 14 Pick. 189.

⁴ Long v. Calley, 91 Mo. 305; Spring Brook Road, 64 Pa. S. 451.

⁵ Matter of New York Central & Hudson River R. R. Co., 35 Hun, 306.

§ 530.

' Waterbury v. Darien, 9 Conn. 252; Coleman v. Andrews, 48 Me. 562; Pott's Appeal, 15 Pa. S. 414.

² Ives v. East Haven, 48 Conn. 272; McArthur v. Morgan, 49 Conn. 347.

³ Greene v. East Haddam, 51 Conn. 547.

and part new.⁴ In recommitting the report, the court may direct the commissioners as to the principles by which they are to be governed, but cannot direct them to allow a certain amount on account of a particular item of damages omitted from their report.⁵ Where a report was made by commissioners one of whom did not qualify until after the report was made, and their report was set aside and the matter referred back to the same commissioners, who merely changed and signed the old report, it was held bad and that they should have made a new view and new report.⁶ Where a report was recommitted for want of notice to certain parties, such parties are entitled to a full and fair hearing.⁷

In Pennsylvania, in road cases, a review by new viewers is held to be a matter of right, though not authorized by statute.⁸ The court may adopt the report of either the viewers or reviewers.⁹ But, where both the viewers and reviewers reported in favor of the road, it was held that the court must confirm the last award, if any.¹⁰ Where the statute required the application for a review to be made at the next term after the reviewers filed their report, an application after the next term will be futile.¹¹

Where a report was referred back to the same commissioners with directions to file an amended report within ten days, a report filed after the ten days had expired was set aside, because not in compliance with the order.¹² Where the

⁴ Matter of Henry Street, 7 Cow. 400.

¹⁰ Road in Lewiston, 84 Pa. S. 410.

⁵ Matter of Commissioners of Central Park, 61 Barb. 40.

¹¹ Road in Indiana County, 51 Pa. S. 296. See also, on the subject of reviews, Matter of Highway, 3 N. J. L. 272; Addis v. Priest, 3 N. J. L. 378; State v. Cruser, 14 N. J. L. 401; George's Creek Coal & Iron Co. v. New Central Coal Co., 49 Md. 425; Hannibal & St. Joseph R. R. Co. v. Rowland, 29 Mo. 337.

⁶ Cambria Street, 75 Pa. S. 357.

⁷ Stinson v. Dunbarton, 46 N. H. 385.

⁸ King's Road, 1 Dall. 11; Road in Franklin County, 2 Yeates, 53; Berlin Road, 3 Yeats, 263; Bachman's Road, 1 Watts, 400.

⁹ Buckwalter's Road, 3 S. & R. 236; Bachman's Road, 1 Watts, 400.

¹² New Orleans, Dryades St., 11 La. An. 458.

statute provided for a reassessment of damages, it was held the first assessment remained in force until the new assessment was completed. And where there was a mistrial on the first attempt to reassess and nothing further was done for eleven months, the application for reassessment was held to be abandoned.¹

§ 531. When objectors are estopped.—If the owner accepts the damages awarded, he cannot object to the report either on account of the amount awarded or any other ground.¹ So, if the party condemning takes possession of the property, under the proceedings,² or pays the damages awarded,³ it will be estopped from prosecuting objections to the report or proceedings. One person cannot urge an objection which affects another only.⁴ Parties are estopped from urging objections against the confirmation of the report which they might have made at an earlier stage of the proceedings and omitted to make.⁵ But objections which go to the jurisdiction may be made at any time and are not waived by not being urged in the first instance.⁶

§ 532. The order confirming the report of commissioners.—The nature of the order to be entered depends upon the provisions of the statute and the nature and circumstances of the case. The statutes are so various that we shall not do more than refer to the points decided. The order entered should, of course, conform to the statute, so far as the statute prescribes its form or contents.¹ The order should be

¹ *People v. Lewis*, 26 How. Pr. 378.

§ 531.

¹ *Matter of Application of Woolsey*, 95 N. Y. 135.

² *Wilmington & Susquehanna R. R. Co. v. Condon*, 8 G. & J. 443.

³ *Marquette, Houghton & Ontonagon R. R. Co. v. Probate Judge*, 53 Mich. 217.

⁴ *Boyd v. Negley*, 40 Pa. S. 377.

⁵ *Huntress v. Effingham*, 17 N. H. 584; *Stevens v. Goffstown*, 21 N. H. 454; *Matter of Application of Cooper etc.* 93 N. Y. 507; *Chesapeake & Ohio R. R. Co. v. Pack*, 6 W. Va. 397.

⁶ *Hughes v. Sellers*, 34 Ind. 337; *Wilkinson v. Mayo*, 3 Hen. & Munf. 565.

§ 532.

¹ *Reynolds v. Reynolds*, 15 Conn.

certain² and unconditional.³ Where the statute requires the court in highway proceedings to fix the width of the road in its order, a failure to do so is fatal to the proceedings.⁴ The omission cannot be cured by a *nunc pro tunc* order at a succeeding term.⁵ But on appeal or error the order may be reversed with directions to fix the width and enter a new order.⁶ Where the statute provided that, upon payment or tender of the damages assessed, the party condemning might take possession, an order which requires the payment or tender of damages *and costs* is erroneous.⁷ Where the company condemning is already in possession, a provision in the order that it be restrained from using the property until the damages are paid,⁸ or directing the proper officer of the court to oust the company in case of non-payment, is improper.⁹ It has been held in Pennsylvania that an order confirming an award of damages has the effect of a judgment upon which execution may issue.¹⁰

83; Indianapolis etc. R. R. Co. v. Smythe, 45 Ind. 322; Terre Haute & Logansport R. R. Co. v. Crawford, 100 Ind. 550; Snoddy v. County of Pettis, 45 Mo. 361; State v. Dover, 10 N. H. 394; State v. Cincinnati & Indiana R. R. Co., 17 Ohio St. 103; Ft. Worth & Denver City R. R. Co. v. Lamphear, 1 Tex. App. Civil Cases, p. 127.

² Portland etc. R. R. Co. v. County Comrs., 65 Me. 292; Yeamans v. County Comrs., 16 Gray, 36.

³ *In re* Road in Lathrop Township, 84 Pa. S. 126. But orders of confirmation, conditional upon payment of costs by the petitioners, and remitting part of his damages by the owner, were held valid in the following cases, respectively: Partridge v. Ballard, 2 Me. 50; Matter of Wharton St., 48 Pa. S. 487.

⁴ Road in Pitt Township, 1 Pa. S. 356; Road in Township of Lackawanna, 112 Pa. S. 212; Clowe's Road, 2 Grant's Cases, 129.

⁵ Road in Township of Lackawanna, 112 Pa. S. 212.

⁶ Clowe's Road, 2 Grant's Cases, 129.

⁷ Evansville, Indianapolis and Cleveland Straight Line R. R. Co. v. Fitzpatrick, 10 Ind. 120; Same v. Stringer, 10 Ind. 551.

⁸ Chicago & Great Southern Ry. Co. v. Jones, 103 Ind. 386.

⁹ Reed v. Chicago, Mil. & St. P. Ry. Co., 25 Fed. R. 886.

¹⁰ Davis v. North Pennsylvania R. R. Co., 2 Phila. 146; Neal v. Pittsburgh & Connellsville R. R. Co., 2 Grant's Cases, 137; and see Matter of Rhinebeck & Connecticut R. R. Co., 8 Hun, 34.

§ 533. The judgment to be entered on the verdict of a jury.—Some cases hold that it is proper to render a personal judgment upon the verdict of a jury in condemnation cases, and to award execution, the same as in common law suits.¹ If the statute is so far silent upon the subject as to leave the matter open for judicial construction, then the proper judgment to be entered will depend upon the following considerations: If possession has already been taken of the property, either by consent or otherwise, or if the property has already been taken by virtue of an instrument of appropriation, as it may be in some States, before the compensation is paid, then a personal judgment with all its incidents may properly be entered.² But, if the property has not been entered upon and cannot be until compensation is made, and the effect of the proceedings is to fix a price at which the petitioner can take the property if it elects so to do, then a personal judgment is improper and should not be entered.³

§ 533.

¹ *Deitrichs v. Lincoln & North Western R. R. Co.*, 12 Neb. 225; *Drath v. Burlington & Missouri River R. R. Co.*, 15 Neb. 367. These decisions are not based upon any provision of the statute authorizing it.

² *Cook v. South Park Comrs.*, 61 Ills. 115; *Rockford etc. R. R. Co. v. Coppinger*, 66 Ills. 510; *St. Louis etc. Ry. Co. v. Teters*, 68 Ills. 144; *Peoria & Rock Island Ry. Co. v. Mitchell*, 74 Ills. 394; *Curtis v. St. Paul etc. R. R. Co.*, 21 Minn. 497; *Robbins v. St. Paul etc. R. R. Co.*, 24 Minn. 191. But in *Louisville etc. R. R. Co. v. Ryan*, 64 Miss. 399, it was held improper to render a personal judgment, though the railroad was in possession, on the ground that the company might

prefer to abandon the location and remain liable for the trespass.

³ *Peoria etc. R. R. Co. v. Peoria etc. R. R. Co.*, 66 Ills. 174; *Springfield etc. Ry. Co. v. Turner*, 68 Ills. 187; *Barbian v. Chicago*, 80 Ills. 482; *Bloomington v. Miller*, 84 Ills. 621; *Evansville & Crawfordsville R. R. Co. v. Miller*, 30 Ind. 209; *St. Louis, Lawrence & Denver R. R. Co. v. Wilder*, 17 Kan. 239; *Kansas City etc. R. R. Co. v. Merrill*, 25 Kan. 421; *Elizabethtown etc. R. R. Co. v. Thompson*, 79 Ky. 52; *Commonwealth v. Blue Hill Turnpike*, 5 Mass. 420; *Derby v. Gage*, 60 Mich. 1; *State v. Hug*, 44 Mo. 116; *Oregon Ry. Co. v. Bridwell*, 11 Or. 282; *Chesapeake & Ohio R. R. Co. v. Bradford*, 6 W. Va. 220; *State v. Mills*, 29 Wis. 322.

§ 534. **Setting aside the order of confirmation.**—Some New York cases hold that, under the statutes construed, the court acted as a commissioner in confirming the report, and that when it had once acted the matter passed forever beyond its control.¹ But, although the act under which the proceedings are had makes the confirmation final, a subsequent act authorizing the court to set aside the confirmation for good cause shown will be valid.² Where the court acts in its ordinary capacity as a judicial tribunal, there is no reason why it should not have the same control over an order of confirmation as over other orders which are final; that is, the court has control over such orders during the term at which they are entered and no longer.³ A motion to set aside an order of confirmation is addressed largely to the discretion of the court, and the jurisdiction will be exercised upon equitable principles.⁴

§ 534.

¹ Matter of Mayor etc. of New York, 6 Cow. 571; Matter of Mount Morris Square, 2 Hill, 14; Visscher v. Hudson River R. R. Co., 15 Barb. 37.

² Matter of Widening Broadway, 61 Barb. 483; S. C., 42 How. Pr. 220; S. C., 49 N. Y. 150.

³ Matter of New York Central & Hudson River R. R. Co., 64 N. Y.

60; Dolan v. Mayor etc. 62 N. Y. 472; Matter of Curtis Street, 1 Sheldon, (N. Y.) 425; Marsh et al., Petitioners, 2 Aikin, 239; Reiff v. Conner, 10 Ark. 241.

⁴ Matter of Opening Lexington Ave., 50 How. Pr. 114. As to confirmation by non judicial bodies, see Kyle v. Board of Commrs., 94 Ind. 115.

CHAPTER XXII.

REVIEW OF THE PROCEEDINGS, BY APPEAL OR OTHERWISE.

§ 535. **The subject generally.**—Where the proceedings are not carried on under the supervision of a court of general jurisdiction, the practice is almost universal of providing for an appeal to such a court, or for a review of the proceedings, or a retrial of some or all the questions involved by some other tribunal than the one in which the proceedings have been initiated. The modes in which such review or retrial may be had are so various that the decisions are not of general interest.

A statute gave an appeal from “all decrees and decisions of the county court on the merits of any matter affecting the rights or interests of individuals as distinguished from the public.” It was held that an individual could not appeal from an order establishing a highway, but only from the order as to damages.¹ Where an act simply provided for laying out a toll-bridge as a highway and was silent as to an appeal, it was presumed that the legislature intended the general road law to apply and an appeal was entertained.² A statute provided that the owner of land taken for a street, who was aggrieved by the assessment of damages, might appeal to any court having jurisdiction. No court had been given jurisdiction in express terms, but it was held an appeal would lie to the circuit court, the same being a court of general jurisdiction.³

§ 535.

¹ Myers v. Simms, 4 Ia. 500; Mc-Cune v. Swafford, 5 Ia. 552.

² Bridge v. New Hampton, 47 N.

H. 151.

³ Hamilton v. Fort Wayne, 73

Ind. 1.

§ 536. Statutes making the decision of commissioners or of inferior tribunals final and conclusive.—Statutes of this sort are not uncommon, and are valid, unless in conflict with the local constitution.¹ A statute of Indiana provided that the judgment of the circuit court upon an award of damages in a railroad condemnation case should be final. The Supreme Court, however, sustained a writ of error to the circuit court in such a proceeding, saying: “We do not think that the language is sufficiently explicit to authorize us in saying that a writ of error will not lie in this case.”² Such a proceeding was held not to be a *case at law* within the meaning of the constitution of California conferring appellate jurisdiction upon the Supreme Court, and a statute making the judgment of the county court final and conclusive was sustained.³ The constitution of Illinois provided that the Supreme Court should have original jurisdiction in cases relating to the revenue, in *mandamus* and *habeas corpus* and appellate jurisdiction in *all other cases*. A proceeding to condemn land for a railroad was held to be a *case* within this provision, and an appeal was sustained, though the statute made the decision of the circuit court final and conclusive.⁴

§ 537. Practice in taking appeals.—The practice in taking and perfecting appeals is regulated by statute, and the decisions present little of interest beyond the State in which they are made. The owner of several parcels affected by one proceeding may join all in one appeal.¹ The award or judg-

§ 536.

¹ Appeal of S. O. Houghton, 42 Cal. 35; Matter of Canal and Walker Streets, 12 N. Y. 406; King *v.* New York, 36 N. Y. 182; Matter of Comrs. of Central Park, 50 N. Y. 493; Matter of Prospect Park etc. R. R. Co., 85 N. Y. 489; Matter of Comrs. of State Reservation at Niagara, 102 N. Y. 734; S. C., 16 Abb. N. C. 159, 395; Norfolk

Southern R. R. *v.* Ely, 95 N. C. 77.

² Lawrenceburg & Upper Mississippi R. R. Co. *v.* Smith, 3 Ind. 253.

³ Appeal of S. O. Houghton, 42 Cal. 35.

⁴ St. Louis etc. Ry. Co. *v.* Lux, 63 Ills. 523, overruling Coon *v.* Mason County, 22 Ills. 666.

§ 537.

¹ Neff *v.* Chicago & Northwestern

ment is several as to each owner affected, and each should appeal separately unless a joinder is allowed by statute. A bond with surety may be required,² and in such case a bond signed by appellants only will be ineffectual.³ Where there are several appellants, each may be security for the other, and, if all the appeals are consolidated in the appellate court, the appeals will still be good, though there is no outside security.⁴

Where an appeal is given and no mode is pointed out in which to avail of the right, the courts will endeavor, if possible, to make the statute effectual by adopting the practice in similar proceedings, or under other statutes regulating appeals.⁵ Where the appeal is from proceedings by commissioners or a sheriff's jury, the practice in appeals from justices of the peace has been adopted, so far as applicable.⁶ And, where an appeal was given in case of private roads, the same procedure was adopted as was provided for appeals in case of public roads.⁷ A statute gave an appeal to either party from the award of commissioners, "within sixty days after such assessment," but was otherwise silent as to the manner of taking the appeal. It was held that the time began to run from the doing of the last act to complete the assessment, and that the essential thing to be done to perfect the appeal was the filing of a transcript in the district court; that notifying the county judge and the petitioner and filing a petition in the district court claiming an increase of damages within the sixty days were insufficient to perfect

Ry. Co., 14 Wis. 370; *Weyer v. Milwaukee etc. R. R. Co.*, 57 Wis. 329; *Larson v. Superior Short Line Ry. Co.*, 64 Wis. 59.

² See *Weir v. St. Paul etc. R. R. Co.*, 18 Minn. 155.

³ *McVey v. Heavenridge*, 30 Ind. 100.

⁴ *Leffel v. Overchain*, 90 Ind. 50.

⁵ *Warner v. Baker*, 24 Ills. 351; *Peters v. Hastings & Dakota Ry. Co.*, 19 Minn. 260; *Twombly v. Madbury*, 27 N. H. 433.

⁶ *County of Peoria v. Harvey*, 18 Ills. 364; *Dubuque & Pacific R. R. Co. v. Critenden*, 5 Ia. 514; *Same v. Shinn*, 5 Ia. 516.

⁷ *West v. McGurn*, 43 Barb. 198.

the appeal.⁸ Under the same statute it was held that the transcript need contain nothing but the commissioners' report, in order to give the district court jurisdiction.⁹ A party aggrieved by the award of commissioners for land taken for a highway could apply for a jury within a year. It was held that the application must be made to the board in regular session, and that an application filed with the clerk in vacation, when there would be no meeting of the board until after the year had expired, was too late.¹⁰ But, where the appeal was required to be taken to a court, it was held sufficient to file a claim of appeal with the clerk of the court within the time allowed, though the court was not in session during such time.¹¹ Where the appeal was to three supervisors of the county, it was held that their names need not be given, but that it was better to designate them by their respective towns.¹² Where an appeal was to be taken within thirty days after the assessment was made, it was held to mean thirty days after it was actually made, reduced to writing and made public or brought to the notice of the parties in interest.¹³ The appellant must advance the filing fees, though the other party is required to pay all costs in the end.¹⁴ The inferior tribunal cannot refuse to send up the papers on the ground that the appeal has been taken too late; that is a question for the appellate court to decide.¹⁵

Unless the right of appeal in such cases is guaranteed by the constitution, the whole matter is within the control of

⁸ Gifford *v.* Republican Valley etc. R. R. Co., 20 Neb. 538.

⁹ Nebraska & Col. R. R. Co. *v.* Storer, 22 Neb. 90.

¹⁰ Eaton *v.* Framingham, 6 Cush. 245.

¹¹ Northampton Bridge Case, 116 Mass. 442.

¹² People *v.* Smith, 15 Ills. 326.

For other points under the same statute see Commissioners *v.* Supervisors, 53 Ills. 320.

¹³ Jamison *v.* Burlington & Western Ry. Co., 69 Ia. 670.

¹⁴ Scott *v.* Lasell, 71 Ia. 180.

¹⁵ People *v.* Canal Appraisers, 13 Hun, 64.

the legislature, which may grant or withhold it,¹⁶ or impose such conditions as it sees fit.¹⁷

§ 538. Parties, and who may appeal.—As the right of appeal is conferred by statute, every appeal must find its warrant in the statute. In statutes granting appeals, the word "person" will include corporations.¹ The words "any party," or "any party in interest," will include the owner of any distinct interest in the property;² also the corporation which is seeking to obtain the property.³ A statute gave a right of appeal to any person who should *think* himself aggrieved by the establishment of a public ferry. It was held that the statute was to be taken as it read, and that a party might appeal without showing any interest or special damage and secure a reversal if there was error.⁴ But in a later case it was held that one not a party must show some ground for thinking himself aggrieved.⁵ But, ordinarily, only parties to the proceeding can appeal.⁶ The party condemning cannot appeal from an order apportioning the damages among the different parties having interests in the property.⁷ Where there is a transfer of title pending proceedings, the appeal may be in the name of the owner of record, or a substitution may be made.⁸ But, if the transfer

¹⁶ *Kundinger v. Saginaw*, 59 Mich. 355; *Norfolk Southern R. R. Co. v. Ely*, 95 N. C. 77.

¹⁷ *Same and Schwede v. Burnstown*, 35 Minn. 468.

§ 538.

¹ *People v. May*, 27 Barb. 238.

² *Wilkin v. St. Paul etc. R. R. Co.*, 22 Minn. 177; *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 379.

³ *Lee v. Northwestern Union Ry. Co.*, 33 Wis. 222.

⁴ *Lawless v. Rees*, 1 Bibb, 495.

⁵ *Cosby v. Lynn*, 4 Bibb, 249. To the same effect, *Fleming v. Hight*, 95 Ind. 78.

⁶ *Barr v. Stevens*, 1 Bibb, 292; *Canyonville etc. Road Co. v. County of Douglass*, 5 Or. 280; *Wingfield v. Crenshaw*, 3 H. & M. 245. In the following case it was held that the petitioners for a road had not such an interest as entitled them to appeal: *Foster v. Dunklin*, 44 Mo. 216.

⁷ *Spaulding v. Milwaukee etc. Ry. Co.*, 57 Wis. 304; *Haswell v. Vermont Central R. R. Co.*, 23 Vt. 228.

⁸ *Connable v. Chicago, Mil. & St. P. Ry. Co.*, 60 Ia. 27; *Cedar Rapids etc. R. R. Co. v. Same*, 60 Ia. 35. As to who should be substituted in

is after the right to compensation has vested, the grantees cannot prosecute an appeal.⁹ Joint owners should appeal jointly,¹⁰ but the owners of distinct interests in the same property should appeal separately.¹¹ The statute may, however, provide otherwise. When a remonstrance was signed Hosmer & Hildreth, and an appeal was taken by Stephen R. Hosmer and Charles C. Hildreth, they were presumed to be the same persons.¹²

The proper defendants or respondents in case of an appeal by the owner are either the petitioners for the improvement,¹³ or the person or corporation who is seeking to condemn the property.¹⁴ Under a statute which required notice of appeal in road cases to be served on the county auditor, it was held proper to make the county a defendant in the appeal.¹⁵

§ 539. Notice in case of appeals.—The notice required by statute must be given.¹ Where the notice of appeal is required to be filed with the clerk of the appellate court, a failure to do so will defeat the appeal, though the notice was served on the petitioner.² It has been held that notice should be given to the adverse party, even though the statute

case of the death of an owner, see chap. 14.

20 N. H. 195; Cummings *v.* Williamsport, 84 Pa. S. 472.

⁹ Losch's Appeal, 109 Pa. S. 72.
¹⁰ Chicago, Rock Island & Pacific R. R. Co. *v.* Hurst, 30 Ia. 73; Watson *v.* Milwaukee & Madison Ry. Co., 57 Wis. 332.

¹⁵ Raymond *v.* Clay County, 68 Ia. 130.

§ 539.

¹ Butte County *v.* Boydston, 68 Cal. 189; Maxwell *v.* La Brune, 68 Ia. 689; Klein *v.* St. Paul etc. Ry. Co., 30 Minn. 451; Proprietors of the Morris Aqueduct *v.* Jones, 36 N. J. L. 206; People *v.* Osborn, 20 Wend. 186; People *v.* See, 29 Hun, 216; Neff *v.* Chicago & Northwestern Ry. Co., 14 Wis. 370; Burns *v.* Spring Green, 56 Wis. 239.

² Klein *v.* St. Paul etc. Ry. Co., 30 Minn. 451.

¹¹ Lance *v.* Chicago, Mil. & St. P. R. R. Co., 57 Ia. 636.

¹² Munson *v.* Blake, 101 Ind. 78.

¹³ Myers *v.* Old Mission & Whitbeck Road, 7 Ia. 315; Deaton *v.* County of Polk, 9 Ia. 594. In the former case it is held improper to make the *road* defendant, and in the latter, the county.

¹⁴ Baker *v.* Windham, 25 Conn. 597; Chase *v.* Sullivan R. R. Co.,

makes no provision for it.³ Notice was required to be served upon the commissioner or commissioners of the town. It was held that it must be served upon all the commissioners where there were more than one.⁴ Notice was required to be served upon the clerk of the appellate court. It was held sufficient to file the notice with the clerk, calling his attention to it.⁵ A notice was brought to the attention of the sheriff and accepted by his deputy by direction of the former; held a good service upon the sheriff.⁶ A notice of appeal, signed by several and stating that each appealed for himself, was held sufficient, though informal.⁷ A notice of appeal need not specify what steps have been taken in the matter of the appeal.⁸ Want or defect of notice is not waived by the appearance of the adverse party in the appellate court as a witness,⁹ or for the purpose of dismissing the appeal.¹⁰ Where notice of appeal is required to be served upon an *agent* of a railroad company, service on a civil engineer making the location and surveys for the company was held good.¹¹

§ 540. Practice in the appellate court.—This is a matter of statutory regulation. Sometimes there is a trial *de novo* upon all the questions tried by the tribunal appealed from. This is usually the effect of allowing an appeal to a court of original jurisdiction.¹ In such cases the appellate court

³ Commissioners of Highways *v.* Claw, 15 Johns. 537.

¹¹ Jamison *v.* Burlington & Northern Ry. Co., 69 Ia. 670.

⁴ People *v.* Lawrence, 54 Barb. 589.

§ 540.

⁵ Black *v.* Chicago & Northwestern Ry. Co., 18 Wis. 208.

¹ Kemp *v.* Smith, 7 Ind. 471; Providence *v.* Droon, 20 Ind. 238;

⁶ Waltmeyer *v.* Wisconsin, Ia. & Neb. Ry. Co., 64 Ia. 688.

McPherson *v.* Leathers, 29 Ind. 65; Heady *v.* Vevay etc. Turnpike Co.,

⁷ Larson *v.* Superior Short Line Ry. Co., 64 Wis. 59.

52 Ind. 117; Coyner *v.* Boyd, 55 Ind. 166; Turley *v.* Oldham, 68 Ind. 414; Schmied *v.* Keeney, 72 Ind. 309; Corey *v.* Swagger, 74 Ind.

⁸ Andrews *v.* Marion, 23 Minn. 372.

211; Fleming *v.* Hight, 95 Ind. 78; Reynolds *v.* Shults, 106 Ind. 291;

⁹ People *v.* Osborn, 20 Wend. 186.

Hardy *v.* McKinney, 107 Ind. 364;

¹⁰ Spurrier *v.* Wirtner, 48 Ia. 486.

does not concern itself with errors committed by the tribunal appealed from, and only examines the former proceedings to see that the inferior tribunal acquired jurisdiction.² Where the appeal is in respect to matters as to which the inferior tribunal is invested with a discretion, it has been held the appellate court should exercise an appellate jurisdiction only.³ Sometimes the trial in the appellate court is limited to certain objections filed or made in the tribunal appealed from.⁴ And, where objections may be made in the lower tribunal, it is usually held that objections not made are waived.⁵ But, where the trial is *de novo*, all questions should be passed upon in the appellate court.⁶ The trial in the appellate court, in the absence of statutory provisions, is usually according to the practice of the appellate court.⁷ But in some States the practice is to proceed according to the forms prescribed for the tribunal appealed from, as near as practicable.⁸ In one case the appellate court caused an issue to be made up in trespass *quare clausum fregit*, and it

Mississippi & Missouri R. R. Co. v. Rousseau, 8 Ia. 373; Shaffner v. Fogleman, Busbee Law, 280; York Co. v. Fewell, 21 S. C. 106.

² Dunlap v. Mount Sterling, 14 Ills. 251; Turley v. Oldham, 68 Ind. 114; Mississippi & Missouri R. R. Co. v. Rousseau, 8 Ia. 373; Runner v. Keokuk, 11 Ia. 543; Piercy v. Morris, 2 Iredell Law, 168; Blize v. Castlio, 8 Mo. App. 290; Matter of Wells Co. Road, 7 Ohio St. 16; Miller v. Prairie du Chien & McGregor Ry. Co., 34 Wis. 533. But see Forsyth v. Kreuter, 100 Ind. 27.

³ Evans v. Shields, 3 Head, 70; and see County of Sangamon v. Brown, 13 Ills. 207.

⁴ Daggy v. Coats, 19 Ind. 259; Shafer v. Bordener, 19 Ind. 294; Cummins v. Shields, 34 Ind. 154;

Green v. Elliott, 86 Ind. 53; Breitweiser v. Fuhrman, 88 Ind. 28; Rominger v. Simmons, 88 Ind. 453; Lowe v. Ryan, 94 Ind. 450; Denny v. Bush, 95 Ind. 315; Thayer v. Burger, 100 Ind. 262; Sutherland v. Holmes, 78 Mo. 399; Muire v. Falconer, 10 Gratt. 12.

⁵ *Ibid.*; see also *ante*, § 531.

⁶ Scraper v. Pipes, 59 Ind. 158; Schermeely v. Stillwater & St. Paul R. R. Co., 16 Minn. 506; Phifer v. Carolina Central R. R. Co., 72 N. C. 433.

⁷ Kellogg v. Price, 42 Ind. 360; Sigafos v. Talbot, 25 Ia. 214; Hord v. Nashville & Chattanooga R. R. Co., 2 Swan, 497.

⁸ Inhabitants of Limerick, 18 Me. 183; Andrews v. Johnson, 1 Law Repos. N. C. 272; Gold v. Vermont Central R. R. Co., 19 Vt. 478.

was held to be proper.⁹ Where the statute is that on appeal the court *may* direct a new appraisal, it is permissive only, and if there is no error in the proceedings none will be granted.¹⁰ Two appeals by the same person from different orders,¹¹ or as to different tracts of land,¹² may be consolidated. Separate appeals by landlord and tenant, it was held, could not be consolidated.¹³

§ 541. Effect of the appeal.—Taking an appeal is an entry of appearance and a waiver of defective notice,¹ and also of errors in respect to those matters which are to be retried in the appellate court.² The effect of an appeal where there is a trial *de novo* in the appellate court is to vacate the decision appealed from until the appeal is disposed of.³ But if the appeal is dismissed, the decision appealed from is restored to full force and effect.⁴ The petitioner, though appellee, may discontinue the proceedings, and the decision appealed from is then permanently vacated.⁵ The appellant may, of course, dismiss his appeal at any time.⁶ But, where either party had a right to appeal within twenty days, it was held that one having appealed could not dismiss after the twenty days had expired, as this would deprive the other party of his right.⁷ In a proceeding to open a street, and in which both damages and benefits were assessed, it was

⁹ *Phila. etc. R. R. Co. v. Smick*, 2 Whart. 273.

¹⁰ *New York etc. R. R. Co. v. Coburn*, 6 How. Pr. 223.

¹¹ *Jamaica v. Board of Comrs.*, 56 Ind. 466.

¹² *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364.

¹³ *Ortman v. Union Pacific Ry. Co.*, 32 Kan. 419.

§ 541.

¹ *Atchison etc. R. R. Co. v. Patch*, 28 Kan. 470.

² *Allison v. Commissioners of Highways*, 54 Ills. 170.

³ *Pool v. Breese*, 114 Ills. 594; *City of Kansas v. Kansas Pacific Ry. Co.*, 18 Kan. 331.

⁴ *Minneapolis & Northwestern R. R. Co. v. Woodworth*, 32 Minn. 452.

⁵ *Vail v. Fall Creek Turnpike Co.*, 32 Ind. 198; *Wright v. Wisconsin Central R. R. Co.*, 29 Wis. 341.

⁶ *Fall River R. R. Co. v. Chase*, 125 Mass. 483.

⁷ *Brown v. Corey*, 43 Pa. S. 495.

held that an appeal by one person took up the whole case and that the whole case must be tried *de novo*.⁸

§ 542. Certiorari: Its nature and office generally.—*Certiorari* is a common law writ. It is defined by Bouvier to be “a writ issued by a superior to an inferior court of record, requiring the latter to send into the former some proceeding therein pending, or the record and proceedings in some cause already terminated, in cases where the procedure is not according to the course of the common law.”¹ It may issue, not only to inferior courts of record, but also to courts not of record, such as justices of the peace, and to officers and boards exercising *quasi* judicial functions.² Its office is to compel the inferior tribunal to certify its proceedings into the court from which the writ has issued, where the jurisdiction of the inferior tribunal and the legality of its proceedings will be tried by the record so certified.³ It is a common mode of reviewing the proceedings in condemnation cases, which are not usually according to the course of the common law. The cases cited in the succeeding sections shows that it lies to boards of supervisors or commissioners, common councils of cities and other similar bodies vested with jurisdiction in cases of eminent domain.⁴ In New England, where highways are laid out by selectmen and approved at a general town meeting, it has been held that certiorari would not lie to the town to bring up the proceedings, but that the only mode of questioning the validity of the road was in an action of trespass, or

⁸ *State v. Gill*, 84 Mo. 248; *Long v. Tulley*, 91 Mo. 305; and see *Phifer v. Carolina Central R. R. Co.*, 72 N. C. 433; *Anders v. Anders*, 4 Jones Law, 248; *Portland v. Kamm*. 5 Or. 362.

§ 542.

¹ See also 1 Tidd's Prac. 397.

² See cases cited in this section.

³ *McAllilly v. Horton*, 75 Ala. 491; *Commissioners v. Supervisors of Carthage*, 27 Ills. 140; *Savage v. Board of Comrs.*, 10 Ills. App. 204; *Crandall v. Taunton*, 110 Mass. 421.

⁴ *Dwight v. Springfield*, 4 Gray, 107; *Thompson v. Multnomah Co.*, 2 Or. 34.

the like, where a right or duty was based upon the legal existence of the road.⁵

§ 543. When it lies, and when the proper remedy.—Where an appeal is given, certiorari will not usually be granted for the purpose of reaching errors or irregularities that may be reached by an appeal.¹ But, if there is a want of jurisdiction in the inferior tribunal, it is a proper remedy, even though an appeal may lie also.² It is the only remedy to take advantage of a want of jurisdiction of the person, because an appeal gives jurisdiction of the person.³ It is a proper remedy where no appeal is given;⁴ and even though the decision of the inferior tribunal is made final by statute.⁵ Where no appeal is given from the decision of certain questions, such as the necessity or utility of a road, certiorari will lie as to such decisions.⁶ So it will lie where an appeal is given by statute but is denied by the inferior tribunal,⁷ or lost by the lapse of time without negligence.⁸ In Pennsylvania it is held that it will only lie after a final

⁵ *Harlow v. Pike*, 3 Me. 438; *Baker v. Runnels*, 12 Me. 235; *Robbins v. Lexington*, 8 *Cush.* 292; *Robbins v. Bridgwater*, 6 N. H. 524.

543.

¹ *Cedar Rapids etc. Ry. Co. v. Whelan*, 64 Ia. 694; *Dunlap v. Toledo etc. Ry. Co.*, 46 Mich. 190; *Tucker v. Parker*, 50 Mich. 5; *Diets v. Frazier*, 50 Mich. 227; *Moore v. Bailey*, 8 Mo. App. 156; *People v. Wallace*, 4 N. Y. Supreme Ct. 438; *Tarrytown v. Cobb*, 14 Abb. (N. C.) 493; *Boston & Maine R. R. Co. v. Folsom*, 46 N. H. 64.

² *Dunlap v. Toledo etc. Ry. Co.*, 46 Mich. 190.

³ *Commissioners of Town of Oran v. Hoblit*, 19 Ills. App. 259; *Names v. Commissioners of Highways*, 30

Mich. 490; *Bixby v. Goss*, 54 Mich. 551.

⁴ *Commissioners of Talladega Co. v. Thompson*, 15 Ala. 134; *Barnett v. State*, 15 Ala. 829; *Couch ex parte*, 14 Ark. 337; *Cornell v. Crawford Co.*, 11 Ark. 604; *Dietrick v. Highway Comrs.*, 6 Ills. App. 70; *St. Charles v. Stewart*, 49 Mo. 132; *Same v. Rogers*, 49 Mo. 530.

⁵ *Allen v. Levee Comrs.*, 57 Miss. 163; *Baldwin v. Buffalo*, 35 N. Y. 375.

⁶ *Commissioners v. Harper*, 38 Ills. 103; *People v. Brighton*, 20 Mich. 57.

⁷ *Shields v. Justices of Green County*, 2 Coldw. 60.

⁸ *Roberts v. Williams*, 13 Ark. 355; *Joliet & Chicago R. R. Co. v. Barrows*, 24 Ills. 562.

order in the proceedings.⁹ Where the court appointed commissioners who afterward proceeded independently, and whose report was final unless a motion was made to set it aside within fifteen days after being filed, it was held that certiorari would lie to bring up the appointment of the commissioners.¹⁰ It has been held that the writ cannot properly be granted by a judge at chambers.¹¹

§ 544. Application for the writ.—The proper mode of obtaining a certiorari is by application in writing to the superior court, in the nature of a petition, setting forth the proceedings to be removed and the irregularities relied upon.¹ The petition should be verified by affidavit, and should be certain and specific.² Different owners may join in one petition.³ Notice of the application should be given to the adverse party.⁴ The affidavit must show a sufficient interest in the subject matter.⁵ The interest of a taxpayer, or of one who may be called upon to work upon the road, is not sufficient to enable him to question in this manner the regularity of proceedings to establish a highway.⁶ Cause may be shown by the adverse party in interest against granting the writ, by answer or counter affidavit showing a waiver by the applicant of the irregularities complained of or the existence of circumstances which render it inequitable to grant the writ.⁷

⁹ Case of Road etc. *v.* 2 S. & R., 419; also Detroit Western Transit Co. *v.* Backus, 48 Mich. 582.

¹⁰ Clay *v.* Pennoyer Creek Improvement Co., 34 Mich. 204.

¹¹ People *v.* Cheritree, 4 N. Y. Supreme Ct. 289.

§ 544.

¹ Board of Supervisors *v.* Magoon, 109 Ills. 142.

² Chambers *v.* Lewis, 9 Ia. 583.

³ Richman *v.* Board of Supervisors, 70 Ia. 627.

⁴ Milan *v.* Sproull, 36 Ga. 393; Albany Water Works Co. *v.* Albany Mayor's Court, 12 Wend. 292.

⁵ Colden *v.* Botts, 12 Wend. 284; Berryman *v.* Little, 49 N. J. L. 182.

⁶ Parnell *v.* Commissioner's Court, 34 Ala. 278; Vanderstolph *v.* Highway Commissioner, 50 Mich. 330.

⁷ Spofford *v.* Bucksport & Bangor R. R. Co., 66 Me. 26, and cases cited in next section.

§ 545. When granted and when refused.—The writ of certiorari is not a writ of right, but is granted or withheld in the discretion of the court.¹ It will not, therefore, be granted for errors from which no injury has resulted,² nor where justice has been done.³ In Alabama it is held that, where the proceedings are erroneous and the petitioner's property will be taken, a *prima facie* case is made for granting the writ.⁴ In some cases mere delay, unexplained, has been held a sufficient reason for denying the writ.⁵ Other cases hold that laches will not bar the writ, unless something has been done on faith in the validity of the proceedings which would render it disastrous to have them declared void.⁶ Where the work has been done under the proceedings or money paid upon assessments of damages or benefits, any considerable delay will bar the writ, if the facts were known to the applicant or might have been known by the exercise of reasonable diligence.⁷ But, if the prosecutor has not slept upon his rights, the fact that work has been

§ 545.

¹ Keys *v.* Marin Co., 42 Cal. 252; Board of Supervisors *v.* Magoon, 109 Ills. 142; Thorpe *v.* County Comrs., 9 Gray, 57; Granville *v.* County Comrs., 97 Mass. 193; Petition of Landaff, 34 N. H. 163; Boston & Maine R. R. Co. *v.* Folsom, 46 N. H. 64.

² Boston & Maine R. R. Co. *v.* Folsom, 46 N. H. 64.

³ Petition of Landaff, 34 N. H. 163.

⁴ *Ex parte* Keenan, 21 Ala. 558.

⁵ Hancock *v.* Boston, 1 Met. 122; Willcheck *v.* Edwards, 42 Mich. 105; Wilder *v.* Hubbell, 43 Mich. 487. In the latter case a delay of fourteen months was held fatal in proceedings to establish a drain. The court say: "Public policy

requires that these local business arrangements should be closed up speedily and that parties complaining should be prompt and consistent in their opposition." In California the writ was held to be barred in two years by analogy to the statute regulating appeals. Keys. *v.* Morin Co., 42 Cal. 252.

⁶ Hyslop *v.* Finch, 99 Ills. 171.

⁷ Keys *v.* Morin Co., 42 Cal. 252, Spofford *v.* Bucksport & Bangor R. R. Co., 66 Me. 26; Noyes *v.* City Council of Springfield, 116 Mass. 87; Matter of Lautis, 9 Mich. 324; Bresler *v.* Ellis, 46 Mich. 335; State *v.* Ten Eyck, 18 N. J. L. 373; State *v.* Woodruff, 36 N. J. L. 204; State *v.* Clark, 38 N. J. L. 102; Rinehart *v.* Cowell, 44 N. J. L. 360; People *v.* Landreth, 1 Hun, 544.

done or money paid will not prejudice him.⁸ And where the prosecutor was assured that a drain would not affect a lake upon his land, but it lowered it so as to render it a sickly mud-hole, it was held that a delay of a year, during which the drain had been constructed and paid for, would not bar the writ.⁹ Where the ground of the application is a failure to give the notice required, the petition should show a want of *actual* notice as well as of the notice required by law, otherwise it will be insufficient.¹⁰ Certiorari will not be granted to review proceedings in a road case after the prosecutor has had the benefit of an appeal,¹¹ or after he has proceeded for damages and failed.¹² It will not be granted to correct mere errors of judgment,¹³ nor for objections which the petitioner might have had corrected in the inferior tribunal,¹⁴ nor for errors produced by the prosecutor himself.¹⁵ A statutory limitation of two years in which to issue the writ still leaves it discretionary with the court to issue it within the two years.¹⁶

§ 546. Form and effect of the writ.—The writ should be directed to the inferior tribunal whose action is to be reviewed, and in effect commands that tribunal to certify the record of the proceedings specified.¹ As to matters which are not recorded, such as the rulings of the tribunal upon

⁸ State *v.* Green, 18 N. J. L. 179.

⁹ Wright *v.* Rowley, 44 Mich. 557.

¹⁰ Pagels *v.* Oaks, 64 Ia. 198; Hancock *v.* Boston, 1 Met. 122; Petition of Tucker, 27 N. H. 405; Boston & Maine R. R. Co. *v.* Folsom, 46 N. H. 64.

¹¹ Burt *v.* Comrs. of Highways, 32 Mich. 190; but see Budd *v.* New Jersey R. R. Co., 14 N. J. L. 467.

¹² Weaver's Road, 45 Pa. S. 405.

¹³ Inhabitants of Vasselborough, 19 Me. 338; Kingman *v.* County Comrs. of Plymouth, 6 Cush. 306.

¹⁴ Ipswich *v.* County Comrs., 10

Pick. 519; People *v.* Covert, 1 Hill, 674.

¹⁵ State *v.* Woodward, 9 N. J. L. 21. And one who has known of all the proceedings to establish a drain, and who took the contract to dig it and has performed in part, will not be permitted to question the proceedings. People *v.* Drain Commissioner, 40 Mich. 745.

¹⁶ Matter of Lautis, 9 Mich. 324.
§ 546.

¹ See Goodrich *v.* Comrs. of Highways, 1 Mich. 385; French *v.* Same, 12 Mich. 267; Matter of Mount

evidence and the like, it may command that the facts be certified.² When granted and served, the writ operates as a supersedeas, unless otherwise provided in the order or by statute.³ It must correctly describe the proceedings to be removed, or it will be ineffectual.⁴

§ 547. Return to the writ.—The return to the writ should be co-extensive with the command contained in it. In a railroad condemnation case it is said that the return should contain the record, the proceedings in the nature of a record, the rulings upon testimony, the instructions and so much of the evidence as is necessary to show the bearing of the rulings and instructions.¹ The return may be amended when it does not set forth the record or facts correctly.²

§ 548. Proceedings on the return.—The hearing in the superior court must be had upon the return, the writ and the papers upon which the writ was granted.¹ The validity of the proceedings must be determined from the return alone. Extraneous evidence cannot be received upon the hearing to aid or contradict the record.² The only questions which will be considered are those which relate to the jurisdiction of the inferior tribunal and the regularity of its proceed-

Morris Square, 2 Hill, 14; *People v. Brooklyn*, 49 Barb. 136.

² *Mendon v. County Comrs.*, 2 Allen, 463; and see cases in next section.

³ *Tidd's Practice*, 404; but see *Inhabitants of Adams, Petitioners*, 10 Rich. 273.

⁴ *Road in Chester County*, 4 Yeates, 433.

§ 547.

¹ *Minnesota Central Ry. Co. v. McNamara*, 13 Minn. 508. See also *People v. Goodwin*, 5 N. Y. 568; *People v. Van Alstyne*, 32 Barb. 181; *People v. First Judge of Columbia*, 2 Hill, 398.

² *State v. City of Kansas*, 89 Mo 34.

§ 548.

¹ *People v. Dains*, 38 Hun, 43.

² *Mendon v. County, Comrs.*, 5 Allen, 13; *People v. Talmage*, 46 Hun, 603; *Philadelphia & Trenton R. R. Co.*, 6 Wharton, 25; *Road in Macunie Township*, 26 Pa. S. 221; *Church v. Northern Central Ry. Co.*, 45 Pa. S. 339; *Road Comrs. v. Fickinger*, 51 Pa. S. 48; *Duff Private Road*, 66 Pa. S. 459. The case of *Turnpike Road by Chad's Ford*, 5 Binney, 481, appears to be an exception to the above cases.

ings.³ The decision of the lower tribunal upon questions of fact will not be reviewed.⁴

§ 549. What are sufficient grounds for quashing the proceedings.—The record certified must show that the inferior tribunal had jurisdiction, and that it has proceeded according to law.¹ The questions of jurisdiction and procedure have been discussed in previous chapters, and the discussion need not be repeated here. If the petition is insufficient,² or the notice required by law has not been given,³ the proceedings will be quashed. But, if the party complaining has had actual notice, or the benefit of actual notice, the proceedings will not be quashed for lack of legal notice.⁴

¹ *Tiedt v. Carstensen*, 61 Ia. 334.

² *Law v. Galena etc. R. R. Co.*, 18 Ills. 324; *Schroeder v. Detroit etc. Ry. Co.*, 44 Mich. 387; *People v. Judge of Dutchess*, 23 Wend. 360; *Union Canal Co. v. Keiser*, 19 Pa. S. 134; *Kirk's Appeal*, 28 Pa. S. 185; *Spring Garden Road*, 43 Pa. S. 144; *In re Germantown Ave.*, 99 Pa. S. 479; *State v. Vandevere*, 25 N. J. L. 233, 669.

§ 549.

³ *Commissioners' Court v. Traber*, 25 Ala. 480; *Savage v. Board of Comrs.*, 10 Ill. App. 204.

⁴ *Richman v. Board of Supervisors*, 70 Ia. 627; *Fox v. Holcomb*, 34 Mich. 298; *Ayres v. Richards*, 38 Mich. 214; *Null v. Tierle*, 52 Mich. 540; *Frost v. Leatherman*, 55 Mich. 33; *Bennett v. Draik Comrs.*, 56 Mich. 634.

³ *Stone v. Boston*, 2 Met. 220; *Dupont v. Highway Comrs.*, 28 Mich. 362; *Purdy v. Martin*, 31 Mich. 455; *Brush v. Detroit*, 32 Mich. 43; *Detroit Sharpshooters' Assn. v. Highway Comrs.*, 34 Mich. 36; *Morgan v. Chicago & North*

Eastern Ry. Co., 36 Mich. 428; *Dickinson v. Van Wormer*, 39 Mich. 141; *Strachan v. Brown*, 39 Mich. 168; *Moetter v. Comrs. of Highways*, 39 Mich. 726; *Lane v. Burnap*, 39 Mich. 736; *People v. Highway Comrs.*, 40 Mich. 165; *People v. Ruthruff*, 40 Mich. 175; *Milton v. Wacker*, 40 Mich. 229; *Willcheck v. Edwards*, 42 Mich. 105; *Nielsen v. Wakefield*, 43 Mich. 434; *Wilder v. Hubbell*, 43 Mich. 487; *Wright v. Rowley*, 44 Mich. 557; *Dunlap v. Toledo & C Ry. Co.*, 46 Mich. 190; *Whiteford Township v. Probate Judge*, 53 Mich. 130; *Bixby v. Goss*, 54 Mich. 551; *Bettis v. Geddes*, 54 Mich. 608; *Coray v. Probate Judge*, 56 Mich. 524; *State v. Shreeve*, 15 N. J. L. 57; *People v. Smith*, 7 Hun, 17.

⁴ *Sumner v. County Comrs.*, 37 Me. 112; *Dunning v. Township Drain Comrs.*, 44 Mich. 518; *Pickford v. Lyon*, 98 Mass. 491. In the last case the applicant for certiorari, who was a woman, was represented by her father, who had notice and took an active part in the proceedings. For

If the record shows that the inferior tribunal had jurisdiction, it is then to be considered whether it has proceeded according to law. If the commissioners were incompetent,⁵ or did not take the oath required,⁶ or otherwise qualify as required by law; or if they have failed to conform to the statute in any substantial particular,⁷ the proceedings will be invalid. Erroneous rulings upon evidence which are material have been held to be sufficient ground for relief upon certiorari.⁸ So is the adoption of an erroneous principle in the assessment of damages.⁹ But a mere error in the amount of damages cannot be reached in this way.¹⁰ If the order made exceeds the jurisdiction of the inferior tribunal, it will be quashed on certiorari.¹¹ The proceedings will not be quashed for errors or defects which have produced no substantial injury,¹² or which have been waived by the party complaining.¹³ As has already been observed, the decision of the inferior tribunal upon the merits cannot be reviewed.¹⁴ The only order which can be entered in the superior court is that the proceedings be quashed or that they be affirmed.¹⁵ But, where the statute provided for a

a discussion of other jurisdictional facts the reader is referred to previous chapters. As to what will be considered on certiorari generally, see *Everett v. Cedar Rapids etc. R. R. Co.*, 28 Ia. 417.

⁵ *Ex parte Hinchby*, 8 Me. 146, and see *ante*, §§ 405-407.

⁶ *Keenan v. Commissioners' Court*, 26 Ala. 568; *Bowler v. Drain Comrs.* 47 Mich. 154; and see *ante*, §§ 411-414.

⁷ *Kroop v. Forman*, 31 Mich. 144; *Milton v. Wacker*, 40 Mich. 229.

⁸ *Petition of Landaff*, 34 N. H. 163.

⁹ *Readington v. Dilley*, 24 N. J. L. 209; *State v. Lord*, 26 N. J. L. 140.

¹⁰ *McCrory v. Griswold*, 7 Ia. 248;

Detroit & Bay City R. R. Co. v. Graham, 46 Mich. 642; *Paine v. Leicester*, 22 Vt. 44.

¹¹ *Brown's Petition*, 57 N. H. 367.

¹² *Johnson v. Supervisors of Clayton County*, 61 Ia. 89; *Wayne v. County Comrs.*, 37 Me. 558; *Smith v. Comrs. of Cumberland*, 42 Me. 395; *Davison v. Otis*, 24 Mich. 23; *State v. Blauvelt*, 34 N. J. L. 261.

¹³ *Long v. Commissioners' Court*, 18 Ala. 482.

¹⁴ *Brooks v. Kirby*, 19 Ala. 72; but see *White's Case*, 2 Overton, 109.

¹⁵ *Commissioners etc. v. Supervisors of Carthage*, 27 Ills. 140; *People v. Ferris*, 36 N. Y. 218.

bill of exceptions in the inferior court, it was held that the same relief could be given upon certiorari as upon a writ of error.¹⁶ But, where a part only of the order of the inferior tribunal is erroneous, and the remainder would be complete and valid if the erroneous part was stricken out, it has been held that the proceedings might be quashed as to the erroneous part and affirmed as to the remainder.¹⁷

§ 550. Appeals to the Supreme Court.—Where the proceedings are commenced in, or come by appeal or certiorari before, a court from whose decisions an appeal lies to the Supreme Court of the State, then whether an appeal will lie in the class of cases under consideration will depend upon the constitution and statutes of the State. As a rule, such appeals are entertained, in the absence of words in the law which express or clearly imply a contrary intent. An appeal will lie from a final decision upon certiorari, as this is a jurisdiction exercised according to the course of the common law.¹

§ 551. What is a final order.—An order confirming the report of commissioners is a final order from which an appeal will lie.¹ But, where the award had to be approved by the Governor as well as confirmed by the court, the confirmation of the court was held not to be a final order until approved by him.² The dismissal of a cross petition setting up a claim for damages not recognized by the petition is also a final order.³ The order appointing commissioners is not a

¹⁶ *Haywood v. Bath*, 35 N. H. 514.

Co. v. Mahoney, 29 Cal. 112; *Morris v. Chicago*, 11 Ills. 650; *Rice v. Danville etc. Turnpike Co.* 7 Dana, 81; *Tracy v. Elizabethtown etc. R. R. Co.*, 78 Ky. 309; *In re St. Paul & Northern Pacific Ry. Co.*, 34 Minn. 227; *St. Louis & San Francisco Ry. Co. v. Evans & Howard Fire Brick Co.*, 85 Mo. 307.

¹⁷ *Commonwealth v. Blue Hill Turnpike*, 5 Mass. 420; *Commonwealth v. West Boston Bridge*, 13 Pick. 195; and see *Westport v. County Comrs.*, 9 Allen, 203.

§ 550.

² *People v. Pfeiffer*, 59 Cal. 89. ³ *Johnson v. Freeport & Miss. River Ry. Co.*, 116 Ills. 521.

¹ *Baltimore & Havre-de-Grace Turnpike Co. v. Northern Central R. R. Co.*, 15 Md. 193.

§ 551.

¹ *San Francisco & San Jose R. R.*

final ope and not appealable unless by express provision of the statute;⁴ nor is an order denying a motion to vacate the appointment and dismiss the petition;⁵ nor is an order setting aside the report of commissioners,⁶ or sustaining exceptions to the same,⁷ or confirming it—except as to the damages awarded,⁸ or quashing an inquisition under a writ of *ad quod damnum*.⁹ Where the statute provides first for a determination by the county court to lay out a road, then an assessment of damages, and lastly an order laying out the road upon the payment of the damages, no appeal will lie from an order determining to lay out the road.¹⁰ The denial of a motion to set aside a confirmation is an appealable order.¹¹ So is the dismissal of the petition,¹² and any order which in legal effect terminates the proceedings.¹³ A refusal to dismiss an appeal taken from commissioners to the district court is not such an order.¹⁴

§ 552. Construction of statutes as to when an appeal will lie.—Where the proceedings are before a court which appoints the commissioners and acts upon the report, an appeal will lie from the final order in the proceedings, under a general provision of the statutes giving an appeal from all final orders, judgments and decrees.¹ Some courts hold

⁴ *Williams v. Hartford & New Haven R. R. Co.*, 13 Conn. 110; *Freshour v. Logansport & Northern Turnpike Co.*, 104 Ind. 463; *Comrs. v. Cook*, 86 N. C. 18.

⁵ *Turner v. Holleran*, 11 Minn. 253.

⁶ *Road in Kiskimintas Township*, 32 Pa. S. 9.

⁷ *Tucker v. Mass. Central R. R. Co.*, 116 Mass. 124.

⁸ *Evans v. Shields*, 3 Head, 70.

⁹ *Allison v. Taylor*, 3 T. B. Monroe, 7.

¹⁰ *Roosa v. Henderson County*, 59 Ills. 446; see also *Koenig v. County of Winona*, 10 Minn. 238.

¹¹ *Denver etc. R. R. Co. v. Jackson*, 6 Col. 340; *contra*: *California Southern R. R. Co. v. Southern Pacific R. R. Co.*, 65 Cal. 295.

¹² *Warren v. First Division of the St. Paul & Pacific R. R. Co.*, 18 Minn. 384.

¹³ *Smith v. Scearce*, 34 Ind. 285.

¹⁴ *Minnesota Central R. R. Co. v. Patterson*, 31 Minn. 42.

§ 552.

¹ *North Missouri R. R. Co. v. Reynal*, 25 Mo. 534; *Same v. Lackland*, 25 Mo. 515, 529; *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. 812.

that the jurisdiction exercised in such cases is a special and limited statutory jurisdiction, and that no appeal lies unless expressly given by the statute conferring the jurisdiction, or by some statute clearly referring to the class of cases in question.² Where such jurisdiction was conferred upon the county court, which acted upon a petition, it was held a general statute giving a right of appeal from that court to either plaintiff or defendant did not cover the case in question.³ A statute giving an appeal in any "action or *special proceeding*,"⁴ or in any "civil action, suit or proceeding whatever,"⁵ was held to apply to condemnation cases.

§ 553. Practice in the Supreme Court.—It is hardly necessary to say that the practice in the Supreme Court is the same as in other cases. Where the case was tried *de novo* in the court from which the proceedings have been appealed to the Supreme Court; errors committed anterior to the trial in the former court, as to matters which have been retried in that court, will not be considered in the Supreme Court.¹

§ 554. Writs of error.—In the absence of any statutory provision, a writ of error will not lie, except to a court of record in a proceeding according to the course of the common law.¹ Where, therefore, condemnation proceedings are conducted before a non-judicial body or a court not of record, or in a court of record, but not according to the course of the common law, it follows that a writ of error will not lie to review them, and so it is usually held.² In Kentucky it

² *Wilmington & Susquehanna R. R. Co. v. Condon*, 8 G. & J. 443; *Raleigh & Gaston R. R. Co. v. Jones*, 1 Ired. L. 24.

³ *Hawkins v. County of Randolph*, 1 Murphy, 118.

⁴ *Sacramento, Placer & Nevada R. R. Co. v. Harlan*, 24 Cal. 334.

⁵ *Lanesborough v. County Comrs.*, 22 Pick. 278.

§ 553.

¹ *Williamson v. County of Cass*, 84 Ills. 361; *Patton v. Clark*, 9 Yerg. 268.

§ 554.

¹ 2 Tidd's Prac., * 1134 *et seq.* and cases cited.

² *Hill v. Bridges*, 6 Porter, 197; *Hannibal & St. Joseph R. R. Co.*

is held that a person over whose land a road is laid out is entitled to a writ of error as a matter of right.³

§ 555. Limitations as to the time in taking an appeal or certiorari.—Where a city charter gives the same right of appeal from the action of the city council, in laying out streets, as is given in the general road law from the action of selectmen, the limitations of the latter statute apply.¹ A petition for review was required to be presented within one year after the laying out of a road; it was held that the year commenced with the entry of the order laying out the road.² In another case it was to be presented within sixty days after the highway was laid open to be worked; it was held to mean sixty days from the time work was actually commenced.³ A statute provided that damages should be assessed by a committee appointed by the court of common pleas, and that any party aggrieved might apply for a jury at the same term of said court at which the report of said committee should be returned and acted upon, or at the next regular term thereafter. This refers to the term at which the report is finally accepted,⁴ and, where final action was delayed for four years by an appeal to the Supreme Court, it was held not to bar the right to a jury.⁵ An appeal was required to be taken within sixty days after the return was recorded, if the party had actual notice of the decision. It was held that a statement by selectmen of what they intended to decide was not such notice.⁶ Limitations, as to an appeal, are usually held

v. Morton, 20 Mo. 70; *Dorchester v. Wentworth*, 31 N. H. 451.

¹ *Peck v. Whitney*, 6 B. Mon. 117. The right is also implied in the following cases, though refused to the parties applying, for want of sufficient interest: *Taylor v. Black*, 3 Bibb, 78; *Commonwealth v. Dudley*, 5 T. B. Mon. 22.

§ 555.

² *Bennett v. County Comrs.*, 4 Gray, 359.

³ *Wood v. Quincy*, 11 Cush. 487.

⁴ *Myers v. Pownal*, 16 Vt. 415.

⁵ *Dodge v. Acworth*, 32 N. H. 474. ⁶ *Concord Railroad v. Greely*, 20 N. H. 157.

⁶ *Freeman v. Cornish*, 52 N. H. 141.

to be mandatory.⁷ Where a statute required a petition for review to be presented to the county commissioners at the next term after filing the report, unless a good cause was shown for the delay, it was held the county commissioners were sole judges of what was good cause.⁸

§ 556. Estoppel to prosecute an appeal or certiorari.— If the owner accepts the damages which have been awarded him, this will operate as a waiver and release of errors and estop him from prosecuting an appeal or certiorari.¹ But, where damages awarded to the city of New York for land taken were deposited with the city chamberlain for the use of the city, pursuant to an order of court, but were not used or appropriated by the city, it was held the city was not thereby estopped from having its appeal.² Where an appeal was taken by the owner, pursuant to statute, from the order appointing commissioners, but the petitioner went on and had damages assessed and the owner appeared in such subsequent proceedings, it was held that such appearance did not prejudice his appeal.³ And, where the owner appealed from an assessment of damages in a highway case, but altered his fences to conform to the lay-out, it was held this did not affect his appeal.⁴ If the petitioner pays the damages awarded, this will, in the absence of any statute, waive an appeal, but the deposit of damages for the purpose of obtaining possession will not deprive the petitioner of the right of appeal.⁵ But, where a railroad company paid the damages

⁷ Cambridge *v.* County Comrs., 6 Allen, 134; Roberts *v.* Boston & Lowell R. R. Co., 115 Mass. 57.

⁸ Portland & Ogdensburg R. R. Co. *v.* County Commissioners, 64 Me. 505.

§ 556.

¹ Baltimore etc. R. R. Co. *v.* Johnson, 84 Ind. 420; Mississippi & Missouri R. R. Co. *v.* Byington, 14 Ia. 572; Rentz *v.* Detroit, 48 Mich. 544.

² Matter of New York & Harlem R. R. Co., 98 N. Y. 12, overruling S. C. in 39 Hun, 338. The statute in this case also recognized the right, notwithstanding the receipt or payment of damages.

³ Matter of New York Central etc. R. R. Co., 60 N. Y. 116.

⁴ Endicott, Petitioner, 24 Pick. 339.

⁵ Indianapolis & Cincinnati R. R. Co. *v.* Brower, 12 Ind. 374; St.

awarded pending a petition by it for certiorari, but it was obliged to pay in order to get possession and was obliged to get possession and construct its road in order to save its franchises, it was held to be no waiver.⁶

§ 557. When an appeal or certiorari is the proper remedy. —An appeal or writ of certiorari is the proper remedy for the correction of errors in the proceedings.¹ The owner cannot maintain a bill to prevent by injunction the occupation of his land on account of such errors.² Where the commissioners assess the damages upon a mistaken idea as to the amount of land taken, the only remedy is by appeal, and mandamus will not lie to compel the appointment of new commissioners to assess the value of the part omitted.³

§ 558. Statutes opening proceedings for review after final judgment. —It is competent for the legislature, by a statute passed after the final termination of proceedings for condemnation, to provide for an appeal or for setting aside the confirmation or judgment for error or good cause shown.¹ In *Garrison v. New York*² the court say: “In the proceeding to condemn the property of the plaintiff for a public street, there was nothing in the nature of a contract between him and the city. The State, in virtue of her right of eminent domain, had authorized the city to take his property for a public purpose, upon making to him just compensation. All

Louis & San Francisco Ry. Co. v. Evans & Howard Fire Brick Co.,
85 Mo. 307, overruling S. C. 15
Mo. App. 152.

⁶ *Commonwealth v. Hall*, 8 Pick.
440.

§ 557.

¹ *State v. Hanna*, 97 Ind. 469;
Brown v. Beatty, 34 Miss. 227;
Buckley v. Drake, 41 Hun, 384.

² *Thorp v. Witham*, 65 Ia. 566;
Phifer v. Carolina Central R. R.

Co., 72 N. C. 433; *Frovert v. Finfrock*, 31 Ohio St. 621.

³ *State v. Longstreet*, 38 N. J. L. 312.

§ 558.

¹ *Henderson & Nashville R. R. Co. v. Dickerson*, 17 B. Mon. 173; *Matter of Widening Broadway*, 61 Barb. 483; *S. C.*, 49 N. Y. 150; *Baltimore & Susquehanna R. R. Co. v. Nesbitt*, 10 How. U. S. 395; *Garri- son v. New York*, 21 Wall. 196.
² 21 Wall. 196, 203, 204.

that the constitution or justice required was that a just compensation should be made to him, and his property would then be taken whether or not he assented to the measure.

"The proceeding to ascertain the benefits or losses which will accrue to the owner of the property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the State, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it. And she can to that end vacate or authorize the vacation of any inquest taken by her direction, to ascertain peculiar facts for her guidance, where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing from the parties interested in the property."

CHAPTER XXIII.

COSTS.

§ 559. General principles in regard to costs in condemnation cases.—At common law no costs could be recovered by either party.¹ The whole subject of costs in common law actions is regulated by statutes, which, in England, extend back to the thirteenth century.² In equity, costs are discretionary with the court which awards or apportions costs upon equitable principles.³ In the matter of costs, condemnation proceedings are usually likened to common law actions, and costs are made to depend entirely upon the statute.⁴ It seems to us that courts should be guided by the following principles and considerations in the matter: By the constitution the owner is entitled to just compensation for his property taken for public use. He is entitled to receive this compensation *before* his property is taken or his possession disturbed. If the parties cannot agree upon the amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process.⁵ Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void. When the compensation has once been ascertained by a competent tribunal, at the expense

§ 559.

³ 2 Dan. Ch. Pr. p. 1376.

¹ 2 Tidd's Prac. 945; *State v. Kinne*, 41 N. H. 238; *Greenville & Columbia R. R. Co. v. Partlow*, 6 Rich. 286.

⁴ *Hamlin v. New Bedford*, 143 Mass. 192.

² *Ibid.*

⁵ *Toledo etc. Ry. Co. v. Dunlap*, 47 Mich. 456, 464; *Ulster & Delaware R. R. Co. v. Gross*, 31 Hun, 83.

of the condemning party, the law has done all for the owner which the constitution requires. If the owner is given a right of appeal or review, it may be upon such terms as to costs as the legislature may deem just. But, if the statute gives the condemning party a right of appeal, it cannot cast the costs upon the owner if the assessment is reduced.⁶

§ 560. Costs in the absence of special statutory provisions relating to eminent domain proceedings.—As stated in the last section, the doctrine of the courts has generally been that costs could not be awarded in condemnation cases in the absence of a statute authorizing it.¹ And it is the prevailing doctrine that the general statutory provisions in regard to costs do not apply to condemnation proceedings.² In a proceeding to establish a public road which was successfully resisted by the owners of property to be taken, it was held in Tennessee that they were entitled to recover costs under the general law in regard to costs in *civil suits*.³ A similar decision was made in Alabama in a proceeding to erect a dam, the general statute being in reference to costs in civil actions.⁴ Sometimes the language of the general statutes is much broader than in the cases just cited. In New Hampshire the general statute in question provided “that costs should follow the event of every action or petition unless otherwise directed by law or by the court.” Under this provision it has been held that costs should be allowed the pre-

⁶ *Matter of New York, West Shore & Buffalo R. R. Co.*, 94 N. Y.

287.

§ 560.

¹ *Hawkins v. Robinson*, 5 J. J. Marsh. 9; *Commonwealth v. Carpenter*, 3 Mass. 268; *Gifford v. Dartmouth*, 129 Mass. 135; *Dickinson v. Amherst Water Co.*, 139 Mass. 210; *Philadelphia, Germantown & Norristown R. R. Co. v. Johnson*, 2 Whart. 275; *Herbein v. Railroad Co.*, 9 Watts, 272; *Greenville & Co.*

Lumbia R. R. Co. v. Partlow, 6 Rich. 283.

² *Dickinson v. Amherst Water Co.*, 139 Mass. 210, and cases cited; *Cherokee v. Town Lot and Land Co.*, 52 Ia. 279; *Johnson v. Sutliff*, 17 Neb. 423. But there is some dissent from this view.

³ *Senaker v. Justices of Sullivan, 4 Sneed*, 116.

⁴ *Folmar v. Folmar*, 71 Ala. 136; see also *Williams v. Jackman*, 2 J. J. Marsh. 352.

vailing party in highway cases.⁵ A statute of Iowa provided that, in an action for the recovery of money only, the defendant might offer to submit to a judgment for a certain sum, and, if such offer was rejected and a less sum recovered, the plaintiff should pay the costs; it was held not to apply to condemnation proceedings.⁶ A similar conclusion was reached by the Supreme Court of Nebraska under a very similar statute.⁷ In the absence of any statute the condemning party cannot recover costs on the ground of having offered to pay a sum which is more than the damages awarded.⁸

§ 561. Costs under particular statutes.—Condemnation cases are special proceedings within the New York code, as to costs.¹ In such proceedings costs are in the discretion of the court, and it was held proper to award costs against the defendants in a proceeding to obtain the right to cross a railroad where the application was resisted for the purpose of preventing any crossing.² Under a statute which provided that the cost and expenses of the jury should be paid by the party condemning, it was held the owner could have an allowance for witness fees.³ Under a statute which allows the owner his costs, charges and expenses, the expense of a former inquisition which has been set aside may be included.⁴ So in Massachusetts the plaintiff in a complaint for flowage, who finally prevailed, was allowed to recover the expense of several mistrials.⁵ Where the owner is entitled to costs and

⁵ *Hanson v. Effingham*, 20 N. H. 460; *Knowles Petition*, 23 N. H. 193; *Currier v. Grafton*, 28 N. H. 73.

⁶ *Cherokee v. Town Lot and Land Co.*, 52 Ia. 279.

⁷ *Johnson v. Sutliff*, 17 Neb. 423.

⁸ *Ulster & Delaware R. R. Co. v. Gross*, 31 Hun, 83.

§ 561.

¹ *Rensselaer & Saratoga R. R.*

Co. v. Davis, 55 N. Y. 145; *Matter of New York etc. Ry. Co.*, 26 Hun, 592.

² *Matter of Cortland & Homer Horse R. R. Co.*, 98 N. Y. 336.

³ *Philadelphia, Germantown & Norristown R. R. Co. v. Johnson*, 2 Whart. 275.

⁴ *Owners of Ground v. Albany*, 15 Wend. 374.

⁵ *Fitch v. Stevens*, 2 Met. 506.

expenses, he may recover for serving on viewers a notice of their appointment, for subpoenaing witnesses, for witness fees, and for mileage in making service of notices and subpoenas.⁶ It was held in Illinois that it was error to award execution for costs, that the proper order to be entered was that, upon payment of the damages awarded and costs of proceedings, the company might take possession of the land.⁷

§ 562. Costs in case of appeals, reviews, etc.—Where the owner is dissatisfied with the amount of damages awarded him in the first instance, and takes an appeal or other proceedings to have a re-assessment of the damages, it is usual to provide that he shall pay the costs of the appeal if he fails to secure an increase of damages, and such provisions are proper and valid.¹ To exempt the owner from costs in such cases, the increase must be exclusive of interest.² Where the award of commissioners was \$500, and that the railroad company build a certain culvert, and on appeal to a jury an award of \$600 was obtained, a decision refusing the owner costs was sustained.³ A statute of Massachusetts provided that a party who was dissatisfied with the award of commissioners might apply for a jury to re-assess the damages, and that “upon any application for a jury to assess such damages the prevailing party shall be entitled to his legal costs,” etc. Under this provision it is held that, if the owner obtains any damages, whether more or less than the sum awarded by the commissioners, and whether the application for a jury is made by him or the party condemning, he is the *prevailing*

⁶ Pennsylvania R. R. Co. v. Keifer, 22 Pa. S. 356.

⁷ Chicago etc. R. R. Co. v. Bull, 20 Ills. 218.

§562.

¹ Leak v. Selma, Rome & Dalton R. R. Co., 47 Ga. 345; Atchison & Denver Ry. Co. v. Lyon, 24 Kan. 745; Morse Petitioner, 18 Pick. 443; First Baptist Society v. Fall River,

119 Mass. 95; Metler v. Easton & Amboy R. R. Co., 37 N. J. L. 222; Paris v. Coltraine, 3 Hawks. (N. C.) 312.

² First Baptist Society v. Fall River, 119 Mass. 95; Metler v. Easton & Amboy R. R. Co., 37 N. J. L. 222.

³ Morse Petitioner, 18 Pick. 443.

party and entitled to costs.⁴ Another statute of the same State provided that, if a railroad company applied for a jury and failed to reduce the damages, it should pay the costs, but was silent as to costs in the event it succeeded in reducing the damages. It was held that in the latter event it could not recover costs, but each party would have to pay his own costs.⁵

Statutes which provide that, if the party condemning appeals and recovers a reduction of damages, it shall have costs, have been sustained in some of the States, but without a discussion of the constitutional questions involved.⁶ But it seems to us that such statutes are a clear violation of the spirit of the constitution. The owner should receive his just compensation clear of any expense of the proceedings. He is presumptively entitled to the amount of the first award. No act of his forces the condemning party to appeal, and, if such party chooses to appeal, the appeal becomes merely another step in the process of ascertaining the just compensation, the total expense of which it should bear.⁷ In the case first cited the court say: "The only point remaining to be considered is the appeal from the judgment for costs rendered by the General Term against the land owners, on reversing the order of confirmation and appointing new commissioners amounting to \$120.70. We are of opinion that the General Term had no power to award these costs. If the appeal to the General Term had been taken by the land owners, and they had been defeated, it may be that the court could, in its

⁴ *New Haven & Northampton Co. v. Northampton*, 102 Mass. 116; *Childs v. New Haven & Northampton Co.*, 135 Mass. 570. See also *Marshall Fishing Co. v. Hadley Falls Co.*, 5 Cush. 602. To the same effect, *Burrill v. Martin*, 12 Me. 345.

⁵ *Commonwealth v. Boston & Maine R. R. Co.*, 3 Cush. 25, 56;

Harvard Branch R. R. Co. v. Rand, 8 Cush. 218.

⁶ *Leak v. Selma, Rome & Dalton R. R. Co.*, 47 Ga. 345; *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364.

⁷ *Matter of New York, West Shore & Buffalo R. R. Co.*, 94 N. Y. 287, 294; *Schuylkill Navigation Co. v. Kittera*, 2 Rawle, 438; *Johnson v. Sutliff*, 17 Neb. 423.

discretion, have compelled them to pay the costs to which they had subjected the company by such an appeal. But the appeal was taken by the company because it was dissatisfied with the amount awarded, and was a continuation of the proceeding instituted by it to ascertain the compensation payable to the land owners, and to acquire their land against their will. In such a case, to compel the land owners to pay any part of the expenses incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the land owners to just compensation. They are entitled to the full amount of their damages when finally ascertained, and this amount cannot be diminished by allowing to the company its own expenses incurred in ascertaining it, or in endeavoring to reduce it. In the present case the costs allowed are small compared with the amount of the award, which was \$35,500, but that can make no difference in the principle. If the company can recover against the land owner the expenses of proceedings carried on by it for its own benefit, where the award is large, it may do the same when the award is small; and a case may be supposed where the costs and expenses of the company would absorb a large part, or even the whole, of the award. There is no warrant in the statute for awarding such costs, and if there were, *it would be a violation of the constitutional right of the land owner.*"

In certiorari costs are taxed in favor of the prevailing party.⁸ Where the owner appealed, and the petitioner dismissed the proceedings in the upper court, it was held proper to give judgment for costs against the petitioner.⁹ Where all *expenses* of the proceedings were to be paid by the party condemning, it was held that counsel fees were not included.¹⁰ Where several appeals were heard together before the same

⁸ State *v.* Blake, 36 N. J. L. 442. ¹⁰ Marshall Fishing Co. *v.* Hadley

⁹ St. Louis, Ft. Scott & Wichita Falls Co., 5 Cush. 602.
R. R. Co. *v.* Martin, 29 Kan. 750.

referee, who was allowed two dollars a day, it was held that he could not have two dollars a day for each appeal.¹¹ A railroad company appealed from an assessment of \$1,500, and obtained a verdict for \$1,414.83, and the court apportioned the costs of appeal.¹² Where the owner took two appeals, one from the order establishing a road and one from the finding as to damages, and succeeded in the latter but not in the former, the costs of appeal were taxed according to the result, though both appeals were tried together.¹³ Where the prevailing party was allowed costs by statute, it was held that he was entitled to secure all taxable costs in all the courts and tribunals.¹⁴

§ 563. **Miscellaneous cases.**—Mandamus will not lie to county commissioners to compel them to change their allowance of costs.¹ Where proceedings were commenced in the county court, which only had jurisdiction in cases not exceeding two thousand dollars in amount, and a verdict was rendered for three thousand dollars compensation, the court set aside the verdict and dismissed the proceedings *at the cost of the petitioner*, and this was held correct.² Where proceedings were dismissed before the confirmation of the report of commissioners, it was held improper to allow costs to the owners.³ In Iowa a suit in chancery to make the costs a lien upon the land taken was sustained.⁴

¹¹ *Disosway v. Winant*, 34 Barb. 538.

² *Denver & Rio Grande Ry. v. Otis*, 7 Col. 198.

¹² *Noble v. Des Moines & St. Louis Ry. Co.*, 61 Ia. 637.

³ *Matter of Syracuse etc. R. R. Co.*, 4 Hun, 311. But see *St. Louis, Ft.*

¹³ *Jamieson v. Board of Comrs.*, 56 Ind. 466.

⁴ *Scott & Wichita R. R. Co. v. Martin*, 29 Kan. 750; see also *Miller v. Junction Canal Co.*, 41 N. Y. 98.

¹⁴ *Abbott v. County of Penobscot*, 52 Me. 584.

⁴ *Frankel v. Chicago, B. & P. Ry. Co.*, 70 Ia. 424.

§ 563.

¹ *Woodman v. County Comrs.*, 24 Me. 151.

CHAPTER XXIV.

THE DAMAGES PRESUMED TO BE INCLUDED IN THE AWARD OR JUDGMENT.

§654. **Statement of the question.**—Where the whole of a tract is taken, no interest remains in the owner with respect to which he can be damaged by any subsequent use of the property, and consequently no question can arise with respect to the right to recover for such subsequent damages. But, where part of a tract is taken, it not infrequently happens that a claim for further damages is made by the owner or those who succeed to his rights, on account of injuries resulting from the construction or operation of the works, or from changes in the works, or on account of alleged mistakes, errors or omissions in estimating the damages. Some of these claims commend themselves to one's sense of what is fair and just, while others do not. The treatment which they have received from the courts is very unsatisfactory, and the principles upon which they have been allowed or disallowed are, for the most part, as it seems to the writer, entirely erroneous.

§ 565. **General doctrine of the decisions.**—It is a doctrine often repeated in the decisions, that the damages must be assessed once for all, and that when once assessed according to law they include all the injuries resulting from the particular appropriation and from the construction and operation of the works in a reasonable and proper manner for all time to come.¹ In one case, where the taking was for a

§ 565.

Ind. 328; Elizabethtown etc. R. R.

¹ Kimball *v.* White Water Valley Co., 1 Ind. 285; Motmoren-
cy Gravel Road Co. *v.* Stockton, 43 Co. *v.* Combs, 10 Bush, 382; Gordon
v. Tucker, 6 Me. 247; Chesapeake & Ohio Canal Co. *v.* Grove, 11 G.

canal, the language of the court is that the assessment is final and conclusive for "all damages accruing to the owner of lands from any and every physical effect produced by the construction and use of the canal; whether the same were clearly to be seen and easily to be estimated before the construction of the canal or whether they were uncertain and doubtful results from such construction."² In another case, where property was taken for a railroad, the court says: "He whose land is taken for a railroad is to be equally protected. He is to receive all that equity and justice require, when the nature and extent of the property and rights to be affected are considered. The corporation acquire the right to construct their road in any suitable and proper manner, for their own convenience and public accommodation, and the right to vary and change that construction, within the established limits of the road, from time to time, forever, until the State resume the right and privilege of the corporation, or until the charter be altered, repealed or annulled. Accordingly, the commissioners or jury should take into consideration and appraise all damages, direct or consequential, present and prospective, certain and contingent, which may be judged by them fairly to result to the land-owner by the loss of his property and rights, and the injuries done thereto. * * * And, for any loss or injury which results from building the road in a suitable and proper manner, the land-owner can maintain no action against the company; the whole matter is concluded by the award of the commissioners or the verdict

& J. 398; *Fowle v. New Haven etc.* R. R. Co., 112 Mass. 334; *Bailey v. Woburn*, 126 Mass. 416; *McCormick v. Kansas City etc. R. R. Co.*, 57 Mo. 433; *Dearborn v. Boston etc. R. R. Co.*, 24 N. H. 179; *Perley v. B. C. & M. R. R. Co.*, 57 N. H. 212; *Trenton Water Power Co. v. Chambers*, 13 N. J. Eq. 199; *Van Schoick v. Delaware & Hudson*

Canal Co.

20 N. J. L. 249; *Furniss v. Hudson R. R. Co.*, 5 Sandf. 551; *Tucker v. Erie etc. R. R. Co.*, 27 Pa. S. 281; *Pittsburg, Ft. Wayne & Chicago Ry. Co. v. Gilleland*, 56 Pa. S. 445.

² *Van Schoick v. Delaware & Hudson Canal Co.*, 20 N. J. L. 249.

of the jury on appeal; for, where the legislature authorizes an act the necessary consequence of which is to damage the property of another, and at the same time prescribes the particular mode in which the damage shall be ascertained and compensated, he who does the act cannot be liable as a wrong-doer.

“The damages awarded by the commissioners must be regarded as a full compensation for all the injury which the land-owner may sustain, then or at any further time, from any cause which the commissioners were bound, or had a right to consider; so that it can never afterwards be made a question whether, in fact, the commissioners have or have not considered any particular cause of damage legitimate for their consideration. It must be taken that they have done their duty in considering all such causes, and that the party who has acquiesced in their decision, without appeal, is satisfied that they have done so. Or in case of a submission to a jury, it must be understood that they have been governed by the same principles.”³ Similar language will be found in many of the cases cited in this chapter.

§ 566. The doctrine of the cases criticised.—As most of the cases for subsequent damages arise out of a taking for railroad purposes, we may use those for illustration, though the same principles apply to all. The theory or principle upon which the decisions go is that, when land is taken for a railroad, the absolute right is acquired to construct the road according to the most approved methods of engineering, provided no unnecessary injury is done to adjacent property, and provided a reasonable degree of skill, ability and forethought is exercised to prevent such injury.¹ If the required degree of skill, ability and forethought has been exercised, and still damage results, then it is presumed to have been considered and estimated in the original assess-

³ Dearborn v. Boston etc. R. R. Co.,
24 N. H. 179, 186.

§ 566.

¹ Cases cited in last section.

ment of damages, although it may be apparent to the court and to everybody that the injuries in question were not dreamed of and could not have been considered at the time the damages were assessed. The practical operation of the rule, therefore, is that injuries of the class last referred to are only paid for "in contemplation of law" and not in fact. Underlying the decisions referred to is an erroneous assumption as to the rights acquired by the purchase or condemnation of property for public use. This assumption is that there is acquired, not only all the ordinary proprietary rights in the property taken, but also certain proprietary rights which pertain to the property not taken. If a right of way is taken through a tract for railroad purposes, it is assumed, for instance, that the railroad acquires not only the land constituting the right of way with all the rights and incidents which attach to it as land, but also the right of the owner of the remainder of the tract to have the adjacent soil supported, the right of such owner to have a stream flow as it has been wont to flow by nature, and, generally, his right not to be injured by an unreasonable use of the adjacent land in so far as the taking of such rights may *at any time in the future* prove to be necessary for the construction and operation of the road in the most approved manner. There is no warrant for this assumption, either in reason or authority, outside of the particular cases referred to. There is no reason why a railroad, in purchasing or condemning property for its use, should be held to acquire anything more than would be acquired by a private individual purchasing the same property for the same use. A man may build and operate a railroad without any authority from the legislature, if he does so upon his own land, and he may purchase land for that purpose. If one individual should convey to another a strip of land to be used for a railroad, there would be a release of all damages resulting from the operation of the road in a reasonable and proper manner. But in constructing the road the purchaser would be bound *at his peril*

not to do any actionable injury to the adjacent land, either by depriving the soil of its support, by interfering with the flow of running streams, or otherwise. The purchaser would in all respects be subject to the law of adjoining proprietors and of the maxim, *sic utere tuo ut alienum non laedas*. So with a railroad when it acquires a right of way through a tract of land; it becomes an adjoining proprietor with the owner of the tract, with precisely the same rights and duties with respect to such owner as though the strip of land had been acquired by an individual for ordinary use, except the unqualified right of operating the road in a reasonable and proper manner. And so with every description of taking for public use. In adapting the property taken to the use proposed, the public or its agent is subject to the law of adjoining proprietors, and to the maxim, *sic utere tuo ut alienum non laedas*. If, in such adaptation, the adjacent owner's rights of property are violated, he is entitled to compensation, not on the ground of a want of skill or diligence in constructing the works, but because his constitutional rights of property have been violated.

This principle affords in all cases a clear and definite rule, both for the assessment of damages in the first instance and for the determination of claims for subsequent injuries. It is in harmony with the law of real estate in other transactions, and is capable of being administered with a nearer approach to equality and justice to all parties than is possible under the other system.

Suppose a right of way is taken for a railroad through a farm for, say, a distance of half a mile. Suppose the surface is diversified and that one or two streams are intersected. The railroad may condemn its right of way before it has adopted any grade or plan of construction.² A tribunal is consti-

² Or, if it has surveyed a grade, it is not bound to follow it, and even after it has once constructed its road it may change its grade and mode of construction in the most material manner at any time in the future.

tuted for the purpose of assessing the owner's damages. It is not difficult to imagine the speculations which may be indulged in as to the manner in which the road will probably be constructed; the volume of evidence which might be introduced for the purpose of showing what the demands of good engineering would require, and the probable effects resulting from the road as so constructed. And, after all, it would all be *speculation*. The road might not be constructed in the manner testified to by witnesses or supposed by the tribunal, and if it was the consequences might in fact be very different from those predicted. The evidence might show, and the tribunal conclude, that a stream could be bridged without interference with its current to the injury of the owner's remaining land. The fact might turn out to be otherwise. The owner would then sustain an injury for which he had not been and could not be compensated, except "in contemplation of law." On the other hand, if the evidence showed and the tribunal concluded that the bridge would interfere with the current of the stream to the detriment of the owner and made an allowance for this in their estimate of damages, and the fact proved to be otherwise, then the company would have to pay for injuries never sustained. But, adopting the principle here contended for, the tribunal would not concern itself with speculations as to bridging the stream, but would assume that no right would be acquired by the condemnation to interfere with its current to the detriment of the owner's remaining land. If, in constructing the bridge, such interference should result, the owner would then have his action for damages according to the actual facts, and justice would be done to both and wrong to neither.

§ 567. **Damages arising from construction of the works.**

—The authorities undoubtedly hold that the assessment of damages will be presumed to include all damages which arise from constructing the works in a reasonable and proper man-

ner, having regard to the efficiency of the works on the one hand and the interest of the land-owner on the other. Where a subsequent claim for damages is made, arising from the construction of works, the question will be whether the works have been constructed in a proper manner, and whether the damage necessarily results from the works as so constructed. If these questions are answered in the affirmative, then the damages complained of will be presumed to have been considered in estimating the damages, and no further recovery can be had.¹ If they are answered in the negative, then a recovery can be had in an appropriate common law action.²

§ 568. Damages from works on land to which the assessment does not relate.—The rule stated in the foregoing section applies only to damages from the construction of works upon the land to which the assessment relates. If parts of black acre and white acre are taken, and if the works as constructed upon black acre produce damage to white acre, then there is no presumption that these were included in the assessment to the proprietor of white acre, and he may recover therefor the same as though no land of his had been taken for the work.¹

§ 567.

¹ "In the absence of any negligence, unskillfulness, or mismanagement in the construction of the embankment or the road bed, the injury thereby done to the plaintiff's property must be considered as the natural and necessary consequence of what the corporation had acquired the lawful right to do; and such damages must be taken to have been included in the compensation assessed, or it was *damnum absque injuria.*" Clark's Admx. v. Hannibal & St. Joseph R. R. Co., 36 Mo. 202.

v. Hannibal & St. Joseph R. R. Co., 36 Mo. 202, 234.

² Clark's Admx. v. Hannibal & St. Joseph R. R. Co., 36 Mo. 202; McCormick v. Kansas City etc. R. R. Co., 57 Mo. 433; Van Schoick v. Delaware & Hudson Canal Co., 20 N. J. L. 249; Dearborn v. Boston etc. R. R. Co., 24 N. H. 179; Furniss v. Hudson R. R. Co., 5 Sandf. 551; Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Gilleland, 56 Pa. S. 445; Spencer v. Hartford etc. R. R. Co., 10 R. I. 14; I. & G. N. Ry. Co. v. Pape, 62 Tex. 313.

§ 568.

¹ Eaton v. Boston & Maine R. R. Co., 51 N. H. 504. For an account

§ 569. By interfering with the support of the adjacent soil.

—It not infrequently happens that, in the construction or improvement of highways and railroads, excavations are made so that the soil of the adjoining owner gives away and slides into the excavation. Some cases, and perhaps a majority, hold that there can be no recovery in such cases.¹ These cases proceed upon the theory that the right so to undermine the soil at any time when necessary to the proper constructing of the works was acquired and paid for at the time of the original taking. On the other hand, there are a number of cases which hold that, where land is taken for public use, the right of support for the adjoining soil is not taken, but the owner retains such right and the works must be constructed so as not to interfere with that right, or further compensation must be made.² For reasons already stated in a prior section, it seems to us that the latter cases are founded upon the better reason, and upon a more just and correct appreciation of the rights of the respective parties.³

§ 570. By bringing a street to grade.—Where a street is widened, it is held that the damages assessed should include any damages that will be occasioned by bringing the new part to the proper grade.¹ So in a proceeding to condemn land for opening a street, if the grades have been already established it has been held proper to show how the street

of this case see *ante*, § 58. See also *Delaware Canal v. Lee*, 22 N. J. L. 243.

§ 569.

¹ *Rome v. Omberg*, 28 Ga. 46; *Mitchell v. Rome*, 49 Ga. 19; *Hortsman v. Corrington & Lexington R. R. Co.*, 18 B. Mon. 218; *Boothby v. Androscoggin & Kennebec R. R. Co.*, 51 Me. 318; *Callendar v. Marsh*, 1 Pick. 418; *Radcliff's Executors v. Brooklyn*, 4 N. Y. 195; *Cheever v. Shedd*, 13 Blatch. 253.

² *Quincy v. Jones*, 76 Ills. 231; *Aurora v. Fox*, 78 Ind. 1; *Dyer v. St. Paul*, 27 Minn. 457; *Armstrong v. Same*, 30 Minn. 299; *Keating v. Cincinnati*, 38 Ohio St. 141; *Metropolitan Board of Works v. Metropolitan Ry. Co.*, 37 L. J. C. P. 281; S. C., 38 L. J. C. P. 172.

³ *Ante*, §§ 101, 151. 566.

§ 570.

¹ *Van Riper v. Essex Road Board*, 38 N. J. L. 23.

was to be constructed and to give compensation for any damages that will result from such construction.²

§ 571. By interfering with running streams.—Claims for subsequent damages from interferences with running streams usually arise with respect to railroads. In bridging streams the company must exercise due diligence to avoid injury to adjacent property. If it does not, it will be liable on the ground of negligence.¹ If it does exercise such diligence, any resulting damage will be presumed to have been included in the assessment.² By merely condemning a right of way the company acquires no right to dam³ or divert⁴ a stream, and any damages produced thereby may be recovered in a subsequent action.⁵

§ 572. By interfering with surface or subterranean waters.

—The doctrine with respect to these waters is discussed in a previous chapter.¹ It will there be seen that the rights of adjoining owners in respect to surface water differ in the different States, and that claims for subsequent damages by reason of interference with such waters are sometimes made to turn upon the question of negligence in the construction of the works,² and sometimes such interference is regarded

² *Portland v. Kamm*, 10 Or. 383; *Pursey v. Allegheny*, 98 Pa. S. 522. *Contra: In re Ridge Street, Allegheny City*, 29 Pa. S. 391. See, generally, for damages by a change of grade, *ante*, §§ 92–109.

§ 571.

¹ *Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Gilleland*, 56 Pa. S. 445; *Spencer v. Hartford, Providence & Fishkill R. R. Co.*, 10 R. I. 14.

² *Ibid.*

³ *Selma etc. R. R. Co. v. Keith*, 53 Ga. 178.

⁴ *Stodghill v. Chicago, Burlington & Quincy R. R. Co.*, 43 Ia. 26. See

Baltimore & Ohio R. R. Co. v. Magruder, 34 Md. 79.

⁵ See *ante*, chap. iv.

§ 572.

¹ *Ante*, §§ 88–90.

² *Canniff v. San Francisco*, 67 Cal. 45; *Drake v. Chicago, Rock Island & Pacific Ry. Co.*, 63 Ia. 302; *Miller v. Keokuk & Des Moines Ry. Co.*, 63 Ia. 680; *Clark's Admx. v. Hannibal & St. Joseph R. R. Co.*, 36 Mo. 202; *McCormick v. Kansas City etc. R. R. Co.*, 57 Mo. 433; *Nason v. Woonsocket Union R. R. Co.*, 4 R. I. 377; *Carriger v. Railroad Co.*, 7 Lea, 388.

as a new taking, for which additional compensation must be made.³

§ 573. Damages by blasting, trespass and the like.—The rights of the party condemning are confined to the land taken, and for any damages done to adjoining land by blasting,¹ by occupation or encroachments,² or by using it as a roadway,³ a recovery may be had.

§ 574. The assessment does not include damages resulting from the improper construction or negligent use of the works.—This is implied in the preceding section, and has already been referred to in the chapter upon damages.¹ If such damages arise at any time, the owner at the time may have his common law remedy therefor.

§ 575. Claims based upon changes in the plan of construction.—This is a question which we have considered in the chapter upon damages.¹ The principle of the cases cited in the preceding sections precludes a recovery for any such change. The express point has also been often decided adversely to any such claim.² The cases favoring a recovery will be found collated in section 481, *ante*.

¹ *Tearney v. Smith*, 86 Ills. 391; *Texas Central Ry. Co. v. Clifton*, 2 Tex. App. Civil Cases, p. 433; *ante* §§ 88-90.

§ 573.

¹ *Eaton v. European & North America Ry. Co.*, 59 Me. 520; *Tibbetts v. Knox & Lincoln R. R. Co.*, 62 Me. 437; *Hay v. Cohoes Co.*, 3 Barb. 42; *S. C.*, 2 N. Y. 159; *Tremain v. Same*, 2 N. Y. 163; *Carman v. Stubenville & Indiana R. R. Co.*, 4 Ohio St. 399; *Sabine v. Vermont Central R. R. Co.*, 25 Vt. 363; *ante*, § 146.

² See *Lauderbrun v. Duffy*, 2 Pa. S. 398, where such occupation was allowed by statute.

³ *Sabine v. Vermont Central R. R. Co.*, 25 Vt. 363.

§ 574.

¹ *Ante*, §§ 154, 482; *Rodemacher v. Milwaukee & St. Paul R. R. Co.*, 41 Ia. 297; *Steele v. Western Inland Lock Navigation Co.*, 2 Johns. 283; *New York v. Bailey*, 2 Denio, 433; *S. C.*, 3 Hill, 531; *Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Gilleland*, 56 Pa. S. 445; *Clothier v. Webster*, 12 C. B. N. S. 790; *S. C.*, 104 E. C. L. R. 789; 31 L. J. C. P. 316; 10 W. R. 624.

§ 575.

¹ *Ante*, § 481.

² *Cassidy v. Old Colony R. R. Co.*, 141 Mass. 174; *Moss v. St. Louis,*

§ 576. **Mistake in making the assessment.**—If the commissioners or jury make a mistake in the assessment of damages, by omitting an item of damages, which ought to have been allowed, by proceeding upon erroneous principles, or otherwise, the remedy must be sought in the proceedings themselves. Such mistake cannot be made the basis of an independent suit.¹

§ 577. **Statutes giving a remedy for damages not foreseen and estimated.**—Virginia has a statute which provides that the inquisition or judgment shall not be a bar to a further action for injuries not actually foreseen and estimated. Several cases have arisen under this statute, but they do not appear to have adjudicated anything of general interest.¹ Iowa has a similar statute.² If the injury was foreseen and nothing awarded for it, it was foreseen and estimated within the meaning of the statute.³ It cannot be presumed that damages to fence and timber a mile from a railroad, by fire from a locomotive, were taken into account and estimated when the road was laid out.⁴

Iron Mountain & Southern Ry. Co.,
85 Mo. 86; Butman *v.* Vermont
Central R. R. Co., 27 Vt. 500.

Hydraulic Co., 30 Conn. 316. *Post*,
§ 652.

§ 577.

¹ Commonwealth *v.* Favis, 5 Rand. 691; Whitworth *v.* Puckett, 2 Gratt. 528; Calhoun *v.* Palmer, 8 Gratt. 88; Southside R. R. Co. *v.* Daniel, 20 Gratt. 344.

² Watson *v.* Van Meter, 43 Ia. 76.

³ *Ibid.*

⁴ Rodemacher *v.* Milwaukee & St. Paul R. R. Co., 41 Ia. 297.

CHAPTER XXV.

RIGHTS OF THE RESPECTIVE PARTIES IN THE PROPERTY CONDEMNED.

§ 578. General principles as to obtaining possession.—It has already been shown that, upon a proper construction of the constitution, the owner's possession cannot be disturbed until his just compensation has been paid or tendered.¹ Many cases, however, hold a contrary doctrine, and some constitutions provide for possession by the party condemning upon giving security. The only general rule which can be laid down is that possession cannot be lawfully taken without a strict compliance with the statute which applies to the particular case. This rule applies to all the States. But what the legislature may lawfully authorize in this respect will depend upon the constitution of the State as interpreted by the courts. Where the statute requires certain notice to be given the owner before entry is made, an entry without giving such notice is a trespass.² Where proceedings are instituted to lay out a highway, no entry can be made until such proceedings are fully completed.³ In the absence of statutory authority, the court cannot authorize possession pending proceedings.⁴

§ 579. Statutes permitting possession upon a tender or deposit of the damages awarded.—Where the damages have been duly ascertained, there is no valid objection to a statute

§ 578.

¹ *Ante*, §§ 456–459.

² *Taylor v. Marcy*, 25 Ills, 518; *Dunbar v. Wightman*, 51 Mo. 432.

³ *Linblom v. Ramsey*, 75 Ills. 246; *Road in Bucks County*, 3 Whart. 105; *Patchin v. Doolittle*, 3 Vt. 457;

Patchin v. Morrison, 3 Vt. 590.

⁴ *Coburn v. Pacific Lumber & Mill Co.*, 46 Cal. 31; *Loomis v. Andrews*, 49 Cal. 239; *San Mateo Water Works v. Sharpstein*, 50 Cal. 284; *Matter of Saratoga & Schenectady R. R. Co.*, 66 How. Pr. 42.

which permits the condemning party to have possession upon a tender of the amount to the owner, or upon making a deposit of the same for his benefit. The tender or deposit cannot be made until the award or verdict is approved by the court. In a proceeding to condemn for railroad purposes, the company, pending a motion for new trial, deposited the amount of the verdict and took possession. Afterwards a new trial was granted. The company was enjoined from further interference.¹ To be effectual the tender or deposit should be made in accordance with the statute and unconditionally.²

§ 580. Possession pending an appeal upon depositing the damages awarded.—Statutes permitting the party condemning to take possession pending an appeal by either party, upon making a deposit of the damages awarded, are uniformly upheld by the courts.¹ But, in the absence of a statute permitting it, the party condemning cannot obtain the right to possession pending an appeal by tendering or depositing the damages awarded.² If on the appeal the dam-

§ 579.

¹ *Wagner v. Railway Co.*, 38 Ohio St. 32.

² *Arnold v. Covington & Cincinnati Bridge Co.*, 1 Duvall, 372; *Lull v. Curry*, 10 Mich. 397; *Kanne v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 423.

§ 580.

¹ *Baltimore etc. R. R. Co. v. Johnson*, 84 Ind. 420; *Lake Erie & Western R. R. Co. v. Kinsey*, 87 Ind. 514; *Peterson v. Ferreby*, 30 Ia. 327; *Hastings v. Burlington etc. R. R. Co.*, 38 Ia. 316; *Downing v. Des Moines Northwestern Ry. Co.*, 63 Ia. 177; *Central Branch Union Pacific R. R. Co. v. Atchison etc. R. R. Co.*, 28 Kan. 453; *Arnold v. Covington & Cincinnati Bridge Co.*, 1 Duvall, 372; *State v. Dick-*

son, 3 Mo. App. 464; *St. Louis & San Francisco Ry. Co. v. Evans & Howard Fire Brick Co.*, 85 Mo. 307; S. C. 15 Mo. App. 152; *Cooper v. Chester R. R. Co.*, 19 N. J. Eq. 199; *Doughty v. Somerville etc. R. R. Co.*, 21 N. J. L. 442; *Mercer & Somerset R. R. Co. v. Delaware & Bound Brook R. R. Co.*, 26 N. J. Eq. 464; *Matter of New York Central R. R. Co.*, 60 N. Y. 116; *Matter of New York & Harlem River R. R. Co.*, 98 N. Y. 12; S. C., 39 Hun, 338; *Schuller v. Northern Liberties etc. R. R. Co.*, 3 Whart. 555; *Railroad Co. v. Foreman*, 24 W. Va. 662.

² *Colville v. Langdon*, 22 Minn. 565; *Browning v. Camden etc. R. R. Co.*, 4 N. J. Eq. 47.

ages are increased, the whole amount must be paid or tendered, or the right to possession will cease³ and the property may be recovered in ejectment,⁴ or its further use prevented by injunction.⁵ Where in a railroad case the deposit was made with the sheriff pending an appeal, and the money was lost through his insolvency, it was held to be the loss of the company, and that the owner could recover possession unless the full amount of damages awarded on appeal was paid to him.⁶

§ 581. Right of the owner to the damages deposited in such cases.—The only serious question with respect to the statutes considered in the foregoing section is the right of the owner to the money deposited, immediately upon possession being taken of his property. The right of the owner to appeal may be subjected to such conditions as the legislature sees fit to impose. When the damage have once been ascertained by a competent tribunal, the constitution is satisfied and the legislature is under no necessity of allowing any appeal therefrom. As it may withhold the appeal altogether, it may annex such conditions as it pleases.¹ The right of the owner to appeal, therefore, may be made conditional upon the party condemning being let into possession upon such terms as the legislature deem equitable, such as the deposit of the damages awarded, or the giving of security therefor, or the like. The first award is the just compensation to which the owner is entitled until it is revised on appeal or otherwise. If he is satisfied with the amount, the

³ Lake Erie & Western R. R. Co. v. Kinsey, 87 Ind. 514; Peterson v. Ferreby, 30 Ia. 327; Downing v. Des Moines Northwestern Ry. Co., 63 Ia. 177; White v. Wabash etc. Ry. Co., 64 Ia. 281; Levering v. Philadelphia etc. R. R. Co., 8 W. & S. 459; Railroad Co. v. Foreman, 24 W. Va. 662.

⁴ Lake Erie & Western R. R. Co.

v. Kinsey, 87 Ind. 514; Levering v. Philadelphia etc. R. R. Co., 8 W. & S. 459.

⁵ Peterson v. Ferreby, 30 Ia. 327.

⁶ White v. Wabash, St. Louis & Pacific Ry. Co., 64 Ia. 281.

§ 581.

¹ Central Branch U. P. R. R. Co. v. Atchison etc. R. R. Co., 28 Kan. 453.

legislature cannot authorize an entry upon his property until this amount is paid, or such a disposition made of it as is equivalent to payment. If it is deposited, it must be deposited subject to the order of the owner. This being so, a law which permits the party condemning to take possession pending an appeal by him, upon depositing the amount of the first award to be held until the appeal is determined, would be unconstitutional and void, at least so far as it withheld the money deposited from the owner.² This conclusion is based upon the assumption that there is no special constitutional provision covering the matter, and that a proper interpretation of the general constitutional provision requires that compensation shall be paid before the property is entered upon.³

§ 582. Possession upon giving security for the compensation.—The constitutions of some of the States recognize the right to enter upon property upon giving security for the payment of the just compensation.¹ The constitution of Colorado provides, “That private property shall not be taken or damaged for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three free-holders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested.” This was held to recognize the fact that there might be *needful* interference, and to imply that such interference might be authorized. A law authorizing an entry pending proceedings, upon the deposit with the clerk of the court of a sum sufficient to

² *Meily v. Zurmehly*, 23 Ohio St. 627. Consult also *State v. Lubke*, 15 Mo. App. 152; *S. C.*, 85 Mo. 307; *Matter of New York & Harlem River R. R. Co.*, 98 N. Y. 12.

³ *Ante*, §§ 456-459.
§ 582.

¹ See *Weir v. St. Paul etc. R. R. Co.*, 18 Minn. 155; *Riffe v. Chicago etc. R. R. Co.*, 22 Minn. 44.

pay the damages which would probably be awarded, such sum to be ascertained by the judge before whom the proceedings are pending, was held valid under this provision.² In other States laws permitting an entry upon giving security are upheld upon the ground that the payment of the compensation need not precede the entry.³ Where, under such statutes, the practice is not prescribed, it is proper for the court to hear evidence for the purpose of fixing the amount of the bond.⁴ Where the bond presented is first rejected by the court and afterwards approved, an entry in the meantime is a trespass.⁵ But, according to principles already discussed, where the constitution does not provide for possession upon giving security, such laws are invalid.⁶

§ 583. What constitutes an entry.—An entry is some act of possession by authority of the party condemning. The mere fact that contractors, without authority or consent of the party condemning, take their tools and wagons upon the property is not an entry.¹ Where a small part of plaintiff's lot was embraced in the location for the right of way of a railroad, but the road was constructed without disturbing his lot, which was fenced, and afterwards a telegraph wire was stretched over it by a company authorized to string a line of wire by the railroad company, it was held there had been no entry on the lot by the railroad company, and that the award could not be recovered.² Under a statute which required that possession should be taken of property condemned for a street within two years from the time the right of posses-

² *McClain v. People*, 9 Col. 190.

³ See *Wadhams v. Lackawana etc. R. R. Co.*, 42 Pa. S. 303; *Sling-luff v. Wissahickon Turnpike Co.*, 1 Phila. 379; *Application of Philadelphia etc. R. R. Co.*, 7 Phila. 461.

⁴ *Ibid.*

⁵ *Deinmick v. Broadhead*, 75 Pa. S. 464.

⁶ *Moody v. Jacksonville etc. R. R. Co.*, 20 Fla. 597; *State ex rel. Moody v. Same*, 20 Fla. 616; *ante*, §§ 456-459.

§ 583.

¹ *Standish v. Liverpool*, 1 Drewry, 1.

² *Dimmick v. Council Bluffs etc. R. R. Co.*, 58 Ia. 637.

sion accrued, it was held that any entry upon any part was an entry upon all the lots and lands embraced in the same petition.³

§ 584. Rights of the parties in land taken for railroad right of way.—Where land is taken for a right of way for a railroad, the company may make any use of the land which, directly or indirectly, contributes to the safe, economical and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands.¹ The company may place its tracks on any part of the right of way,² and may change their location at pleasure.³ It may construct its road-bed in any way it pleases and change the mode of construction at any time,⁴ provided always that it does not interfere with the rights of adjoining proprietors. It may dig a well on the right of way for the purpose of securing a supply of water, though the effect may be to drain a spring on adjoining land,⁵ or construct a line of telegraph for use in connection with operating the road.⁶ So the company may erect or permit the erection by private parties, upon the right of way, of suitable buildings for use in connection with the business of the road,⁷ but not of buildings

¹ Poor *v.* Blake, 123 Mass. 543.

§ 584.

² Brainard *v.* Clapp, 10 Cush. 6; Curtis *v.* St. Paul etc. R. R. Co., 20 Minn. 28. As to what is an interference with the rights of property pertaining to adjacent lands, see *ante*, chap. xxiv.

³ State *v.* Sioux City & Pacific R. R. Co., 43 Ia. 501; Commonwealth *v.* Haverhill, 7 Allen, 523.

⁴ Dougherty *v.* Wabash, St. Louis & Pacific Ry. Co., 19 Mo. App. 419; Commonwealth *v.* Haverhill, 7 Allen, 523.

⁵ Cassidy *v.* Old Colony R. R. Co., 141 Mass. 174; Moss *v.* St.

Louis, Iron Mountain & Southern Ry. Co., 85 Mo. 86; I. G. & N. R. R. Co. *v.* Bost., 2 Tex. App. Civil Cas. p. 334.

⁶ Hougan *v.* Milwaukee & St. Paul Ry. Co., 35 Ia. 558.

⁷ Western Union Tel. Co. *v.* Rich, 19 Kan. 517; see *ante*, §§ 140, 141.

⁷ Illinois Central R. R. Co. *v.* Walthen, 17 Ills. App. 582; Worcester *v.* Western R. R. Co., 4 Met. 564; Boston Gas Light Co. *v.* Old Colony & Newport Ry. Co., 14 Allen, 444; Evans *v.* McLucas, 15 S. C. 67; Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. 454.

or structures for private business unconnected with the operation of the road.⁸

§ 585. The company an adjoining proprietor, and limited by the maxim, *sic utere tuo ut alienum non laedas*.—The rights of the company in constructing and using its road are limited by its obligations to the adjoining proprietors, which are the same as between individuals whose premises are contiguous.¹ It must not take away the support of the adjacent soil,² or interfere with the adjoining owner's rights respecting surface water³ or running streams.⁴ It cannot, therefore, either divert or dam a stream on its right of way to the injury of the adjacent owner,⁵ or interfere with the flow of surface water in a way which would be actionable as between private individuals.⁶ A railroad cannot take, from a stream which it crosses, water for its locomotives beyond the quantity which an individual might take as a riparian proprietor.⁷ If it needs more, it must obtain it by condemnation.⁸

§ 586. Whether the company's possession is exclusive.—There is no question but that the company is entitled to the exclusive possession of the right of way, *if such possession is necessary to the proper operation of the road*. Some courts hold that the company is entitled to such exclusive possession from the nature of the case and as matter of law.¹ Other

⁸ Proprietors of Lock & Canals *v.* Nashua & Lowell R. R. Co., 104 Mass. 1; Lance's Appeal, 55 Pa. S. 14.

Ry. Co. *v.* Dyche, 31 Kan. 120. See Baltimore & Ohio R. R. Co. *v.* Magruder, 34 Md. 79.

§ 585.

¹ *Ante*, § 566.

² *Ante*, §§ 151, 569.

³ *Ante*, §§ 89, 572.

⁴ *Ante*, §§ 60 *et seq.*, 571.

⁵ Selma, Raleigh & Dalton R. R. Co. *v.* Keith, 53 Ga. 178; Stodghill *v.* Chicago, Burlington & Quincy R. R. Co., 43 Ia. 26; Union Pacific

⁶ Payne *v.* Morgan's Louisiana & Texas R. R. Co., 38 La. An. 164.

⁷ Pennsylvania R. R. Co. *v.* Miller, 112 Pa. S. 34.

⁸ *Ibid.*

§ 586.

¹ Lake Superior & Mississippi R. R. Co. *v.* Greve, 17 Minn. 322; Jackson *v.* Rutland & Burlington R. R. Co., 25 Vt. 150; Connecticut

courts hold that it is a question of fact whether the necessities of the company require the exclusive occupancy of the right of way, and what use of the same by the owner of the fee is not inconsistent with the company's rights.² The latter is the prevailing doctrine, where only an easement vests in the company.³ The owner of the fee would undoubtedly have the right to cross the right of way, for purposes connected with the use of his remaining land, and in a manner which would not interfere with the operation of the road,⁴ but this right is usually provided for by statute.

§ 587. Right to trees, herbage, materials, etc.—As intimated in the last section, where only an easement is taken the prevailing doctrine is that the owner of the fee may make any use of the right of way which does not interfere with the rights of the company.¹ The company has a right to use the timber and materials so far as necessary for the construction and repair of its roadway,² but it cannot sell or otherwise dispose of them merely for profit.³ The company may remove timber or materials in so far as may be necessary to construct or to safely and conveniently operate the road.⁴ But the company may not sell or otherwise appro-

& Passumpsic Rivers R. R. Co. *v.* Holton, 32 Vt. 43; Troy & Boston R. R. Co. *v.* Potter, 42 Vt. 265; Brainard *v.* Clapp, 10 Cush. 6.

² Kansas Central R. R. Co. *v.* Allen, 22 Kan. 285; Kansas City & Emporia R. R. Co. *v.* Kregelo, 32 Kan. 608.

³ See cases cited in next section.

⁴ Mississippi etc. R. R. Co. *v.* Wooten, 36 La. An. 441; Presbrey *v.* Old Colony & Newport R. R. Co., 103 Mass. 1.

§ 587.

¹ Kansas Central Ry. Co. *v.* Allen. 22 Kan. 285.

² Preston *v.* Dubuque & Pacific

R. R. Co., 11 Ia. 15; Chapin *v.* Sullivan R. R. Co., 39 N. H. 564; Taylor *v.* New York & Long Branch R. R. Co., 38 N. J. L. 28; Aldrich *v.* Drury, 8 R. I. 554. In Evans *v.* Haefner, 29 Mo. 141, it is held that the title to the minerals and materials above the grade of the road is in the company, while below the grade of the road they remain in the owner of the fee.

³ Blake *v.* Rich, 34 N. H. 282; Aldrich *v.* Drury, 8 R. I. 554.

⁴ Toledo etc. Ry. Co. *v.* Green, 67 Ills. 199; Brainard *v.* Clapp, 10 Cush. 6.

priate to its own use such materials, except for the construction and repair of its road.⁵ But it doubtless might do so, after giving the owner notice and reasonable opportunity to remove them.⁶ The owner has a right to the herbage growing on the right of way,⁷ and may remove timber and materials not needed by the company and which can be removed without detriment to the safe and proper operation of the road.⁸ But the owner may not remove the turf, as that would tend to incommodate travelers by dust.⁹

§ 588. Property taken for other railroad uses.—Where land was conveyed to a railroad company for railroad and depot purposes, it was held not improper to permit the erection thereon by private parties of elevators, corn-cribs, lumber-yards, lime-houses and the like for the purpose of facilitating business with the road.¹ So, where land is taken for depot purposes and is actually used for such purposes, it is no objection that, as incidental to such use, the station-master is permitted to cultivate a part of the ground or keep a boarding-house, or carry on a mercantile business thereon.²

§ 589. Property taken for highways and streets.—The same general principles apply to highways as to railroads. Where an easement is taken for a public highway, the public

⁵ So held in respect to coal severed from the right of way and sold by the company. *Lyon v. Gormley*, 53 Pa. S. 261. See also *Briston v. Dubuque & Pacific R. R. Co.*, 11 Ia. 15; *Blake v. Rich*, 34 N. H. 282; *Aldrich v. Drury*, 8 R. I. 554.

⁶ See *Clark v. Dasso*, 34 Mich. 86.

⁷ *Lake v. Rich*, 34 N. H. 282. *Contra*: *Troy & Boston R. R. Co. v. Potter*, 42 Vt. 265.

⁸ *Preston v. Dubuque & Pacific R. R. Co.*, 11 Ia. 15; *Vermilya v. Chicago, Milwaukee & St. Paul Ry. Co.*, 66 Ia. 606; *Blake v. Rich*, 34 N. H. 282. As to mining coal see *Philadelphia & Reading R. R. Co. v. Lawrence*, 10 Phila. 604.

⁹ *Connecticut & Passumpsic Rivers R. R. Co. v. Holton*, 32 Vt. 43.

§ 588.

¹ *Illinois Central R. R. Co. v. Wathen*, 17 Ills. App. 582.

² *Hoggatt v. Vicksburg etc. R. R. Co.*, 34 La. An. 624; *Pierce v. Boston & Lowell R. R. Co.*, 141 Mass. 481; *Hamilton v. Annapolis & Elk Ridge R. R. Co.*, 1 Md. 553; *S. C. v. Md. Ch.* 107.

acquire a paramount right to use and improve the land taken for highway purposes, which includes not only the right of passage, but such other incidental uses as have been immemorially accustomed to be made of public highways, such as the laying of sewers, gas and water pipes, and the like.¹ The uses which can be made of a highway without further compensation to the owner of the fee, and the uses which cannot be so made, have been discussed at length in a former chapter.² Subject to the paramount right of the public, the rights of the owner of the fee remain the same as though the public easement did not exist. As against a stranger not using the land as a highway, his rights are the same as though the highway had never been established, and he may maintain his rights against such stranger by the usual remedies.³ As against the public, he may make any use of the land which does not interfere with the use and enjoyment of the same as a highway. These general principles are established by numerous decisions extending back to the earliest times.⁴

From this statement of general principles it is evident

§ 589.

¹ *Ante*, §§ 126-132.

² Chap. v.

³ *Taylor v. Armstrong*, 24 Ark. 102; *Peck v. Smith*, 1 Conn. 103; *Reed v. Leeds*, 19 Conn. 182; *Thommas v. Ford*, 63 Md. 346; *Gidney v. Earl*, 12 Wend. 98; *Piollet v. Simmons*, 106 Pa. S. 95; *Bolling v. Petersburg*, 3 Rand. 563.

⁴ *Angell on Highways*, chap. vii; *Baker v. Shepard*, 24 N. H. 208; *Adams v. Emerson*, 6 Pick. 57; *Barclay v. Howell*, 6 Pet. 498; *Jackson v. Hatheway*, 15 Johns. 447; *Palatine v. Kreuger*, 121 Ills. 72, reversing 20 Ills. App. 420. In this case a highway which was originally laid out as a country road had be-

come a village street. The village board of trustees ordained that it should not be lawful for any person to remove any dirt or earth from any of the streets within the limits of said town for any personal or individual purpose whatever, without first obtaining the consent of said board. Kreuger, acting under the authority of the owner of the fee, removed gravel from a street of the village in violation of the ordinance. He was convicted and fined for such violation by the criminal court. The appellate court reversed the judgment of the criminal court, but the Supreme Court reversed the appellate court, and sustained the conviction.

that the rights which the owner of the fee may exercise must depend upon the extent of the use which the public needs *require*. This is very different in remote and sparsely-settled country districts from what it is in populous cities and villages. Moreover, the rights of the owner of the fee in the same highway are liable to be curtailed by changes in the surroundings which increase the use of the highway by the public. That which is laid out as a country road may become a city or village street, and, where a single traveled path once sufficed, the entire surface may be required. In such case the rights of the owner must yield to the demands of the public.

The public may use the whole or any part of the right of way, and, where only a part is used, the public authorities may locate the traveled path anywhere within the right of way.⁵ Drains may be constructed for the purpose of improving or preserving the traveled road.⁶ But under cover of this right drains cannot be laid for the purpose of draining private property.⁷ The public acquire no right to the use of springs in the highway, and cannot divert them for the purpose of making a public watering place.⁸ The owner of the fee cannot change the location of the road where it crosses his land.⁹ He may deposit materials on the surface of the way,¹⁰ plant shade or ornamental trees therein,¹¹ set hitching posts,¹² and make drains across, along or under-

⁵ But in Iowa the supervisors were enjoined from building a bridge on one side of the road, next to the plaintiff's line, where it would necessitate the destruction of shade trees planted by the plaintiff. *Quinton v. Burton*, 61 Ia. 471.

⁶ *Highway Comrs. v. Ely*, 54 Mich. 173.

⁷ *Conrad v. Smith*, 32 Mich. 429.

⁸ *Suffield v. Hatheway*, 44 Conn.

521; *Old Town v. Dooley*, 81 Ills. 255.

⁹ *Holcraft v. King*, 25 Ind. 352.

¹⁰ *Piolett v. Simmons*, 106 Pa. S. 95.

¹¹ *Quinton v. Burton*, 61 Ia. 471; *Commonwealth v. Hanck*, 103 Pa. S. 536.

¹² *Commonwealth v. Hanck*, 103 Pa. S. 536. It has been held that public agents will be enjoined from removing trees when not necessary. *Bills v. Belknap*, 36 Ia. 583.

neath the surface of the road.¹³ So the owner of the fee may excavate underneath the surface and use the space in connection with his adjacent property.¹⁴ Wells which have been dug by permission of the public authorities may be filled up if necessary for the health or safety of the public.¹⁵ The public cannot place structures on the soil which have no connection with its use as a highway.¹⁶

§ 590. Right to trees, herbage and materials, etc.—The herbage growing upon the highway belongs to the owner of the fee, and the public cannot use it or authorize it to be depastured.¹ The authorities may cut it for the purpose of improving the highway, but after severance it belongs to the owner of the soil.² In regard to timber and materials, the public have a right to use so much as may be necessary for the construction and repair of the road.³ The materials taken from one part of a highway may be used upon any other part thereof, or upon a different highway.⁴ In New York it is held that the public can use only such materials

¹³ *Perley v. Chandler*, 6 Mass. 454; *Groton v. Haines*, 36 N. H. 388; *Woodring v. Forks Township*, 28 Pa. S. 355.

¹⁴ *McCarthy v. Syracuse*, 46 N. Y. 194; *Papworth v. Milwaukee*, 64 Wis. 389.

¹⁵ *Ferrenbach v. Turner*, 86 Mo. 416.

¹⁶ *Winchester v. Capron*, 63 N. H. 605.

§ 590.

¹ *Woodruff v. Neal*, 28 Conn. 165; *Stackpole v. Healy*, 16 Mass. 33; *Adams v. Emerson*, 6 Pick. 57; *Cole v. Drew*, 44 Vt. 49; *contra*: *Griffin v. Martin*, 7 Barb. 297; *Hardeburgh v. Lockwood*, 25 Barb. 9.

² *Cole v. Drew*, 44 Vt. 49.

³ *New Haven v. Sargent*, 38 Conn. 50; *Hovey v. Mayo*, 43 Me. 322;

Bissell v. Collins, 28 Mich. 277; *Niagara Falls Suspension Bridge Co. v. Buchannan*, 4 Lans. 523; *Robert v. Sadler*, 37 Hun, 377 (reversed in 104 N. Y. 229); *Stockley v. Robbstown Bridge Co.*, 5 Watts. 546; *Huston v. Fort Atkinson*, 56 Wis. 350. In the following cases it was held that the public might cut trees growing on the highway, but could not use them to build or repair the road: *Baker v. Shepard*, 24 N. H. 208; *Tucker v. Eldred*, 6 R. I. 404; see also *Kelly v. Donahoe*, 2 Met. (Ky.) 483.

⁴ *Ibid*; *Robert v. Sadler*, 104 N. Y. 229; *contra*: *Smith v. Rome*, 19 Ga. 89; *Overman v. May*, 35 Ia. 89; *Althen v. Kelly*, 32 Minn. 280; *Cuming v. Prang*, 24 Mich. 514; and see *LeBen v. Gerard*, 4 La. An. 30.

as are above the established grade.⁵ The rights of the public to such materials are paramount and may be protected by injunction.⁶ Subject to these rights of the public, the owner of the fee is the owner of the trees and materials in the roadway, and may take and use them in any way which does not interfere with the rights of the public.⁷ In regard to superfluous materials, the proper course would seem to be to notify the owner of the fee to remove them if he desires to do so. If, after a reasonable time has elapsed, he has not done so, then the public authorities may make any disposition of them they see fit.⁸

§ 591. Property taken for turnpikes.—A turnpike is a public highway which is built and maintained by private persons or corporations in consideration of the privilege of collecting certain tolls for its use. The same principles apply in respect to the rights of the owner of the fee and of the franchise as apply in the case of highways, and they need not be repeated. One additional feature may be noticed, and that is the right of the owner of the franchise to erect and maintain necessary toll-houses and toll-gates, and to remove any trees or soil that may be necessary for that purpose.¹ But, after a toll-house ceases to be used for any purpose

⁵ *Robert v. Sadler*, 104 N. Y. 229. In this case an injunction was granted to prevent the taking of gravel from below the grade for use on the road.

⁶ *New Haven v. Sargent*, 38 Conn. 50.

⁷ *Deaton v. County of Polk*, 9 Ia. 594; *Dubuque v. Benson*, 23 Ia. 248; *Trustees of Hawesville v. Howes' Heirs*, 6 Bush, (Ky.) 232; *Makepeace v. Worden*, 1 N. H. 16; *Winter v. Petersen*, 24 N. J. L. 524; *Jackson v. Hatheway*, 15 Johns. 447; *Higgins v. Reynolds*, 31 N. Y. 151; *Fisher v. Rochester*, 6 Lans.

225; *Phifer v. Cox*, 21 Ohio St. 248; *Sanderson v. Haverstick*, 8 Pa. S. 294; *Chambers v. Furry*, 1 Yates, 167.

⁸ *Clark v. Dasso*, 34 Mich. 86. But see *Upham v. Marsh*, 128 Mass. 546, which holds that such a removal may be made by the public without notice to the owner of the fee. See also *Prather v. Ellison*, 10 Ohio, 396.

§ 591.

¹ *Tucker v. Tower*, 9 Pick. 109; *Ward v. Marietta etc. Co.*, 6 Ohio St. 15; *Ridge Turnpike Co. v. Stoever*, 6 W. & S. 378.

connected with the road, its continuance becomes unlawful and the owner of the fee may maintain ejectment for the ground occupied by it.² And no structure can be erected which is not for use in connection with the operation of the turnpike.³

§ 592. Property taken for other uses.—Where a right of flowage has been condemned, the owner of the land flowed cannot fill it up so as to exclude the water.¹ But he may make any use of it which does not materially interfere with its use for the storage of water, and consequently may use it for boom purposes or for cutting ice, to the exclusion of the mill-owner.² Where a stream was taken for supplying water to a town, it was held that a riparian owner might use it in any way which did not impair the public use.³ Where a strip of land is taken for a line of telegraph, the owner of the fee may make any use of it not inconsistent with the rights of the company.⁴ Where land is taken for a reservoir,⁵ or for a school house or other public building, the public use is exclusive.⁶

§ 593. When a fee is taken for public use.—When a fee is taken for a railroad, highway, turnpike, canal or other public use, the public or its representatives acquire the full and absolute dominion over the property and the materials composing it, for the uses specified, and the owner from whom it was taken has no more right therein, while it continues to be used for the purpose for which it was acquired, than he has in the land of a stranger.¹ The statute may

¹ Feiber *v.* Coyle, 3 Watts, 407.

⁴ Lockie *v.* Mutual Union Tel. Co., 103 Ills. 401.

² Ridge Turnpike Co. *v.* Stoever, 6 W. & S. 378.

⁵ Finn *v.* Providence Gas & Water Co., 99 Pa. S. 631.

§ 592.

¹ Boston & Roxbury Mill Corporation *v.* Newman, 12 Pick. 467,

⁶ Eighth School District *v.* Cope-land, 2 Gray, 414.

² Jordan *v.* Woodward, 40 Me.

§ 593.

317; Edgeton *v.* Huff, 26 Ind. 35.

¹ Chicago & Mississippi R. R.

³ Parson's Water Co. *v.* Knapp,

Co. *v.* Patchin, 16 Ills. 198; Zinc

33 Kan. 752; Kane *v.* Baltimore, 15
Md. 240.

Co. *v.* La Salle, 117 Ills. 411; Bur-

nnett *v.* N. & C. R. R. Co., 4 Sneed,

reserve certain rights to the adjoining owner, but unless so reserved he has none whatever.

§ 594. **Transfers by the party condemning.**—Where property has been taken for public use and become vested in the State or in a corporation or individual for such use, the right so acquired may be transferred in such manner as may be authorized by law. So long as the use is not changed, it is immaterial to the owner by whom the right is exercised. As all such rights emanate from the State, and corporations and individuals are but its agents to effect a public object, such transfers amount to nothing more than a change of the agency selected to carry out the public purpose. Such transfer in the case of railroads, turnpikes, canals, water-works and the like are of almost daily occurrence.¹ In *Crolley v. Minneapolis & St. Louis Ry. Co.*² the court say: “In theory the land was taken, and the right to apply it to the public use proposed acquired, for the State. It is true, the title to the right thus acquired vested in the corporation, but it so vested in it only for the purpose of employing it in the public use. So far as taking and holding lands under the sovereign right of eminent domain is concerned, railroad corporations must be deemed agencies through which the State exercises that right, to subserve the public needs. When taken for railroads, the land is taken under authority of the State, to be applied under the same authority to a public use, to wit, to a highway, public in a certain sense. Upon no other theory can the taking and holding of real estate of private persons, without their consent, be justified. It is the purpose for which the land is taken, and not the

528; *Baker v. Johnson*, 2 Hill, 342; *Noll v. Dubuque etc.* R. R. Co., 32 Water Works Co. v. Burkhart, 41 Ind. 364. Ia. 66; *Harrison v. Lexington etc. Co.*, 9 B. Mon. 470; *Crolley v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 541; *Barlow v. Chicago, Rock Island & Pacific R. R. Co.*, 29 Ia. 276.

§ 594.

¹ *Chase v. Sutton Manf. Co.*, 4 Cush. 152; *People v. Michigan Southern R. R. Co.*, 3 Mich. 496; *Smith v. McAdams*, 3 Mich. 50; ² 30 Minn. 541, 544.

particular corporation which the State authorizes to take it, that determines whether the use is public or not.

"In this case the State authorized the taking, for the purpose of a railroad from the city of Minneapolis to the south shore of Lake Minnetonka. The use would have been the same had it authorized any other company than the Northwestern to take it for that purpose. Who holds and uses the land for the purpose for which it is taken, does not affect the character of the use. So long as the land continues to be applied to the purpose for which it was taken,—to wit; as a right of way for a railroad between the two points indicated,—the use remains the same, whether it be so applied by the corporation which originally took the land, or by some other. Who owns the railroad, whose duty it is to maintain and operate it for the benefit of the State and the public, and who does in fact so maintain and operate it, is immaterial so far as the character of the use is concerned. When the St. Louis Company took the transfer of the right of way, and constructed, maintained and operated a railroad over it, having authority from the State to acquire and hold rights of way, and to construct, maintain and operate a railroad between the two points, it applied the right of way to the very use for which it was taken. The right of way seems to have been transferred for the purpose of having it so applied; not for the purpose of giving up the enterprise, but for the purpose of having it carried out by the grantee company. We fail to see how that can be deemed an abandonment of the use or of the right of way. A sale of a right of way is not equivalent to an abandonment."

Where the legislature repealed the charter of a railroad company, it was held the roadway did not revert, but remained the property of the State, which might continue to use it for railroad purposes.³

³ Erie & North East R. R. Co. v. effect, Tifft v. Buffalo, 82 N. Y. Casey, 26 Pa. S. 287. To same 204.

§ 595. Effect of forced sales.—As a general rule, where property is taken for a railroad, turnpike, canal or any like use by a corporation or individual vested with the franchise of operating such a work, it cannot, except by special statutory authority, be levied upon and sold under an execution against the corporation or individual in whom the right is vested.¹ The property is indissolubly linked to the franchise, and cannot be separated from it.²

§ 596. Reversion of lands taken for public use.—Where only an easement is taken for public use, and the use is abandoned, the land reverts to the original proprietor, his heirs or assigns, or perhaps more properly the land is relieved of the burden cast upon it, and the owner of the fee is restored to his complete dominion over it.¹ And an easement taken for one purpose cannot be used for a different purpose. Thus an easement taken for a canal cannot be transferred to a railroad to be used for railroad purposes, even by authority of the legislature.²

But, where a fee simple is taken, the weight of authority is that there is no reversion, but, when the particular use ceases, the property may, by authority of the State, be disposed of for either public or private uses.³

§ 595.

¹ *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *Spear v. Allison*, 20 Pa. S. 200; *Hill v. Western Vermont R. R. Co.*, 32 Vt. 68; *Gue v. Tide Water Canal Co.*, 24 How. 257; *East Alabama Ry. Co. v. Visscher*, 114 U. S. 340. Such a sale was authorized by statute in the following case: *Indianapolis & Cumberland Gravel Road Co. v. State*, 105 Ind. 37.

² *East Alabama Ry. Co. v. Visscher*, 114 U. S. 340. But, if a railroad takes a fee and abandons the use for railroad purposes, the property becomes subject to levy and

sale upon execution. *Benedict v. Heineberg*, 43 Vt. 231.

§ 596.

¹ *Benham v. Potter*, 52 Conn. 248; *Dunham v. Williams*, 36 Barb. 136; *McCombs v. Stewart*, 40 Ohio St. 647; *Day v. Railroad Co.*, 44 Ohio St. 406; *Jessup v. Loucks*, 55 Pa. S. 350; *Pittsburgh & Lake Erie R. R. Co. v. Bruce*, 102 Pa. S. 23; *Healey v. Babbitt*, 14 R. I. 533.

² *Strong v. Brooklyn*, 68 N. Y. 1; *Pittsburgh & Lake Erie R. R. Co. v. Bruce*, 102 Pa. S. 23.

³ *Nelson v. Fleming*, 56 Ind. 310; *Frank v. Evansville & Indianapolis R. R. Co.*, 111 Ind. 132; *Hayward*

The city of New York acquired the fee of lands for an almshouse. After using it for that purpose for more than a quarter of a century, it sold the property for private uses and established the almshouse elsewhere. It was held that it had a right to do so and that the land did not revert.⁴ A fee taken by the State for a canal may be used as a street after the canal is abandoned.⁵ But, where a street was taken for a canal under an act which vested a fee in the State, it was held that, when the canal was abandoned, the rights of the public and of the abutting owners in the street revived.⁶ Where land was taken for a railroad whose corporate existence was limited to fifty years, but the right was reserved in its charter to repeal, alter or amend the same, and by a series of consolidations the property and franchises of the first company had become vested in another company whose corporate existence was extended to five hundred years, it was held that the land did not revert at the end of the fifty years, but was taken subject to the right of the legislature to extend the use in the manner it had done.⁷ Where a railroad is foreclosed, its right of way does not revert, but passes to the purchaser at the foreclosure sale, and to his assigns.⁸

v. New York, 8 Barb. 486; S. C., 7 N. Y. 314; Rexford *v.* Knight, 11 N. Y. 308; Tifft *v.* Buffalo, 82 N. Y. 204; Sweet *v.* Buffalo etc. Ry. Co., 13 Hun, 643; S. C., 79 N. Y. 293; Eldridge *v.* Binghamton, 42 Hun, 202; Birdsall *v.* Cary, 66 How. Pr. 358; Malone *v.* Toledo, 28 Ohio St. 643; S. C., 34 Ohio St. 541; Halde- man *v.* Pennsylvania R. R. Co., 50 Pa. S. 425; Craig *v.* Allegheny, 53 Pa. S. 477; Robinson *v.* West Penn- sylvania Ry. Co., 72 Pa. S. 316; Wyoming Coal & Trans. Co. *v.* Price, 81 Pa. S. 156; Page *v.* Heine- berg, 40 Vt. 81; Benedict *v.* Heine- berg, 43 Vt. 231; De Varaigne *v.* Fox, 2 Blatch. 95; Mason *v.* Lake

Erie etc. Ry. Co., 9 Biss. 239; *contra*: Gebhardt *v.* Reeves, 75 Ills. 301; Kellogg *v.* Malin, 50 Mo. 496; People *v.* White, 11 Barb. 26.

⁴ Heyward *v.* New York, 8 Barb. 486; S. C., 7 N. Y. 314; DeVaraigne *v.* Fox, 2 Blatch. 95.

⁵ Malone *v.* Toledo, 28 Ohio St. 643; S. C., 34 Ohio St. 541; Eldridge *v.* Binghamton, 42 Hun, 202.

⁶ Logansport *v.* Shirk, 88 Ind. 563.

⁷ Terry *v.* New York Central & Hudson River R. R. Co., 67 How. Pr. 439; Beal *v.* Same, 41 Hun, 172; Miner *v.* Same, 46 Hun, 612.

⁸ Columbus, Hope & Greensburg Ry. Co. *v.* Braden, 110 Ind. 553.

§ 597. What amounts to an abandonment of the public use.—This is in most instances a question of fact to be determined from the circumstances of each particular case. The mere transfer of rights and franchises from one corporation to another is not an abandonment.¹ So the condemnation of the property and franchises of a turnpike company for a railroad does not work an abandonment of the turnpike.² And where, by change of arrangements, what was once a part of the main line of a railroad has become a mere switch-track, it is not abandoned.³ Where a statute provided that a school-house lot should revert after a school-house had ceased to be thereon for two years, it does not apply where a school-house is not placed on the lot for two years after the condemnation.⁴ The mere fact that a railroad was not built for thirteen years upon land taken for right of way was held not to be an abandonment.⁵ Permitting a temporary use of property for other purposes than that for which it was taken is not an abandonment, even though such uses may be of a purely private nature.⁶

§ 598. Right to improvements when land reverts.—Where only an easement is taken and the public use is abandoned, the land reverts to the original owner, but he acquires no right to any accessions which have been placed upon it by the State or its agents. Where a canal was abandoned by the State, it was held that its assignee might remove the materials in the locks and other works.¹ So in another case it was held that a railroad company might remove stone piers from land it proposed to abandon.²

§ 597.

¹ *Crolley v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 541.

² *Brainard v. Missisquoi R. R. Co.*, 48 Vt. 107.

³ *Columbus v. Columbus & Shelby R. R. Co.*, 37 Ind. 294.

⁴ *Jordan v. Haskell*, 63 Me. 189.

⁵ *Barlow v. Chicago, Rock Island*

§ 598. & Pacific R. R. Co., 29 Ia. 276.

⁶ *Curran v. Louisville, 83 Ky. 628; Carolina Central R. R. Co. v. McCaskill*, 94 N. C. 746.

¹ *Corwin v. Cowan*, 12 Ohio St. 629.

² *Wagner v. Cleveland & Toledo R. R. Co.*, 22 Ohio St. 563.

§ 599. **No rights are acquired beyond the limits of the land condemned.**—In opening a highway¹ or turnpike,² or in constructing a railroad³ or ditch,⁴ no deviation can be made from the location as established by the proceedings or defined by contract. In one case a variation of an inch in a country road was deemed immaterial.⁵ One person, however, cannot complain of a deviation which is not on his own land.⁶ A railroad has no right to make ditches outside of its right of way, though necessary for the preservation of its roadbed.⁷ In Massachusetts, where it is held that the compensation need not be made until after the taking, the company can make necessary ditches beyond its right of way, and the owner must pursue his statutory remedy for damages therefor.⁸ Nor can a temporary use be made of adjacent lands during the construction of works, unless such use is provided for by statute and acquired in the usual way.⁹

§ 599.

¹ *Beyer v. Tanner*, 29 Ills. 135; *Ward v. State*, 12 Lea, 469.

² *Sidener v. Norristown, Hope & St. Louis Turnpike Co.*, 23 Ind. 623.

³ *Eaton v. European & North American R. R. Co.*, 59 Me. 520; *Brigham v. Agricultural Branch R. R. Co.*, 1 Allen, 316; *New Orleans etc. R. R. Co. v. Brown*, 64 Miss.

479; *Kier v. Boyd*, 60 Pa. S. 33.

⁴ *Rutledge v. Drainage Commissioners*, 16 Ills. App. 655.

⁵ *Brown v. Bridges*, 31 Ia. 138.

⁶ *Newton v. Agricultural Branch R. R. Co.*, 15 Gray, 27.

⁷ *State v. Armwel*, 8 Kan. 288.

⁸ *Babcock v. Western R. R. Co.*, 9 Met. 553.

⁹ *Hoy v. Cohoes Co.*, 2 N. Y. 159; *St. Peter v. Denison*, 58 N. Y. 416.

CHAPTER XXVI.

OF THE RECORD AND PROCEEDINGS WHEN CALLED IN QUESTION COLLATERALLY.

§ 600. **In general.**—It would be impossible to reconcile the decisions which have been made in cases which collaterally attack the validity of condemnation proceedings. One difficulty consists in the fact that these proceedings are conducted in a great variety of ways and before a great variety of tribunals. But, after all allowances have been made for the different circumstances presented for consideration, it will be found that much remains which cannot be harmonized. The power to force a man to give up his property against his will and for a consideration fixed by others is one which is in its nature harsh and against common right. According to all analogies of the law, such a power, to be effectual in its exercise, must be strictly pursued. This has been repeatedly held with respect to the power of eminent domain.¹ On the other hand, the interests of the public are to be considered, and condemnation proceedings should not be lightly overturned when the public or its agents will thereby suffer loss or inconvenience, or both. Both these considerations should be borne in mind in determining the validity of condemnation proceedings in collateral suits.

§ 601. **When jurisdiction exists, the proceedings are good collaterally, though erroneous.**—It has been repeatedly adjudicated in respect to condemnation proceedings that, where the tribunal has acquired jurisdiction in the particular case, its proceedings will be good collaterally, notwithstanding the intervention of mere errors or irregularities.¹ This

§ 600.

¹ *Ante* § 253.

49

§ 601.

¹ *Crise v. Auditor*, 17 Ark. 572;

769

general proposition is subject to some exceptions to be hereafter noted, for there are irregularities which will render the proceedings void, notwithstanding the fact that jurisdiction was obtained originally.

§ 602. What is essential to jurisdiction.—This is a question which is controlled by the particular statute under which the proceedings are had. In general, jurisdiction is obtained by presenting a petition in conformity with the statute and giving the notice required by law.¹ The petition should set forth by appropriate averments all the facts necessary to authorize the tribunal to act. What is sufficient in this respect has already been considered in a former chapter.² If the petition is required to be signed by a certain class of persons, as by a certain number of freeholders, this fact should affirmatively appear on the record. Some cases

Baker *v.* Windham, 25 Conn. 597; Townsend *v.* Chicago & Alton R. R. Co., 91 Ills. 545; Bailey *v.* McCain, 92 Ills. 277; Miller *v.* Porter, 71 Ind. 521; Argo *v.* Barthand, 80 Ind. 63; Foster *v.* Paxton, 90 Ind. 122; Cauldwell *v.* Curry, 93 Ind. 363; Rutherford *v.* Davis, 95 Ind. 245; McMullen *v.* State, 105 Ind. 334; Sunier *v.* Miller, 105 Ind. 393; Young *v.* Sellers, 106 Ind. 101; State *v.* Berry, 12 Ia. 58; Savings Fund and Loan Association *v.* Schmidt, 15 Ia. 213; State *v.* Kinney, 39 Ia. 226; Commissioners *v.* Espen, 12 Kan. 531; Baker *v.* Runnels, 12 Me. 235; Longfellow *v.* Quimby, 29 Me. 196; Small *v.* Pennell, 31 Me. 367; Plummer *v.* Waterville, 32 Me. 566; Gay *v.* Bradstreet, 49 Me. 580; True *v.* Freeman, 64 Me. 573; Brimner *v.* Boston, 102 Mass. 19; Faber *v.* New Bedford, 135 Mass. 162; Gilkey *v.* Watertown, 141 Mass. 317; Clark *v.* Drain Com-

missioner, 50 Mich. 618; Wyatt *v.* Thomas, 29 Mo. 23; State *v.* Richmond, 26 N. H. 232; State *v.* Canterbury, 28 N. H. 195; White *v.* Landaff, 35 N. H. 128; State *v.* Rye, 35 N. H. 368; Brown *v.* Brown, 50 N. H. 538; State *v.* Lewis, 22 N. J. L. 564; State *v.* Trenton, 36 N. J. L. 198; Allen *v.* Utica etc. R. R. Co., 15 Hun, 80; People *v.* Thayer, 63 N. Y. 348; State *v.* Witherspoon, 75 N. C. 222; Beebe *v.* Scheidt, 13 Ohio St. 406; Nolmsville Turnpike Co. *v.* Quimby, 8 Humph. 476; Nankin *v.* State, 2 Swan, 206; Gilson *v.* State, 5 Lea, 161; Yeager *v.* Carpenter, 8 Leigh, 454.

§ 602.

¹ Bailey *v.* McCain, 92 Ills. 277; Rutherford *v.* Davis, 95 Ind. 245; State *v.* Berry, 12 Ia. 58; Commissioners *v.* Espen, 12 Kan. 531; Plummer *v.* Waterville, 32 Me. 566.

² See ch. 14.

have held the proceedings void because it did not so appear.³ Others have held that the facts might be shown by evidence *aliunde*.⁴ A recital of the facts in the record has been held sufficient *prima facie* evidence.⁵ The notice given must be such as to satisfy both the statute and the constitution, but, as this subject is fully treated elsewhere, we shall not discuss further the requisites of such notice.⁶

§ 603. What irregularities, subsequent to jurisdiction, will vitiate the proceedings.—The jurisdiction exercised in condemnation cases is always of a special character. The proceedings are to be conducted according to a certain prescribed mode. It is plain, therefore, that, even after the court or tribunal has acquired jurisdiction in the case, errors may be committed which will render the proceedings void. The jurisdiction acquired is simply a jurisdiction to proceed to a final determination of the case *in the mode provided by law*. Any material departure from that mode will be fatal to the proceedings. An erroneous decision in a matter which the tribunal has power to decide and irregularities in respect to matters of form or time and the like will be overlooked in a collateral proceeding.¹ Beyond this the authority must be strictly, or at least substantially, followed.² Jurisdiction to lay out one road will not justify the laying out of a different road.³ If the statute requires a certain plat or description to be made and recorded, its omission will be fatal.⁴ The

³ *Warne v. Baker*, 35 Ills. 382; *Frost v. Leatherman*, 55 Mich. 33; *Doody v. Vaughan*, 7 Neb. 28; *Sharp v. Johnson*, 4 Hill, 92.

⁴ *Williams v. Holmes*, 2 Wis. 129.

⁵ *Neis v. Franzen*, 18 Wis. 537.

⁶ Upon the question of jurisdiction consult chapters 13, 15, 16 & 17.

§ 603.

¹ *Suits v. Murdock*, 63 Ind. 73; *State v. Kinney*, 39 Ia. 226; *Quayle v. Missouri etc. Ry. Co.*, 63 Mo. 465; *Brown v. Brown*, 50 N. H.

538; *Allen v. Utica etc. R. R. Co.*, 15 Hun, 80.

² *McKernan v. Indianapolis*, 38 Ind. 223; *Northampton v. Abell*, 127 Mass. 507.

³ *State v. Molly*, 18 Ia. 525; *Bennett v. Cutler*, 44 N. H. 69.

⁴ *Wilson v. Lynn*, 119 Mass. 174; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Lund v. New Bedford*, 121 Mass. 286; *Prescott v. Beyer*, 34 Minn. 493; *Pratt v. People*, 13 Hun, 664.

commissioners must possess the qualifications required,⁵ and those who act must appear to have been duly appointed.⁶

§ 604. What the record should show.—It is the rule of the common law that, in case of inferior courts or in case of any court exercising a special statutory jurisdiction, the record must show affirmatively all the facts necessary to give jurisdiction and that the proceedings have been according to law.¹ This rule has been applied to condemnation proceedings in numerous decisions.² As a matter of proper practice there is no doubt but that the record should be made up in such a way as to show affirmatively a compliance with the statute. Some courts, however, hold that, if the record contains all that the statute requires to be recorded or preserved in written form, it will be *prima facie* sufficient to establish the validity of the proceedings, provided what is recorded does not disclose any fatal irregularity.³ And it is said that, where the proceedings are before a court of general jurisdiction, or after jurisdiction appears, every reasonable intendment will be made in favor of the regularity of the proceeding.⁴ A statute of Oregon provided that “in

⁵ United States *v.* Supervisors of Summit, 1 Pinney, 566.

⁶ State *v.* Horn, 34 Kan. 556. See further, upon the subject matter of this section, chapters 16, 17, 18 and 21.

§ 604.

¹ See cases cited in U. S. Digest, Vol. 4, Title Courts, § 352.

² Martin *v.* Rushton, 42 Ala. 289; Nichols *v.* Bridgeport, 23 Conn. 189; Harlow *v.* Pike, 3 Me. 438; Prentice *v.* Parks, 65 Me. 559; Owings *v.* Worthington, 10 G. & J. 283; People *v.* Highway Commissioner, 16 Mich. 63; Ells *v.* Pacific R. R. Co., 51 Mo. 200; Zimmerman *v.* Snowden, 88 Mo. 218; White *v.* Memphis etc. R. R. Co., 64 Miss.

566; Gilbert *v.* Columbia Turnpike Co., 3 Johns. Cases, 107; Harbeck *v.* Toledo, 11 Ohio St. 219; State *v.* Officer, 4 Or. 180.

³ Willis *v.* Sproule, 13 Kan. 257; State *v.* Prine, 25 Ia. 231; Anderson *v.* Commissioners, 12 Ohio St. 635; McClelland *v.* Miller, 28 Ohio St. 488; Lowe *v.* Aroma, 21 Ills. App. 598.

⁴ Commissioners' Court *v.* Thompson, 18 Ala. 694; Baker *v.* Windham, 25 Conn. 597; Louk *v.* Woods, 15 Ills. 256; Dumass *v.* Francis, 15 Ills. 543; Galbraith *v.* Littlech, 73 Ills. 209; Chicago, Burlington & Quincy R. R. Co. *v.* Chamberlain, 84 Ills. 333; Ney *v.* Swinney, 36 Ind. 454; Albertson *v.* State, 95 Ind.

all actions, suits and proceedings concerning the opening, laying out and establishing or widening of any street or alley under the provisions of the act, all the proceedings had for that purpose shall be presumed to have been regularly and legally taken until the contrary is shown." It was held the statute only referred to the proceedings after jurisdiction had attached, and that the record must affirmatively show jurisdiction notwithstanding the statute.⁵

§ 605. Parol evidence to aid or contradict the record.—

Some cases hold that, in a collateral proceeding, parol evidence cannot be received to contradict the record;¹ others hold that such evidence is competent.² So some cases hold that the record cannot be aided by parol testimony,³ while others hold the contrary.⁴ Some courts hold that, if the jurisdiction of a tribunal depends upon facts which the tribunal is required to ascertain, its decision in the matter will be conclusive in any collateral proceeding.⁵

Without attempting to reconcile these conflicting decisions, we think that justice requires that the owner of prop-

370; *Keys v. Tate*, 19 Ia. 123; *Cage v. Trager*, 60 Miss. 563; *Robbins v. Bridgewater*, 6 N. H. 524; *State v. Lewis*, 22 N. J. L. 564; *Van Steenberg v. Bigelow*, 3 Wend. 42.

⁵ *Northern Pacific Terminal Co. v. Portland*, 14 Or. 24.

§ 605.

¹ *Galena etc. R. R. Co. v. Pound*, 22 Ills. 399; *Galbraith v. Letteich*, 73 Ills. 209; *Looby v. Austin*, 19 Ills. App. 325; *Wild v. Dieg*, 43 Ind. 455; *People v. Kniskern*, 50 Barb. 87; *Pittsburgh v. Cluley*, 74 Pa. S. 262.

² *Levitt v. Eastman*, 77 Me. 117; *Cassidy v. Smith*, 13 Minn. 129; *People v. Commissioners*, 27 Barb. 94; *Adams v. Saratoga & W. R. R. Co.*, 10 N. Y. 328; *Anderson*

v. Commissioners, 12 Ohio St. 635; *Roehrborn v. Schmidt*, 16 Wis. 519.

³ *Nichols v. Bridgeport*, 23 Conn. 189; *Stockett v. Nicholson, Walker, (Miss.)* 75; *Stewart v. Wallis*, 30 Barb. 344; *Chapman v. Swan*, 65 Barb. 210.

⁴ *Willis v. Sproule*, 13 Kan. 257; *Oliphant v. Commissioners*, 18 Kan. 386; *Kohlhepp v. West Roxbury*, 120 Mass. 596; *Robinson v. Mathwick*, 5 Neb. 252; *Harrington v. People*, 6 Barb. 607; *Williams v. Holmes*, 2 Wis. 129; *Austin v. Allen* 6 Wis. 134.

⁵ *In re Grove Street*, 61 Cal. 438; *Evansville etc. R. R. Co. v. Evansville*, 15 Ind. 395; *Porter v. Stout*, 73 Ind. 3; *Muncey v. Joest*, 74 Ind. 409; *Heagy v. Black*, 90 Ind. 534; *Jackson v. State*, 104 Ind. 516.

erty sought to be taken for public use should have the opportunity to object to the proceedings to take his property, either on the ground that the contingency has not arisen which authorizes the proceedings to be taken, or on the ground that the proceedings themselves are not in conformity with the law. If this opportunity has been afforded him in the proceedings themselves, and the record shows jurisdiction, he ought to be concluded by them so far as any collateral attack is concerned. If, on account of the peculiar character of the tribunal or otherwise, this opportunity is not afforded, such owner ought in justice to be allowed to resist the effect of such proceedings when they are invoked against him, and should be allowed to controvert the record by parol evidence for that purpose.⁶ As respects a stranger to the record or one whose property is not affected by the proceedings, he should not be allowed to controvert the record by parol evidence.

§ 606. Estoppel to question proceedings collaterally.— If the owner of property taken or affected by a condemnation proceeding accepts the damages which have been awarded him in the proceeding, this will operate as a waiver of all defects and irregularities in the proceedings and both he and those claiming under him will be forever estopped from alleging anything against the validity of the proceedings.¹ The acceptance of the damages will not waive a

⁶ *Gurnsey v. Edwards*, 26 N. H. 224. *Kepley v. Taylor*, 1 Blackf. 492; *Logan v. Vernon etc. R. R. Co.*, 90 Ind. 552; *Marling v. Burlington etc. Ry. Co.*, 67 Ia. 331; *Challis v. Atchison etc. R. R. Co.*, 16 Kan. 117; *Hatch v. Hawkes*, 126 Mass. 177; *Chatterton v. Parrott*, 46 Mich. 432; *Hunter v. Jones*, 13 Minn. 307; *Brooklyn Park Co. v. Armstrong*, 45 N. Y. 234; *Felch v. Gilman*, 22 Vt. 38; *Dodge v. Burns*, 6 Wis. 514; *Burns v. Milwaukee & Mississippi R. R. Co.*, 9 Wis. 450; *Burns v.*

§ 606.

¹ *Whittlesey v. Hartford, Providence & Fishkill R. R. Co.*, 23 Conn. 421; *Hitchcock v. Danbury & Newark R. R. Co.*, 25 Conn. 516; *Town v. Blackberry*, 29 Ills. 137; *Rees v. Chicago*, 38 Ills. 322; *Kile v. Yellowhead*, 80 Ills. 208; *Sheaff v. People*, 87 Ills. 189; *Hartshorn v. Pottroff*, 89 Ills. 509; *St. Louis etc. R. R. Co. v. Karnes*, 101 Ills. 402;

trespass committed prior to the institution of proceedings.² A release of damages will have the same effect as the acceptance of the award.³ And where the owner appears in the proceedings and contests the question of damages, he will be estopped in a collateral proceeding from objecting to the validity of the proceedings.⁴ So in case of highways, the acquiescence of the owner in the establishment of the way, by moving his fences to correspond therewith,⁵ or by recognizing the way in deeds of property,⁶ or even by allowing the public to improve the way without objection⁷ have been held sufficient to estop the owner in a collateral proceeding.

Dodge, 9 Wis. 458; Karber *v.* Nellis, 22 Wis. 215; Schatz *v.* Pfeil, 56 Wis. 429; Moore *v.* Roberts, 64 Wis. 538. Even a violation of the constitution may be waived in this manner, as where property is taken for a purpose which is not a public use. Embury *v.* Conner, 3 N. Y. 511, reversing S. C. 2 Sandf. 98.

² Powers *v.* Hurment, 51 Mo. 136.

³ Trickey *v.* Schlader, 52 Ills. 78; Gurnsey *v.* Edwards, 26 N. H. 224. To same effect Freeman *v.* Weeks, 45 Mich. 335.

⁴ Ney *v.* Swinney, 36 Ind. 454; St. Joseph Hydraulic Co. *v.* Cincinnati, Wabash & Michigan Ry Co., 109 Ind. 172; Ogden *v.* Stokes, 25 Kan.

517; Dyckman *v.* New York, 5 N. Y. 434. But the mere presence of the owner who takes no part and makes no objection will not have this effect. Roehrborn *v.* Schmidt, 16 Wis. 519.

⁵ Rees *v.* Chicago, 38 Ills. 322; Hartshorn *v.* Potroff, 89 Ills. 509; Hunter *v.* Jones, 13 Minn. 307; Schatz *v.* Pfeil, 56 Wis. 429; State *v.* Wertzel, 62 Wis. 184.

⁶ Moses *v.* St. Louis Sectional Dock Co. 84 Mo. 242.

⁷ Rettinger *v.* Passaic, 45 N.J.L. 146; Pittsburgh *v.* Scott, 1 Pa. S. 309; McClelland *v.* Miller, 28 Ohio St. 488.

CHAPTER XXVII.

OF THE REMEDIES AND PROCEEDINGS TO RECOVER THE DAMAGES AWARDED, OR WHICH SHOULD BE PAID, FOR PROPERTY TAKEN OR AFFECTED.

§ 607. When the statutory remedy is exclusive.—In those States in which the law, as held by the courts, permits the occupation of property before compensation is made, it is competent for the legislature to authorize such an occupation of private property upon providing the owner with an adequate remedy whereby he can obtain the just compensation to which he is entitled.¹ In such cases the statutory remedy is exclusive of all other remedies, and supersedes the common law actions for interfering with the owner's possession.² But, if no remedy is provided by the stat-

§ 607.

¹ See *ante*, §§ 456–459.

² *Dyer v. Tuskaloosa Bridge Co.*, 2 Porter, Ala. 296; *Johnson v. St. Louis etc. Ry. Co.*, 32 Ark. 758; *Kimble v. White Water Valley Canal Co.*, 1 Ind. 285; *Conwell v. Hagerstown Canal Co.*, 2 Ind. 588; *Null v. White Water Valley Canal Co.*, 4 Ind. 431, 435; *LaFayette & Indianapolis R. R. Co. v. Smith*, 6 Ind. 249; *Leviston v. Junction R. R. Co.*, 7 Ind. 597; *McLaughlin v. State*, 8 Ind. 281; *McCormick v. Terre Haute & Richmond R. R. Co.*, 9 Ind. 283; *Snowden v. Wilas*, 19 Ind. 10. In the following cases in the same State, the remedy was held to be cumulative: *Lane v. Miller*, 22 Ind. 104; *Toney v. Johnson*, 26 Ind. 382; *Keene v. Chapman*, 25 Me. 126; *Mason v. Kenne-*

bec & Portland R. R. Co., 31 Me. 215; *Underwood v. North Wayne Scythe Co.*, 41 Me. 291; *Dingley v. Gardiner*, 73 Me. 63; *Homer v. Bar Harbor Water Co.*, 78 Me. 127; *Graham v. Virgin*, 78 Me. 338; *Williams v. Camden & Rockland Water Co.*, 79 Me. 543. In the following Maine cases, under the railroad law, the statutory remedy was held to be cumulative: *Hall v. Pickering*, 40 Me. 548; *Nichols v. Somerset & Kennebec R. R. Co.*, 43 Me. 356; *Davis v. Russell*, 47 Me. 443; *Gedney v. Tewksbury*, 3 Mass. 307; *Stowell v. Flagg*, 11 Mass. 364; *Stevens v. Proprietors of the Middlesex Canal*, 12 Mass. 466; *Woolcott Woolen Manf. Co. v. Upham*, 5 Pick. 292; *Leland v. Woodbury*, 4 Cush. 245; *Shaw v. Wells*, 5 Cush. 537; *Tower v. Boston*, 10 Cush. 235;

ute,³ or if the statutory remedy is taken away by repeal,⁴ or if the initiation is given only to the party condemning, who fails to pursue it,⁵ the owner may have his common law action. So in respect to damages which are not within the statute giving the remedy,⁶ or which are caused by acts not done by authority of the statute⁷ or under proceedings which are

Hazen v. Essex Company, 12 Cush. 475; *Burnham v. Story*, 3 Allen, 378; *McNally v. Smith*, 12 Allen, 455; *Dean v. Colt*, 99 Mass. 486; *Hull v. Westfield*, 133 Mass. 433; *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394; *Tieck v. Board of Comrs.*, 11 Minn. 292; *Brown v. Beatty*, 34 Miss. 227; *Lindell's Admr. v. Hannibal & St. Joseph R. R. Co.*, 36 Mo. 543; *Leary v. Same*, 38 Mo. 485; *Lebanon v. Olcott*, 1 N. H. 339; *Woods v. Nashua Manf. Co.*, 4 N. H. 527; *Aldrich v. Cheshire R. R. Co.*, 21 N. H. 359; *Hur-niker v. Contoocook Valley R. R. Co.*, 29 N. H. 146; *Calking v. Baldwin*, 4 Wend. 667; *Lynch v. Stone*, 4 Denio, 355; but see *Crittenden v. Wilson*, 5 Cow. 165. *Mumford v. Terry*, 2 N. C. Law Repos. 425; *McIntire v. Western N. C. R. R. Co.*, 67 N. C. 278; *Holloway v. University R. R. Co.*, 85 N. C. 452; *Carolina Central R. R. Co. v. McCaskill*, 94 N. C. 746; *Little Miami R. R. Co. v. Whitacre*, 8 Ohio St. 590; *Knorr v. Germantown R. R. Co.*, 5 Whart. 256; *McKenny v. Monongahela Navigation Co.*, 14 Pa. S. 65; *Cumberland Valley R. R. Co. v. McLanahan*, 59 Pa. S. 23; *Farnham v. Delaware & Hudson Canal Co.*, 61 Pa. S. 265; *Koch v. Williamsport Water Co.*, 65 Pa. S. 288; *Fehr v. Schuykill Navigation Co.*, 69 Pa. S. 161; *Fuller v. Eddings*, 11 Rich. 239; *Mitchell v.*

Franklin & Columbia Turnpike Co., 3 Humph. 456; *Colcough v. Nashville etc. R. R. Co.*, 2 Head, 171; *Fisher v. Horricon Iron Manf. Co.*, 10 Wis. 351; *Babb v. Mackey*, 10 Wis. 371; *Wood v. Hustis*, 17 Wis. 416; *Smith v. Gould*, 59 Wis. 631. See *Davis v. LaCrosse & Mississippi R. R. Co.*, 12 Wis. 16; *Boyfield v. Porter*, 13 East, 200; *Thicknesse v. Lancaster Canal Co.*, 4 M. & W. 471; *Dunn v. Birmingham Canal Co.*, 8 L. R. Q. B. 42; *Duke of Bedford v. Dawson*, 20 L. R. Eq. Cas. 353. *Contra: Atlantic & Gulf R. R. Co. v. Fuller*, 48 Ga. 423; *Doe v. Georgia R. R. & Banking Co.*, 1 Ga. 524.

³ *Cogswell v. Essex Mill Corporation*, 6 Pick. 94; *Foote v. Cincinnati*, 11 Ohio, 408.

⁴ *French v. Owen*, 5 Wis. 112.

⁵ *Bentonville R. R. Co. v. Baker*, 45 Ark. 252.

⁶ *Wooster v. Great Falls Manf. Co.*, 39 Me. 246; *Stevens v. King*, 76 Me. 197; *Williams v. Camden & Rockland Water Co.*, 79 Me. 543; *Brigham v. Wheeler*, 12 Allen, 89; *Dean v. Colt*, 99 Mass. 480.

⁷ *Clapp v. Manter*, 78 Me. 358; *Halsey v. Lehigh Valley R. R. Co.*, 45 N. J. L. 26; *Cator v. Board of Works etc.*, 34 L. J. Q. B. 74; *Queen v. Darlington Local Board of Health*, 35 L. J. Q. B. 45; *Imperial Gas Co. v. Broadbent*, 7 H. L. 600.

invalid.⁸ Thus an act giving a remedy for damages caused to those whose lands are flowed by a mill dam does not apply to flowage below the dam by water discharged from above.⁹ An act in regard to dams on non-navigable streams does not apply to a dam on a navigable stream.¹⁰ If entry has been made without complying with the statute as to preliminaries, it is wrongful, and the owner has his common law remedies for redress.¹¹ So the language of the statute may be such as to preserve the owner's common law remedies.¹²

§ 608. When not exclusive.—In those states in which, by the express terms of the constitution or by the interpretation placed upon it by the courts, compensation must precede an entry upon the property, it is plain that the owner cannot be turned over to a statutory remedy against the party condemning.¹ “The law does not require the citizen to institute proceedings to protect his rights, but merely permits him to do so. Constitutional guarantees of the rights of property would be of very little value if a corporation could seize the property of an individual and say to the owner, if you want compensation for this property, institute proceedings to condemn it, and after we think the proper amount is awarded we will pay you.”²

⁸ *Badgely v. Hamilton County*, 1 Disney, Ohio, 316.

⁹ *Wilson v. Campbell*, 76 Me. 94, *Hackstack v. Keschner Improvement Co.*, 66 Wis. 439.

¹⁰ *Strout v. Millbridge Co.*, 45 Me. 76.

¹¹ *Birge v. Chicago etc. Ry. Co.*, 65 Ia. 440; *Hamor v. Bar Harbor Water Co.*, 78 Me. 127; *Badgely v. Hamilton County*, 1 Disney, 316.

¹² *Ash v. Cummings*, 50 N. H. 591.

R. R. Co. v. Weaver, 10 Kan. 344; *Republican Valley R. R. Co. v. Fink*, 18 Neb. 82; *Parker v. East Tennessee etc. R. R. Co.*, 13 Lea, 669.

² *Republican Valley R. R. Co. v. Fink*, 18 Neb. 82, 86. This was trespass against a railroad company which had entered upon the plaintiff's property without having his damages assessed. The statute gave the initiative to either party. It was held the suit could be maintained.

§ 608.

¹ *Atchison, Topeka & Santa Fe*

§ 609. Action on the award or judgment.—In some States it is expressly provided by statute that if the award is not paid it may be enforced by action thereon, and the form of action is prescribed.¹ But, in the absence of any such statute, an action of contract upon the award has been held to be a proper remedy for enforcing payment.² Where the common law practice prevails, the form of action may be either debt³ or assumpsit.⁴ Where the statute provided for the collection of the damages awarded by means of a distress warrant issued in the same proceedings, it was held that debt would not lie on the award.⁵ An action on the award is proper, though a bond has been given to secure its payment. The bond is simply an additional security and does not suspend any remedy.⁶ The true owner may sue and recover on the award, though it is to the unknown owners of the property.⁷ An action brought before the award is complete and final, will be premature.⁸ Where an award was confirmed against the county of A for land taken for a highway, and that part of the county embracing the proposed highway

§ 609.

¹ *Fowler v. Holbrook*, 17 Pick. 188; *Abbot v. Upham*, 13 Met. 172; *Fisher v. New York*, 57 N. Y. 344; *Philadelphia v. Dickson*, 38 Pa. S. 247.

² *Fuller v. French*, 10 Met. 359; *Russell Mills v. County Commissioners*, 16 Gray, 347; *Ganson v. Buffalo*, 1 Keyes, 454; *Sage v. Brooklyn*, 89 N. Y. 189; *Fisher v. Warwick R. R. Co.*, 12 R. I. 287; *Aken v. Parfrey*, 35 Wis. 249.

³ *Corwith v. Hyde Park*, 14 Ills. App. 635; *Blanchard v. Maysville etc. Turnpike Co.*, 1 Dana, 86; *Bigelow v. Cambridge etc. Turnpike Co.*, 7 Mass. 202; *Jeffrey v. Blue Hill Turnpike Co.*, 10 Mass. 368; *Gay v. Welles*, 7 Pick. 217; *Kimball Admx. v. Rockland*, 71

Me. 137; *Lebanon v. Olcott*, 1 N. H. 339; *Robbins v. Bridgewater*, 6 N. H. 524; *Smart v. Portsmouth & Concord R. R. Co.*, 20 N. H. 233; *Akers v. Philadelphia*, 4 Phila. 56.

⁴ *Chicago v. Wheeler*, 25 Ills. 478; *Hallock v. Woolsey*, 23 Wend. 328; *Battles v. Braintree*, 14 Vt. 348; *LaCrosse & Milwaukee R. R. Co. v. Seeger*, 4 Wis. 268. But see *McCullough v. Brooklyn*, 23 Wend. 458.

⁵ *Gredney v. Tewksbury*, 3 Mass. 307.

⁶ *Fisher v. Warwick R. R. Co.*, 12 R. I. 287.

⁷ *Fisher v. New York*, 57 N. Y. 344, reversing S. C., 4 Lans, 451.

⁸ *Bradbury v. Cumberland Co.*, 52 Me. 27. See also *Lacroix v. Medway*, 12 Met. 123.

was erected into a new county, it was held the original county remained liable on the award.⁹

§ 610. Defences thereto.—As to the conclusiveness of the award or judgment generally in a collateral suit, we refer to the last preceding chapter. Where the proceedings have been instituted by the party condemning, and possession has been taken under them and the right to possession is through the proceedings, the party condemning should be held to be estopped, when sued on the award, from setting up any defect or irregularity in the proceedings as a defence.¹ Nor should the defendant in such a suit be permitted to insist upon irregularities which are the result of its own fault or neglect, or which it has waived by seeking the approval of the award.² Nor can irregularities be insisted upon which affect the owner only, such as a failure to observe some statutory provision for his benefit.³ But, where the proceedings for damages have been initiated by the owner, the defendant, in a suit upon the award, may insist upon a more strict compliance with the law. The jurisdictional facts must appear⁴ and the suit must not be brought until the award has been confirmed as required by law.⁵ Where the amount of the award has been collected and paid over to highway commissioners, whose duty it is to pay it to the owner, they cannot defend a suit for the money on the ground of irregularities or even want of jurisdiction in the proceedings.⁶ It is not permissible to show that by mistake the award is too much, or that land was included in the estimate which was not taken,⁷ or that the award for a part interest

⁹ *Jones v. Oxford*, 45 Me. 419.
§ 610.

¹ *Corwith v. Hyde Park*, 14 Ills. App. 635. And see *Robbins v. Bridgewater*, 6 N. H. 524.

² *Chicago v. Wheeler*, 25 Ills. 478.

³ *Buel v. Trustees of Lockport*, 3 N. Y. 197.

⁴ *Mifflin v. Commissioners*, 5 S. & R. 69; *Akers v. Philadelphia*, 4 Phila. 56.

⁵ *Bradbury v. Cumberland County*, 52 Me. 27.

⁶ *Hallock v. Woolsey*, 23 Wend. 328.

⁷ *Gay v. Welles*, 7 Pick. 217.

was the entire value of the land.⁸ Where, after suit brought upon an award, the court of county commissioners amended the record so as to make the award in favor of the plaintiff and two others jointly, it was held the amendment was a nullity.⁹ Where, after proceedings had been completed for the establishment of a street and damages awarded, the plaintiff made a map of his property and sold lots recognizing the existence of the street, it was held not to be a dedication which would prevent the plaintiff from recovering the damages which had been awarded him.¹⁰ In a suit upon an award for land taken for a street, it is held that an assessment of benefits against the plaintiff's property for the same improvement may be set off.¹¹ Under the English Land Clauses Act it has been held that, in a suit for damages awarded for property injuriously affected, the award was not conclusive, but it might be shown that the award was for damages not the subject of compensation under the act.¹²

§ 611. When the damages are payable from an assessment of benefits.—It has already been shown that a law which makes the payment of damages contingent upon the collection of an assessment of benefits is invalid.¹ But the owner may waive the invalidity, and if he does so he must take the law as he finds it. If the damages are not made a debt against the municipality, his only remedy is by mandamus to compel the municipality to proceed and collect the

⁸ *Sparhawk v. Walpole*, 20 N. H. 317.

⁹ *Littlefield v. Boston & Maine R. R. Co.*, 65 Me. 248.

¹⁰ *Jersey City v. Sackett*, 44 N. J. L. 428.

¹¹ *Fisher v. New York*, 3 Hun, 648; *Loweree v. Newark*, 38 N. J. L. 151; *Baldwin v. Same*, 38 N. J. L. 158.

¹² *Rhodes v. Aredele Drainage Comrs.*, 1 L. R. C. P. Div. 380;

Chapman v. Monmouthshire Ry. & Canal Co., 27 L. J. N. S. Ex. 97; S. C., 2 H. & N. 267. But it is only the *right* to damages which can be contested, not the *amount*. *Mortimer v. Southwestern Ry. Co.*, 1 Ellis & Ellis, 375; S. C., 102 E. C. L. R. 374; S. C., 38 L. J. Q. B. 129.

§ 611.

¹ *Ante*, § 460.

assessment or by action on the case for neglect.² But, such a law being invalid, the courts will, if possible, so construe it as to make the damages a debt against the corporation and sustain an action therefor.³

§ 612. When there has been no entry, or when the taking has been abandoned.—As to when the right to damages becomes vested—that is a question which depends upon local statutes, and is discussed in a subsequent chapter.¹ The right to the damages may be complete, though the property has not been entered upon.² An abandonment *after* the right to the damages has vested, will not affect the right. Where part of a highway over plaintiff's land was abandoned, it was held he was nevertheless entitled to recover the entire award.³ After a railroad had been partly constructed over plaintiff's land, and after the award of damages had been made, an act was passed that, in case of the abandonment of the route, before the payment of damages, the owner should be entitled only to the actual damages sustained. It was held that plaintiff's right to the damages was complete before the act was passed, and was not affected by it.⁴ In a suit for annual damages for flowage, it is no defence that the dam has been carried away and the mill burned, if the right to maintain the dam has not been abandoned.⁵

§ 613. Mandamus to compel payment.—Mandamus to compel the levy and collection of a tax or assessment for the purpose of raising the fund out of which the award is payable,¹ or to compel payment where the fund is already in ex-

² *McCullough v. Brooklyn*, 23 Wend. 458; and see *Chicago v. Wheeler*, 25 Ills. 478.

³ *Sage v. Brooklyn*, 89 N. Y. 189.

§ 612.

³ *Reid v. Wall Township*, 34 N. J. L. 275.

⁴ *Smart v. Portsmouth & Concord R. R. Co.*, 20 N. H. 233.

⁵ *Fuller v. French*, 10 Met. 359.

¹ Chap. xxix.

² *Kimball Admx. v. Rockland* 71 Me. 137; *Philadelphia v. Dickson*,

§ 613.

¹ *Higgins v. Chicago*, 18 Ills. 276;

istence,² has been held an appropriate remedy. Where the money was to be raised by a sale of bonds, mandamus was granted to compel a sale for that purpose.³ The petition for a mandamus should show all the facts necessary to entitle the relator to the relief sought. Where the petition was for a mandamus upon highway commissioners to compel them to issue an order on the treasurer for payment, it was held insufficient, because it did not show that the treasurer had the funds.⁴ In another case, where the highway commissioners had authority by statute to annul the proceedings in case they deemed the damages awarded too heavy a burden, the petition was held fatally defective in not averring that the proceedings had not been annulled.⁵ If the tribunal which made the award had jurisdiction, mere errors or irregularities will not be a defence to a petition for mandamus to pay the award.⁶ If the tribunal did not have jurisdiction, the award is a nullity and mandamus will not lie to enforce its payment.⁷ Where a statute provided that the proceedings to open a street should be void if the damages were not paid within a year, it was held payment could not be enforced by mandamus after the year was up.⁸

Miller v. Township Committee, 24 N. J. L. 54; *Minhinnah v. Haines*, 29 N. J. L. 388; *People v. Supervisors of St. Lawrence*, 5 Cow. 292; *McCullough v. Brooklyn*, 23 Wend. 458; *Shoobred v. Charleston*, 2 Bay, 63; *Brock v. Hishen*, 40 Wis. 674.

² *Crise v. Auditor*, 17 Ark. 572; *People v. Township Board*, 2 Mich. 187; *People v. Lowell*, 9 Mich. 144; *State v. Board of Park Commissioners*, 33 Minn. 524; *St. Francois Co. v. Marks*, 14 Mo. 539; *Same v. Peers*, 14 Mo. 537; *Ex parte Rogers*, 7 Cow. 526; *People v. Schuyler*, 69 N. Y. 242; *Ryan v. Hoffman*, 26 Ohio St. 109; *Justices of Williamson v. Jefferson*, 1 Coldw. 419.

³ *Duncan v. Mayor of Louisville*, 8 Bush, 98.

⁴ *Commissioners of Highways v. Snyder*, 15 Ills. App. 645.

⁵ *People v. Highway Comrs.*, 88 Ills. 141.

⁶ *Crise v. Auditor*, 17 Ark. 572; *Higgins v. Chicago*, 18 Ills. 276; *People v. Township Board*, 2 Mich. 187; *People v. Lowell*, 9 Mich. 144; *People v. Supervisors of St. Lawrence*, 5 Cow. 292; *State v. Wilson*, 17 Wis. 687.

⁷ *People v. Township Board of Scio*, 3 Mich. 121; *People v. Schuyler*, 69 N. Y. 242; *People v. Whitney's Point*, 102 N. Y. 81.

⁸ *Commonwealth v. Commissioner of Philadelphia*, 2 Whart. 286.

§ 614. Mandamus to compel an assessment of damages.

—Where the right to damages has accrued, mandamus will lie against the proper persons to compel them to proceed and have the damages assessed. Thus, where lands were taken for a canal and it was made the duty of canal appraisers to make an assessment of damages, a mandamus was granted to compel them to do so.¹ Where damages were given by statute for injuries resulting from a change of grade, and such a change was made, mandamus was awarded to compel the proper persons to proceed and have the damages assessed as provided in the statute.² So under the English Land Clauses Act, after notice to treat by a railroad or other public company, it may be compelled by mandamus to go on with the assessment of damages.³ The relator must show title to the land for which damages are claimed.⁴ So mandamus will lie to compel the doing of any act necessary to complete the assessment, such as making a report and the like.⁵ Mandamus will not lie to compel county commissioners to accept a report, it being an act judicial in its nature.⁶ Where the tribunal improperly refuses to proceed, it may be compelled to act by mandamus.⁷

§ 615. Bill in equity for the same purpose.—In England it has been held that, where a railroad company has taken

§ 614.

¹ *People v. Hayden*, 6 Hill, 359.

² *People v. Green*, 3 Hun, 755; *Gilligan v. Providence*, 11 R. I. 258; *Aldrich v. Aldermen of Providence*, 12 R. I. 241.

³ *King v. Nottingham Waterworks*, 6 A. & E. 355; *Queen v. York etc. Ry. Co.*, 16 A. & E. N. S. 886; *S. C.*, 71 E. C. L. R. 886; *Fotterby v. Metropolitan Ry. Co.*, 3 L. R. C. P. 188; *Morgan v. Same*, 4 L. R. C. P. 97; *Birmingham & Oxford Junction Ry. Co. v. Queen*, 20 L. J. Q. B. 304. But not after its com-

pulsory powers have expired.

Queen v. London & Northwestern Ry. Co., 16 A. & E. N. S. 864; 71 E. C. L. R. 863.

⁴ *Canal Comrs. v. People*, 5 Wend. 423.

⁵ *Matter of Trustees etc.*, 1 Barb. 34; *People v. Jefferds*, 2 Hun, 149; *People v. Green*, 3 Hun, 755.

⁶ *Proprietors of Kennebunk Toll Bridge*, 11 Me. 263. See *Commonwealth v. Sessions of Norfolk*, 5 Mass. 435.

⁷ *Budd v. New Jersey R. R. Co.*, 14 N. J. L. 467.

possession of land for its uses, and neglects to have the damages assessed, the owner can maintain a bill to compel it to do so, and the proceeding is likened to a bill for specific performance.¹ In this country we do not know of any precedent for this practice, though damages are sometimes assessed under the supervision of the chancellor in bills for injunction to prevent the use of the land.

§ 616. Proceedings to obtain damages which have been deposited.—Where damages have been deposited in court for the benefit of the owner, there appears to be no well-defined practice as to paying it over. A petition to the court would seem to be proper.¹ If the amount of damages has been finally determined, the condemning party has no further interest in the matter and is not entitled to notice of the application.² He cannot contest the application,³ nor appeal from the order to pay over.⁴ Where the deposit was required to be made in a court of chancery, it was held it should not be paid out without a reference to the master, to ascertain and report as to the rights of the applicant.⁵ The money deposited represents the land.⁶ Trustees with a power of sale were held entitled to the money.⁷ If the claimant's title is doubtful the court may require a refunding bond.⁸

§ 617. The remedy upon bonds given for security of damages.—But one case arising upon such bonds has come

§ 615.

¹ Adams *v.* London & Blackwall Ry. Co., 18 L. J. Ch. N. S. 357; Mason *v.* Stokes Bay Pier & Ry. Co., 32 L. J. Ch. 110; Inge *v.* Birmingham etc. Ry. Co., 3 De G. McN. & G., 658; and see Adams *v.* London & Blackwall R. R. Co., 2 McN. & G. 118; Hedges *v.* Metropolitan Ry. Co., 28 Beav. 109; Red River Bridge Co. *v.* Clarksville, 1 Snead, 176.

§ 616.

¹ Haswell *v.* Vermont Central R. R. Co., 23 Vt. 228.

² *Ex parte* Heirs of Van Vorst, 2 N. J. Eq. 292.

³ Matter of Department of Parks, 73 N. Y. 560.

⁴ Haswell *v.* Vermont Central R. R. Co., 23 Vt. 228.

⁵ *Ex parte* Heirs of Van Vorst, 2 N. J. Eq. 292.

⁶ Ross *v.* Adams, 28 N. J. L. 160.

⁷ *In re Hobson's Trusts*, 7 L. R. Ch. D. 708.

⁸ In *Matter of De Wint*, 2 Cow. 498.

to our notice, and in that it was held that, where a city had taken land for a street and had given a bond to secure the payment of damages, and was in possession, the owner must first exhaust the assessment of benefits before proceeding on the bond.¹

§ 618. Enjoining use and possession until damages are paid.—Another mode of enforcing payment indirectly is by enjoining the use of land taken until the compensation is paid. This has been held to be a proper remedy,¹ and is available not only against the party condemning, but also against one claiming under him by lease or otherwise.² The plea of public inconvenience is no answer to the prayer for this remedy, since the public can derive no permanent rights in private property except upon payment of the just compensation guaranteed by the constitution.³

§ 617.

¹ *Pittsburgh v. Irwin's Exrs.*, 85 Pa. S. 420.

§ 618.

¹ *Young v. Harrison*, 6 Ga. 130; *Gammage v. Georgia Southern R. R. Co.*, 65 Ga. 614; *Richards v. Des Moines Valley R. R. Co.*, 18 Ia. 259; *Hibbs v. Chicago & Southwestern Ry. Co.*, 39 Ia. 340; *Irish v. Burlington & S. Ry. Co.*, 44 Ia. 380; *Harness v. Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248; *Wight v. Packer*, 114 Mass. 473; *Elwell v. Eastern R. R. Co.*, 124 Mass. 160; *Lohman v. St. Paul, Stillwater etc. R. R. Co.*, 18 Minn. 174; *Evans v. Missouri, Ia. & Neb. Ry. Co.*, 64 Mo. 453; *Provolt v. Chicago, Rock Island & Pacific R. R. Co.*, 69 Mo. 633; *Ray v. Atchison & Nebraska R. R. Co.*, 4 Neb. 439; *Omaha & Northwestern R. R. Co. v. Menk*, 4 Neb. 21; *Monmouth County v. Red Bank & Holmdel Turnpike Co.*, 18 N. J. Eq. 91; *Stewart v. Raymond*

R. R. Co.

7 S. & M. 568; *White v. Nashville etc. R. R. Co.*, 7 Heisk. 518; *Kendall v. Railroad Co.*, 55 Vt. 438; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96; *Sturtevant v. Milwaukee etc. R. R. Co.*, 11 Wis. 63; *Davis v. La Crosse & Miss. R. R. Co.*, 12 Wis. 16; *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653; *Cosens v. Bogner Ry. Co.*, 36 L. J. Eq. 104; *Strattan v. Great Western & Breitford Ry. Co.*, 40 L. J. Eq. 50.

² *Hibbs v. Chicago etc. Ry. Co.*, 39 Ia. 340; *Wight v. Packer*, 114 Mass. 473; *Provolt v. Chicago, Rock Island & Pacific R. R. Co.*, 69 Mo. 633; *Ray v. Atchison & Nebraska R. R. Co.*, 4 Neb. 439; *Kendall v. Railroad Co.*, 55 Vt. 438; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96; *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653.

³ *Evans v. Missouri, Iowa & Neb. Ry. Co.*, 64 Mo. 453. "That mythical personage, 'The Public,' so

A statute provided that, when the damages had been assessed and remained unpaid for thirty days after demand, the use of the land might be enjoined. It was held that this remedy was available only to the owner of the land, and not to an assignee of the damages awarded.⁴ As a means of enforcing payment of damages, this is, of course, a remedy which can be used only where an entry has been made or is threatened.

The right to an injunction may be lost by the owner having acquiesced in the possession of the party condemning, at least until all other remedies have been exhausted.⁵

§ 619. Suit to abate dam unless the damages are paid. —Similar to the remedy mentioned in the last section is that of a bill in equity to abate a mill-dam unless the damages occasioned by the flowage are paid.¹ Where the party

often summoned as a convenient accessory when some flagrant wrong or constitutional right is in contemplation, can only acquire rights in the land of the humblest citizen by *payment therefor*." In another case it is said: "With regard to what is said as to public interest, I am not inclined to listen to any suggestion of public interest as against private rights acquired in a lawful way. I do not think that the interest of the public, in using something that is provided for their convenience, is to be upheld at the price of saying that a person's property is to be confiscated for that purpose. A man who comes to this court is entitled to have his rights ascertained and declared, however inconvenient it may be to third persons to whom it may be a convenience to have the use of his property." *Strattan v. Great Western & Brantford Ry. Co.*, 40 L. J. Eq. 50, 58.

⁴ *Illsley v. Portland & Rochester R. R. Co.*, 56 Me. 531.

⁵ *Runshart v. Railroad Co.*, 54 Ga. 579; *Griffin v. Augusta & Knoxville R. R. Co.*, 70 Ga. 164; *Reisner v. Strong*, 24 Kan. 410; *Mooers v. Kennebec & Portland R. R. Co.*, 58 Me. 279; *Forward v. Hampshire & Hampden Canal Co.*, 22 Pick. 462; *Ross v. Elizabethtown etc. R. R. Co.*, 2 N. J. Eq. 422; *Hentz v. Long Island R. R. Co.*, 13 Barb. 646; *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169; *Pettibone v. La Crosse & Milwaukee R. R. Co.*, 14 Wis. 448; *Carnochan v. Norwich & Spalding Ry. Co.*, 26 Beav. 169; *Wood v. Charing Cross Ry. Co.*, 33 Beav. 290; *Mold v. Wheatcroft*, 27 Beav. 510. See also *Bentley v. Wabash, St. Louis & Pacific Ry. Co.*, 61 Ia. 229; *Deere v. Guest*, 1 Mylne & Craig, 516.

§ 619.

¹ *Smith v. Olmstead*, 5 Blackf. 37; *Ackerman v. Horicon Iron*

originally liable has transferred its right to the dam, and it appears there are assets of the first party which can be reached on execution, the relief by abatement will be stayed until the legal remedy is exhausted.² It is said that the right to have the dam abated may be lost by delay in enforcing the right.³

§ 620. Enforcing the claim for damages as a vendor's lien.—Where it is held that the title or right to possession may vest before the payment of damages, such title or right is subject to the obligation of making just compensation which is in the nature of a vendor's lien. A proceeding in equity for the purpose of enforcing this lien is therefore a proper remedy.¹

The relief granted upon such a bill should be that, if the claim is not paid, the property be sold according to the practice in such cases. If such a sale is made, the purchaser acquires the property discharged of any claim under the condemnation, and may have the same remedies to obtain or protect his possession as though the original occupation had been without any right whatever. This would seem to be the only *consistent* mode of enforcing the claim for compensation as a vendor's lien. But in some cases, instead of de-

Manf. Co., 16 Wis. 150; Zweig *v.* Same, 17 Wis. 362; Newell *v.* Smith, 26 Wis. 582.

² Zweig *v.* Horicon Iron Manf. Co., 17 Wis. 362.

³ Cobb *v.* Smith, 16 Wis. 661; Crosby *v.* Smith, 19 Wis. 449.

§ 620.

¹ Mimms *v.* Macon & Western R. R. Co., 3 Ga. 333; Gillison *v.* Railroad Co., 7 S. C. 173; Kendall *v.* Railroad Co., 55 Vt. 438; Walker *v.* Ware, Hadham & Buntingford Ry. Co., 35 L. J. Eq. 94; Wing *v.* Tottenham & Hampstead Junction Ry. Co., 37 L. J. Ch. 654; Goodford *v.*

Stonehouse & Nailsworth Ry. Co., 38 L. J. Eq. 307; Lyckett *v.* Stafford & Uttoxeter Ry. Co., 41 L. J. Eq. 474; S. C., 13 Eq. Cas. L. R. 261; Earl St. Germans *v.* Crystal Palace Ry. Co., L. R. 11 Eq. Cas. 568. But in Pennsylvania, where a railroad company entered upon giving security and mortgaged its road before judgment for damages was entered, it was held that the owner must look to the personal responsibility of the company and to the bond given as security. Fries *v.* Southern Pennsylvania Ry. Co., 85 Pa. S. 73. See next section.

creeing a regular foreclosure of the lien, the courts enjoin the use of the land until payment is made.² In Ohio it is held that, where the property constitutes a section of a railroad right of way, the decree should be for the sale of the entire road, with its franchises, and not of the property with respect to which the lien exists.³ If the compensation has been pre-

² *Provolt v. Chicago, Rock Island & Pacific R. R. Co.*, 69 Mo. 633; *Kendall v. Railroad Co.*, 55 Vt. 438; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96.

³ *Dayton, Xenia & Belpre R. R. Co. v. Lewton*, 20 Ohio St. 401. The court say: "The rights of the public must not be ignored; and it is the right of the public that this highway be maintained. It was by and through the exercise of its power of eminent domain that it was established. And we take it, that the right of the public to maintain the highway is paramount to the right of the defendant in error to destroy it. To sell the section of the right of way over the lands of the defendant in error, and separate its use from the line of the road, would destroy the highway. Hence, to have decreed a sale of this fraction of the road, or right of way, would have been erroneous. The public having delegated to the Dayton, Xenia & Belpre Railroad Company the power to exercise the right of eminent domain in the establishment of this highway, the company had power to obtain the right of way for its road in two modes—by condemnation and pre-payment of compensation under the right of eminent domain, or by contract with the owners of the land, upon such terms as might be agreed upon. In Lewton's case the latter

mode was resorted to, and, by the terms of the contract, a right to enter upon the land and construct the road before the payment of compensation was secured; and yet that compensation was secured to Lewton by an equitable lien upon the easement thus obtained by the company. And justice requires that this security shall be applied to the satisfaction of Lewton's claim. Can it be done? The difficulty is apparent, rather than real. The public has and can have no right which springs from an act of injustice to the defendant in error. Its only right is to preserve the continuity of the road, of the line of public travel and transportation. And this right is as well subserved, if the ownership and management of the highway be in the hands of one party as another. Hence the public has no interest impaired by a sale of the whole line. We have seen that the Little Miami, and Columbus & Xenia Railroad Companies and Rockwell stand in the shoes of the Dayton, Xenia & Belpre Railroad Company. And what shall be said of the rights of the latter? Has it a right to retain the property of the defendant in error without paying for it? Having obtained the possession of this property from the defendant in error, under a promise to pay for it, the Dayton, Xenia & Belpre

viously assessed, the decree should be for the payment of the award with interest and costs, or that the property be sold. If they have not been previously assessed, the amount may be ascertained under the direction of the chancellor.⁴

§ 621. The right to damages, as against those claiming under the party condemning.—No rights can be acquired in private property under the power of eminent domain except subject to the duty of making just compensation therefor. Consequently, the party originally taking or occupying the property cannot transfer to another, by mortgage, lease or otherwise, any right in the property except subject to the same duty. In other words, the owner's claim for just compensation is paramount to any right which can be derived by

Railroad Company may not so blend and mix it with other property of its own, as to constitute a great and indivisible highway, and then be permitted to say in equity, to the defendant in error, This property, upon which you had and have a specific lien, had become, by my act, a part of a highway which the public has an interest in maintaining, and because the withdrawal of your part from the common use would defeat the public right, therefore you may not enforce your lien. On the other hand, because a part may not be sold on account of the paramount right of the public to keep the highway intact, a necessity arises, in order that justice may be done to the defendant in error, to decree the sale of the whole line of the road to satisfy his lien. And this is the only mode in which the rights and interests of other parties, either as owners or lien-holders upon the road, can be protected,

and their property or security saved from absolute destruction."

⁴ *Kendall v. Railroad Co.*, 55 Vt. 438. "It is further claimed that the damages adjudged in the suit against the former company should not be adopted in this proceeding. The adjudication as to amount was pursuant to the statute and regular. The lien for a money equivalent existed under the constitution of the State. The statute provided two methods for fixing the amounts: one available to the railroad company, the other to the land-owner upon failure of the company to proceed. If regularly determined by either method, we think it was the design of the statute that such determination should be permanent and controlling as against any party subject to the operation of the lien. Such is the holding in other jurisdictions." See also *Sennott v. St. Johnsbury & Lake Champlain R. R. Co.*, 59 Vt. 226.

or through the party making or seeking the condemnation.¹ Different courts work out this result in different ways, but we believe all concur in reaching it in one way or another. Some courts hold that the claim for compensation is in the nature of a vendor's lien, and as such is prior to any right which the party condemning can acquire or transfer.² Others hold that no title passes until payment, and consequently that a mortgage or conveyance by the party condemning conveys nothing to the grantee except such possessory rights as the former may have.³ The latter view seems to us the correct one, and is in accordance with the views heretofore expressed in regard to the proper interpretation of the constitution.⁴

§6 21.

¹ *Mims v. Macon & Western R. R. Co.*, 3 Ga. 333; *Lake Erie & Western Ry. Co. v. Griffin*, 92 Ind. 487; *S. C.*, 107 Ind. 464; *Drury v. Midland Ry. Co.*, 127 Mass. 571; *Williams v. New Orleans, Mobile & Texas R. R. Co.*, 60 Miss. 689; *Provolt v. Chicago, Rock Island & Pacific R. R. Co.*, 69 Mo. 633; *Dayton etc. R. R. Co. v. Lewton*, 20 Ohio St. 401; *Hatry v. Painsville & Youngstown Ry. Co.*, 1 Ohio Circ. Ct. Rep. 426; Appeal of Borough of Easton, 47 Pa. S. 255; *Western Pennsylvania R. R. Co. v. Johnston*, 59 Pa. S. 290; *Buffalo, New York & Phila. R. R. Co. v. Harvey*, 107 Pa. S. 319; *Gillison v. Savannah & Charleston R. R. Co.*, 7 S. C. 173; *White v. Nashville etc. R. R. Co.*, 7 Heisk. 518; *Kendall v. Railroad Co.*, 55 Vt. 438; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96; *Adams v. St. Johnsbury & Lake Champlain R. R. Co.*, 57 Vt. 240; *Bridgeman v. Same*, 58 Vt. 198; *Sennot v. St. Johnsbury & Lake Champlain R. R. Co.*, 59 Vt. 226; *Pfeifer v. Sheboygan etc. R. R. Co.*, 18

Wis. 155; *Gilman v. Sheboygan etc. R. R. Co.*, 37 Wis. 317; *Gilman v. Same*, 40 Wis. 653; *Walker v. Ware, Hadham & Buntingford Ry. Co.*, 35 L. J. Eq. 94.

² *Mims v. Macon & Western R. R. Co.*, 3 Ga. 333; *Provolt v. Chicago, Rock Island & Pacific R. R. Co.*, 69 Mo. 633; *Dayton etc. R. R. Co. v. Lewton*, 20 Ohio St. 401; *Gillison v. Savannah & Charleston R. R. Co.*, 7 S. C. 173; *Walker v. Ware, Hadham & Buntingford Ry. Co.*, 35 L. J. Eq. 94.

³ *Hatry v. Painsville & Youngstown Ry. Co.*, 1 Ohio Circ. Ct. Rep. 426; Appeal of Borough of Easton, 47 Pa. S. 255; *Western Pennsylvania R. R. Co. v. Johnston*, 59 Pa. S. 290; *Buffalo, New York & Phila. R. R. Co. v. Harvey*, 107 Pa. S. 319; *White v. Nashville etc. R. R. Co.*, 7 Heisk. 518; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96; *Bridgeman v. St. Johnsbury & Lake Champlain R. R. Co.*, 58 Vt. 198; *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653.

⁴ *Ante*, §§ 454-459.

But it is immaterial which view is correct, so far as the present inquiry is concerned. If title does not pass until compensation is made, the case is clear. On the other hand, if it be held that the title may vest before compensation is made, yet it only vests subject to the obligation of making compensation. The instrument or proceedings by which title is acquired are notice of the claim for compensation, and third parties dealing with the property are bound to ascertain whether this claim has been satisfied.

§ 622. Of a personal remedy against those claiming under the party condemning. —In *Pfeifer v. Sheboygan & Fond du Lac R. R. Co.*¹ it appeared that the Sheboygan & Mississippi R. R. Co. occupied Pfeifer's land for its purposes; that his damages were assessed but never paid, that afterwards the property and franchises of the company were sold under a mortgage and ultimately became vested in the defendant company, which used the plaintiff's land for the same purposes for which it was originally taken. This case was a suit upon the judgment for damages against the new company, and it was held it could be maintained. The reasoning of the case is that the first company could not acquire the right to use the land for railroad purposes without paying the damages awarded, that the use of the land by the new company was an assent to take the land upon the same condition, and that it was therefore personally liable for the damages awarded. In a subsequent case against the same company the same doctrine is repudiated without either explaining or, in terms, overruling the prior case.² In the latter case it was held that the owner's remedy is either an action of trespass, or ejectment, or to enjoin the use of the land until compensation is made. The doctrine of the case in the 18th Wisconsin Reports has been approved and followed in Indiana.³

§ 622.

¹ 18 Wis. 155.² *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 37 Wis. 317.³ *Lake Erie & Western R. R. Co.**v. Griffin*, 92 Ind. 487; S. C., 107

Ind. 464.

Substantially the same doctrine is maintained in Pennsylvania, where it is held that, under a similar state of facts, the new company may be made a party to the judgment for compensation by *scire facias*, and so be made personally liable therefor.⁴

It seems to us that the doctrine of these cases is correct. The first company has taken possession of private property for a public use and is under an obligation to make just compensation to the owner. When its right and franchises are transferred to a new company, by foreclosure or otherwise, the new company is under no obligation to use the property, nor is it liable for the debts of the old company.⁵ The new company may refuse to use the property at all, or it may condemn it anew.⁶ In such case it would lose the benefit of the improvements upon the property. But, if it elects to use the property for the purposes for which it was originally taken, and as the successor of the first company, knowing that the right to use it can be obtained only by the payment of just compensation, it in legal effect assents to the performance of this obligation and an implied promise to pay the same to the owner arises, upon which an action may be maintained. "If a person accepts anything which he knows to be subject to a duty or charge, it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself."⁷ If the obligation has previously been liquidated by an assessment against the old company, this will be binding upon the new company.

§ 623. Common law suits for the value of lands appropriated without proceedings.—It has been held in a number of cases that, where land is appropriated to a public use,

* Western Pennsylvania R. R. Co. v. Johnston, 59 Pa. S. 290; Buffalo, New York & Phila. R. R. Co. v. Harvey, 107 Pa. S. 319; see also Lewell v. Shaw, 15 Me. 242.

⁵ Vilas v. Milwaukee etc. Ry. Co., 17 Wis. 497.

⁶ Adams v. St. Johnsbury & Lake Champlain R. R. Co., 57 Vt. 240.

⁷ Broom's Legal Maxims, 709.

either with the consent of the owner or otherwise, a common law action will lie to recover the just compensation to which the owner is entitled.¹ These cases proceed upon the ground of an implied promise to pay the just compensation to which the owner is entitled, or by analogy to the action of trover in case of personal property. Where lands were taken for a street and were to be paid for by special assessment, it was held that an action would not lie against the city for their value as upon a general liability, because no promise could be implied to pay for the lands except out of the particular fund.² Where, in case of lands taken for a railroad, the owner was to apply to the company within two years for an assessment of damages or be barred, it was held that, if the owner applied within the time and the company promised to pay or settle without proceedings, an action could be maintained upon this promise after the two years.³

A recovery in such a suit vests the right to the lands in the defendant, and the pleadings and record should properly describe the land and show that the suit is for just compensation.⁴

§ 623.

¹ Bentonville R. R. Co. v. Baker, 45 Ark. 252; Rome v. Perkins, 30 Ga. 154; Blake v. Dubuque, 13 Ia. 66; Donald v. St. Louis etc. R. R. Co., 52 Ia. 411; Wichita & Western R. R. Co. v. Fechheimer, 36 Kan. 45; Lawrence v. Second Municipality, 12 Rob. La. 453; Bailey v. New Orleans, 19 La. An. 271; Bailey v. Carrollton, 28 La. An. 171; Jamison v. Springfield, 53 Mo. 224; Ring v. Mississippi Bridge Co., 57 Mo. 496; Allen v. Wabash, St. Louis & Pacific R. R. Co., 84 Mo. 646; Welsh v. Chicago, Burlington & Kansas City Ry. Co., 19 Mo. App. 127; Cincinnati v. Coombs, 16 Ohio, 181; Watkins v. Walker County, 18 Tex. 585; G. C. & S. F. R. R. Co. v. Don-

ahoo, 59 Tex. 128; I. & G. N. Ry. Co. v. Benitos, 59 Tex. 326; Hamilton County v. Garrett, 62 Tex. 602; Newell v. Smith, 15 Wis. 101. *Contra:* Railroad Co. v. Robbins, 35 Ohio St. 531. If the owner can take the initiative in the statutory proceeding to assess the damages, this remedy will be exclusive. See *ante*, § 607.

² Paret v. Bayonne, 40 N. J. L. 333.

³ Plott v. Western North Carolina R. R. Co., 65 N. C. 74.

⁴ Wichita & Western R. R. Co v. Fechheimer, 36 Kan. 45; Lawrence v. Second Municipality, 12 Rob. La. 453; Jamison v. Springfield, 53 Mo. 224; G. C. & S. F. R. R. Co. v. Donahoo, 59 Tex. 128.

§ 624. The remedy for property damaged, injured or injuriously affected.—If, by reason of the construction of public works, damage is done to private property for which there is a right to recover under the constitution, and which is consequential in its nature, a common law action will lie therefor.¹ The ordinary statutory remedies for the assessment of damages for property taken for public use are held not to apply.² If the statute gives a right to compensation for damages for which no remedy before existed, as for damages for changing the grade of a street, and points out no mode in which it is to be recovered or assessed, it may be recovered in a common law suit.³ But, if a remedy is provided to which the party injured may resort, that remedy is exclusive.⁴ If a statute gives compensation for damages by changing the grade of a street and imposes the duty upon the city or municipality of having such damages assessed and paid, and a change is made without complying with the statute as to the assessment and payment of damages, the owner may resort to the appropriate common law remedy.⁵

§ 624.

¹ *Protzman v. Indianapolis & Cincinnati R. R. Co.*, 9 Ind. 467; *Burlington & Missouri River R. R. Co. v. Reinhackle*, 15 Neb. 279; *Taylor v. Metropolitan Elevated Ry. Co.*, 50 N. Y. Supr. Ct. 311; *Railroad Co. v. Hambleton*, 40 Ohio St. 496; *Johnson v. Parkerburg*, 16 W. Va. 402; *Blanchard v. City of Kansas*, 5 McCrary, 217; *Grafton v. Baltimore & Ohio R. R. Co.*, 21 Fed. R. 309.

² *Indiana Central R. R. Co. v. Boden*, 10 Ind. 96; *New Albany & Salem R. R. Co. v. O'Dailey*, 13 Ind. 353; *Burlington & Mo. Riv. R. R. Co. v. Reinhackle*, 15 Neb. 279.

³ *Gregg v. Baltimore*, 53 Md. 256; *McCarty v. St. Paul*, 22 Minn. 527.

⁴ *Tripp v. Overocker*, 7 Col. 72; *Cole v. Muscatine*, 14 Ia. 296; *Burlington v. Gilbert*, 31 Ia. 356; *Reock v. Newark*, 33 N. J. L. 129; *White v. McKeesport*, 101 Pa. S. 394.

⁵ *Healey v. New Haven*, 49 Conn. 394; *Hempstead v. Des Moines*, 52 Ia. 303; *Noyes v. Mason City*, 53 Ia. 418; *Mulholland v. Des Moines etc. R. R. Co.*, 60 Ia. 740; *La Fayette v. Waterman*, 107 Ind. 404; *Wright v. Georgetown*, 4 Cranch, 534; *Dickson v. Baltimore & Philadelphia R. R. Co.*, 3 McArthur D. C. 362. See also *Drady v. Des Moines etc. R. R. Co.*, 57 Ia. 393; *Wilson v. Des Moines etc. R. R. Co.*, 67 Ia. 509; *Benton v. Milwaukee*, 50 Wis. 368.

Where damages by a proposed change of grade were agreed upon with the owner, but the improvement was afterward abandoned, it was held that the owner had no claim to the damages agreed upon.⁶

Case is the proper common law action to recover for damages of the kind referred to in this section, and is the form of action adopted in the cases cited.

§ 625. The measure of damages in such cases.—This is a question which has already been discussed to some extent in a former chapter.¹ The question is to be considered with reference to damages caused to property not taken by works of a public nature, constructed or operated upon property acquired under the power of eminent domain by persons vested with the power for the purpose of constructing and operating such works. In such cases, the cause of the damage being of a permanent nature, there should be but one recovery, and all damages, past, present and prospective, should be included.² There are many cases, however, which hold that a recovery in such cases is limited to the damages which have accrued up to the time of bringing the action, and that successive actions may be brought.³

⁶ *Griggs v. Foote*, 4 Allen, 195.

§ 625.

¹ See *ante*, §§ 492–495.

² *Chicago & Alton R. R. Co. v. Maher*, 91 Ills. 312; *Chicago & Eastern Illinois R. R. Co. v. Loeb*, 118 Ills. 203; *S. C., 8 Ills. App. 627*; *North Vernon v. Voegler*, 103 Ind. 314; *Powers v. Council Bluffs*, 45 Ia. 652; *Stodghill v. Chicago, Burlington & Quincy R. R. Co.*, 53 Ia. 341; *Van Orsdol v. B. C. R. & N. R. Co.*, 56 Ia. 470; *Hempstead v. Des Moines*, 63 Ia. 36; *Drake v. Chicago, R. I. & P. R. R. Co.*, 63 Ia. 602; *Miller v. Keokuk & Des Moines Ry. Co.*, 63 Ia. 680; *Kansas R. R. Co. v. Mihlman*, 17 Kan. 224;

Central Branch U. P. R. R. Co. v. Andrews, 26 Kan. 702, 711; *Elizabethtown etc. R. R. Co. v. Combs*, 10 Bush, 382, 393; *Jeffriesville etc. R. R. Co. v. Esterle*, 13 Bush, 667; *Ortwine v. Baltimore*, 16 Md. 387; *Fowle v. New Haven etc. Co.*, 112 Mass. 334; *Baldwin v. Chicago, Mil. & St. Paul Ry. Co.*, 35 Minn. 354; *Troy & Cheshire R. R. Co.*, 23 N. H. 83; *Town v. Faulkner*, 56 N. H. 255; *Texas & Pacific R. R. Co. v. Long*, 1 Tex. App. Civil Cas., p. 281; *Texas Central Ry. Co. v. Clifton*, 2 Same, p. 433.

³ *Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290; *Dickson v. Chicago, R. I. & P. R. R. Co.*, 71 Mo. 575; *Uline*

Where the former rule of damages prevails, a recovery will operate to vest in the defendant a permanent right to maintain, use and operate the works which cause the damage sued for.⁴

The proper plaintiff in such cases will be the owner of the property when the right of action accrues. In those States which hold that there can be but one recovery, the right to the entire damages vests in the owner at the time of the injury and does not pass by a subsequent grant of the injured premises. Such subsequent grantee, therefore, cannot maintain a suit for such damages.⁵ A city which merely permits a railroad company to occupy a street is not liable to abutting owners for damages to their property by reason of the railroad in the street.⁶ Where the city caused a street to be carried over a railroad by a viaduct, it was held that the railroad company was not liable for damages to adjacent property on the ground that it contributed towards paying for the work.⁷

§ 626. When no damages are awarded, the only remedy is by appeal.—If proceedings are regularly instituted for the

v. New York Central & Hudson River R. R. Co., 101 N. Y. 98; Taylor *v.* Metropolitan R. R. Co., 50 N. Y. Supr. Ct. 311; Gulf, Col. & S. F. Ry. Co. *v.* Helsley, 62 Tex. 593; G. H. & S. A. Ry. Co. *v.* Tait, 63 Tex. 223; Same *v.* Seymour, 63 Tex. 345; Carl *v.* Sheboygan & Fond du Lac R. R. Co., 46 Wis. 625. And see Drady *v.* Des Moines etc. R. R. Co., 57 Ia. 393; Winchester *v.* Stevens Point, 58 Wis. 350; Valley Ry. Co. *v.* Franz, 43 Ohio St. 623.

⁴ Instructive articles pertaining to the subject of this section will be found in 26 Am. Law. Reg., pp. 281 and 345.

⁵ Chicago & Alton R. R. Co. *v.* Maher, 91 Ills. 312; Chicago & Eastern Ills. R. R. Co. *v.* Loeb, 118

Ills. 203. In Merchants' Union Barb. Wire Co. *v.* Chicago, Burlington & Quincy R. R. Co., 70 Ia. 105, it was held the grantee might sue if there had been no prior recovery of permanent damages.

⁶ Olney *v.* Wharf, 115 Ills. 519; Hedrick *v.* Olathe, 30 Kan. 348; Dillenbach *v.* Xenia, 41 Ohio St. 207. *Contra:* Stack *v.* East St. Louis, 85 Ills. 377.

⁷ Culbertson & Blair Packing and Provision Company, *v.* Chicago, 111 Ills. 651. See further, as to defendants in such cases, Bizer *v.* Ottumwa Hydraulic Power Co., 70 Ia. 145; Day *v.* New Orleans Pacific Ry. Co., 37 La. An. 131; Railroad Company *v.* Hambleton, 40 Ohio St. 496.

condemnation of property, and the owner is duly notified and no damages are awarded him, his only remedy is by appeal.¹ He can neither enjoin possession in equity nor sue for damages at law.²

§ 627. Conflicting claims to the damages awarded.—If damages are assessed and paid to one as owner, who is not the true owner, he will be liable to the true owner in an action for money had and received.¹ So, where it was conceded that the entire value of premises was awarded to the landlord, it was held the tenant could recover from the landlord his equitable share.² But, where separate awards are made to both landlord and tenant, the tenant cannot recover from the landlord the amount of an item which the commissioners erroneously allowed the landlord instead of the tenant.³ Where the whole value of the property is awarded one tenant in common, he will be liable to the others for their *pro rata* shares.⁴ Where land was condemned for a railroad and damages paid to the owner, but the land was never used and was subsequently condemned by a second company, it was held the first was entitled to the damages, and not the original owner.⁵ But, where land was conveyed to a railroad company in consideration of the construction of a road over the same which was sold out under a mortgage before the road was completed over the land, and afterwards was taken by another company, it was held that the original vendor of the land was entitled to

§ 626.

¹ *Powell v. Clelland*, 82 Ind. 24; *Connolly v. Griswold*, 7 Ia. 416; *Master v. McHolland*, 12 Kan. 17; *Fravert v. Finfrock*, 31 Ohio St. 621.

² *Ibid.*

§ 627.

¹ *Tamon v. Kellogg*, 49 Mo. 118; *Meginnis v. Nunamaker*, 64 Pa. S.

374. This is sometimes provided for by statute. *DePeyster v. Mali*, 27 Hun, 439.

² *Harris v. Howes*, 75 Me. 436.

³ *Turner v. Williams*, 10 Wend. 139.

⁴ *Brinkeroff v. Wemple*, 1 Wend. 470.

⁵ *Dubuque & Dakota Ry. Co. v. Diehl*, 64 Ia. 635.

compensation, and not the purchaser at the foreclosure sale.⁶ Where the land was taken subject to a life estate, it was held the life tenant was entitled to the use of the damages until her death.⁷ If the holder of the legal title is in fact a trustee, the *cestui que trust* may by bill in equity establish the trust and obtain the damages awarded.⁸ If the party condemning have notice of adverse claims to the damages awarded, it should deposit the same for the use of the true owner, and if after notice it pays to the wrong party, it will be liable to the true owner.⁹ Where A was in possession of property at the time of proceedings to condemn it, but B had an action pending against A for the land, in which he afterwards succeeded, and the damages had been deposited in court, it was held that A was entitled to the part awarded for injury to the crops and B to the remainder.¹⁰ In one case it has been held that the court had power to cause rival claimants to the damages awarded to interplead.¹¹ In another case the party out of possession but claiming to be the true owner was directed to bring ejectment within a month for the purpose of trying this title.¹² In case of the death of a person in whose favor an award has been made, the proper rule would seem to be that the title to the land descends to the heirs, subject to the contingency of being divested upon payment of the damages awarded, while the right to the damages passes to the personal representatives.¹³

⁶ Ingalls *v.* Byers, Admr., 94 Ind. 134.

⁷ Kansas City, Springfield & Memphis R. R. Co. *v.* Weaver, 86 Mo. 473.

⁸ Whitney *v.* Milwaukee, 57 Wis. 636.

⁹ Hatch *v.* New York, 82 N. Y. 436.

¹⁰ Rooney *v.* Sacramento Valley R. R. Co., 6 Cal. 638. But in the following case it was held that the parties in possession claiming title

were entitled to the entire damages: Sacramento Valley R. R. Co. *v.* Moffatt, 7 Cal. 577.

¹¹ Gerrard *v.* Omaha etc. R. R. Co., 14 Neb. 270.

¹² Metropolitan Board of Works *v.* Sant, 38 L. J. Eq. 7.

¹³ Welles *v.* Cowles, 4 Conn. 182; Wilson *v.* Harvey, 3 Harr. 500; Wilson *v.* Cochran, 4 Harr. 88; Rice Exr. *v.* Barre Turnpike Co., 4 Pick. 130.

§ 628. **Remedy of mortgagees of the land taken.**—We have already shown that the rights of a mortgagee cannot be divested, unless he is made a party to the condemnation proceedings, and has an opportunity to protect his interests.¹ If he is made a party, the court will make such an equitable apportionment of the damages as justice may require.² And, where the mortgagee was not a party, it was held that the party condemning might pay the damages into court and apply to have the rights of the mortgagee protected so as not to pay twice.³ If the mortgagee is not a party, he may by bill subject the award to the payment of the debt.⁴ This would be his only remedy in those States in which it is held that he is not a necessary party. But, if he is a necessary party, as we hold to be the case, then his rights are not affected by the proceeding, and, if default is made in the payment of the mortgage debt, he may have the same remedy by foreclosure that he would have if the property condemned had been conveyed for private uses.⁵ The decree in case of non-payment should be first for the sale of the balance of the tract subject to the rights of the party condemning, and, if that prove insufficient, then for the sale of the part condemned.⁶ In *Kennedy v. Milwaukee & St. Paul Ry. Co.*⁷ the court stayed the foreclosure to enable the railroad company to have the property regularly condemned.

§ 629. **Remedies open to the owners of other liens and interests in the land taken.**—Substantially the same prin-

§ 628.

¹ See *ante*, § 324.² *Matter of Noble Street*, 1 Ashmead, 276.³ *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis. 311.⁴ *Wood v. Westborough*, 140 Mass. 403; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Hooker v. Martin*, 10 Hun, 302; *Platt v. Bright*, 29 N. J. Eq. 128.⁵ *Severin v. Cole*, 38 Ia. 463;*Dodge v. Omaha & Southwestern R. R. Co.*, 20 Neb. 276; *North Hudson R. R. Co. v. Booream*, 28 N. J. Eq. 450; *Wade v. Hennessy*, 55 Vt. 207; *Adams v. St. Johnsbury & Lake Champlain R. R. Co.*, 57 Vt. 240; *Kennedy v. Milwaukee & St. Paul Ry. Co.*, 22 Wis. 581.⁶ *Ibid.*⁷ 22 Wis. 581.

ples apply to other liens as to mortgages. If the owners are required to be made parties by the law or constitution as interpreted by the courts, their interests will be protected in the condemnation proceedings, or if not made parties the proceedings will be void as to them. If they are not required to be made parties, they will have the same claim upon the damages awarded as upon the land, and may enforce their rights by appropriate proceedings. The interests of judgment creditors¹ and legatees² have been thus protected; also an inchoate dower.³

§ 630. Rights of an assignee of the damages awarded.

—The award or judgment for damages may be assigned or transferred the same as any other judgment. Where part of an award was assigned and the award was afterward set aside and a new award made, it was held to operate on the new award to the extent of the same fractional part.¹

§ 629.

the owners of such interests par-

¹ Gimble *v.* Stolte, 59 Ind. 446. ties, *ante*, §§ 325, 341.

² Rees *v.* Addams, 16 S. & R. 40. § 630.

³ Wheeler *v.* Kirtland, 27 N. J. Eq. 534. See, further, as to making 359; S. C., 10 Hun, 160.

CHAPTER XXVIII.

THE REMEDY FOR A WRONGFUL INTERFERENCE WITH PROPERTY UNDER COLOR OF EMINENT DOMAIN.

§ 631. **Injunction to prevent entry or construction of works before complying with the law.**— It is now almost universally held that an entry upon private property under color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the constitution and the laws.¹ If the just compensation has not been paid, or deposited as required by law,² or if the proceedings under which the right to enter is

§ 631.

¹ *Tait v. Hall*, 71 Cal. 149; *County Comrs. v. Humphrey*, 47 Ga. 565; *Morgan v. Miller*, 59 Ia. 481; *Bolton v. McShane*, 67 Ia. 207; *Chicago & Atchison Bridge Co. v. Pacific Mutual Tel. Co.*, 36 Kan. 113; *Frederick v. Groshon*, 30 Md. 436; *Piedmont & Cumberland Ry. Co. v. Speelman*, 67 Md. 260; *Devaux v. Detroit*, Harr. Ch. (Mich.) 98; *Woodruff v. Glendale*, 23 Minn. 537; *Chadbourne v. Zilsdorf*, 34 Minn. 43; *Prescott v. Beyer*, 34 Minn. 493; *McPike v. West*, 71 Mo. 199; *Mettler v. Easton & Amboy R. R. Co.*, 25 N. J. Eq. 214; *Wagner v. Railway Co.*, 38 Ohio S. 32; *Warner v. Railroad Co.*, 39 Ohio St. 70; *Jarden v. Philadelphia etc. R. R. Co.*, 3 Whart. 502; *Pierpoint v. Harrisville*, 9 W. Va. 215; *Boughner v. Clarksburg*, 15 W. Va. 394; *Forsyth v. Wheeling*, 19 W. Va. 318; *Wilson v. Mineral Point*, 39 Wis. 160; *Wren v. Walsh*, 57 Wis. 98;

Bonaparte v. Camden & Amboy R. R. Co., Bald. C. C. 205; *Field v. Carnarvon etc. Ry. Co.*, L. R. 5 Eq. Cas. 190; S. C., 37 L. J. Ch. 176; *Poynder v. Great Northern Ry. Co.*, 2 Phillips, 330; *Willey v. South Eastern Ry. Co.*, 1 McN. & G. 58. Compare *Deering v. York & Cumberland R. R. Co.*, 31 Me. 172; *Brooklyn v. Meserole*, 26 Wend. 132.

² *McCann v. Sierra Co.*, 7 Cal. 121; *Curran v. Shattuck*, 24 Cal. 427; *Grigsby v. Burtnett*, 31 Cal. 406; *Shute v. Chicago & Milwaukee R. R. Co.*, 26 Ills. 436; *Cobb v. Illinois etc. R. R. Co.*, 68 Ills. 233; *La Fayette v. Bush*, 19 Ind. 326; *Elkhart v. Simonton*, 69 Ind. 196; *New Albany v. White*, 100 Ind. 206; *Dinwiddie v. Roberts*, 1 G. Greene, 363; *Trustees of Iowa College v. Davenport*, 7 Ia. 213; *Horton v. Hoyt*, 11 Ia. 496; *Young v. Harrison*, 6 Ga. 130; *Gammage v. Georgia Southern R. R. Co.*, 65 Ga. 614;

claimed are invalid for any reason,³ an entry will be enjoined. So if the right to enter is claimed under a statute which is unconstitutional and void.⁴ So an injunction will be granted to prevent the taking of property which is not

Chambers v. Cincinnati & Georgia R. R. Co., 69 Ga. 320; *Kirkendall v. Hunt*, 4 Kan. 514; *Western R. R. Co. v. Owings*, 15 Md. 199; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Stewart v. Raymond R. R. Co.*, 7 S. & M. 568; *Cameron v. Board of Supervisors of Washington Co.*, 47 Miss. 264; *Ray v. Atchison & Nebraska R. R. Co.*, 4 Neb. 439; *Champion v. Sessions County Comrs.* 1 Nev. 478; S. C., 2 Nev. 271; *Ross v. Elizabethtown etc. R. R. Co.*, 2 N. J. Eq. 422; *Morris & Essex R. R. Co. v. Hudson Tunnel R. R. Co.*, 25 N. J. Eq. 384; *Folley v. Passaic* 26 N. J. Eq. 216; *Redman v. Philadelphia etc. R. R. Co.*, 33 N. J. Eq. 165; *Keene v. Borough of Bristol*, 26 Pa. S. 46; *Saver v. Philadelphia*, 35 Pa. S. 231; *Appeal of Borough of Verona*, 108 Pa. S. 83; *Large v. Philadelphia*, 3 Phila. 382; *Parker v. East Tenn., Va. & Ga. R. R. Co.*, 13 Lea, 669; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Mason City Salt & Mining Co. v. Mason*, 23 W. Va. 211; *Shepardson v. Milwaukee & Beloit R. R. Co.*, 6 Wis. 605; *Powers v. Bears*, 12 Wis. 213; *Bohlman v. Green Bay & Lake Pepin Ry. Co.*, 30 Wis. 105; *Diedricks v. Northwestern Union Co.*, 33 Wis. 219; *Bohlman v. Green Bay & Minn. Ry. Co.*, 40 Wis. 157; *Bonaparte v. Camden & Amby R. R. Co.*, 1 Bald. C. C. 205; *Eidemiller v. Wyandotte City*, 2 Dill. 376; *Northern Pacific R. R. Co. v. St.*

Paul etc. Ry. Co.

1 McCrary, 302. Of course, the text will not apply to those States where it is held that compensation need not be first made. *New Albany & Salem R. R. Co. v. Connally*, 7 Ind. 32; *Jefferson etc. R. R. Co. v. New Orleans*, 31 La. An. 478; *Heston v. Canal Comrs.*, Brightley's N. P. 183; *Johnston v. Rankin*, 70 N. C. 550; *Phifer v. Carolina Central R. R. Co.*, 72 N. C. 433.

³ *Miller v. Mobile*, 47 Ala. 163; *Curry v. Jones*, 4 Del. Ch. 559; *Frizell v. Rogers*, 82 Ills. 109; *McPherson v. Holdredge*, 24 Ills. 38; *Erwin v. Fulk*, 94 Ind. 235; *Alcott v. Acheson*, 49 Ia. 569; *Barnes v. Fox*, 61 Ia. 18; *Olyphant v. Commissioners of Atchison Co.*, 18 Kan. 386; *McMillen v. Baker*, 20 Kan. 50; *Jeffries v. Swampscott*, 105 Mass. 535; *Lohman v. St. Paul etc. R. R. Co.*, 18 Minn. 174; *Penrice v. Wallis*, 37 Miss. 172; *Carpenter v. Grisham*, 59 Mo. 247; *Champlin v. New York*, 3 Paige, 573; *Meserole v. Brooklyn*, 8 Paige, 198; *Anderson v. Commissioners of Hamilton Co.*, 12 Ohio S. 635; *Floyd v. Turner*, 23 Tex. 292; *Paris v. Mason*, 37 Tex. 447; *Lumsden v. Milwaukee*, 8 Wis. 485. Some cases limit the relief to where the invalidity depends upon extrinsic facts. *Miller v. Mobile*, 47 Ala. 163; *Baldwin v. Buffalo*, 35 N. Y. 375.

⁴ *Parham v. Justices etc.* 9 Ga. 341; *Wild v. Dieg*, 43 Ind. 455; *Carbon Coal & Mining Co. v. Drake*,

within the power granted,⁵ or after the power has been exhausted.⁶ Where property has long been in the possession of the plaintiff, an injunction will lie against public officers to prevent them from taking the same under the claim that it is part of a public street, until the right has been tried at law.⁷ Where the width of a right of way as originally established was indefinite but its width has been defined by user, an injunction will lie to prevent any encroachment beyond the limits as so fixed.⁸ Where an appeal was taken by certain parties from the decision of commissioners in proceedings to establish a highway, upon grounds going to the validity of the whole proceedings, and the case would be tried *de novo* in the appellate court, it was held that the appeal suspended the whole proceeding and that an entry in the meantime upon property belonging to persons who had not appealed would be enjoined.⁹

§632. The grounds of jurisdiction in such cases.—The grounds upon which equity takes jurisdiction in such cases are not always plainly defined and differ in different jurisdictions. Perhaps a majority of the cases are put upon the ground of irreparable injury and the consequent lack of an adequate remedy at law.¹ In a few cases the relief has been

²⁶ Kan. 345; *Morse v. Stocker*, 1 Allen, 150; *Watson Exr. v. Trustees etc.* 21 Ohio St. 667; *Rhine v. McKinney*, 53 Tex. 354.

⁵ *Butler v. Thomasville*, 74 Ga. 570; *Forbes v. Delagmunt*, 68 Ia. 164; *Trustees v. Walsh*, 57 Ills. 363; *Flanders v. Wood*, 24 Wis. 572; *Hughes v. Trustees of Modern College*, 1 Ves. Sr. 188. But, where it appeared the plaintiff would suffer no damage, the injunction was refused. *Brown v. Gardner*, Harr. Ch. (Mich.) 291.

⁶ *Moorhead v. Little Miami R. R. Co.*, 17 Ohio, 340.

⁷ *Tate v. Sacramento*, 50 Cal. 242; *Champlin v. Morgan*, 18 Ills. 293; *Owens v. Crossett*, 105 Ills. 354; *Chadbourne v. Zilsdorf*, 34 Minn. 43; *Devaux v. Detroit*, Harr. Ch. (Mich.) 98; *Baldwin v. Buffalo*, 29 Barb. 396.

⁸ *Commissioners of Highways v. Harrison*, 108 Ills. 398; *Prescott v. Beyer*, 34 Minn. 493; *Warner v. Railroad Co.*, 39 Ohio S. 70.

⁹ *Pool v. Breese*, 114 Ills. 594.

§ 632.

¹ *Grigsby v. Burtnett*, 31 Cal. 406; *Erwin v. Fulk*, 94 Ind. 235; *McMillan v. Baker*, 20 Kan. 50; Car-

denied on the ground that the remedy at law was adequate.² But in most of these there were other circumstances which rendered it inequitable to grant the relief, while, in many of the cases in which injunctions were granted on the ground of irreparable injury, it was plain enough that the injury could have been readily repaired or fully compensated for in money.

It seems to us that the jurisdiction of equity in such cases may be placed upon broader grounds; namely, that where the power of eminent domain has been delegated to public officers or others who are threatening to make a permanent appropriation of private property to public uses, in excess of the power granted or without complying with the conditions upon which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation.³ The remedy in equity protects both the owner and those acting under the authority, and is more

penter *v.* Grisham, 59 Mo. 247; McPike *v.* West, 71 Mo. 199; Champion *v.* Sessions County Comrs., 1 Nev. 478; Folley *v.* Passaic, 26 N. J. Eq. 216; Pierpont *v.* Harrisville, 9 W. Va. 215; Forsyth *v.* Wheeling, 19 W. Va. 318; Wilson *v.* Mineral Point, 39 Wis. 160; Uren *v.* Walsh, 57 Wis. 98; Bonaparte *v.* Camden & Amboy R. R. Co., 1 Bald. C. C. 205; Eidemiller *v.* Wyandotte City, 2 Dill. 376.

² Nichols *v.* Sutton, 22 Ga. 369; Lewis *v.* Rough, 26 Ind. 398; Smith *v.* Weldon, 73 Ind. 454; Mercer *v.* Williams, Walker Ch. (Mich.) 85; Brown *v.* Gardner, Harr. (Mich.) 291; Anderson *v.* St. Louis, 47 Mo. 479; McLaughlin *v.* Sandusky, 17 Neb. 110; Chesapeake & Ohio R. R. Co. *v.* Patton, 5 W. Va. 234.

³ Cobb *v.* Illinois etc. Co., 68 Ills. 233; Bolton *v.* McShane, 67 Ia. 207; Western R. R. Co. *v.* Owings, 15 Md. 199; Frederick *v.* Groshon, 30 Md. 436; Pennsylvania R. R. Co's. Appeal, 115 Pa. S. 514. In Browning *v.* Camden & Amboy R. R. Co. 4 N. J. Eq. 47, 57, the court say: "If his (the plaintiff's) rights of property are about to be destroyed without the authority of law, or if lawless danger impends over them by persons acting under the color of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass, a court of equity will enjoin its commission."

speedy and efficacious in its operation than the ordinary legal remedies.⁴

§ 633. When the relief will be refused.—The relief in equity will be denied where it is based upon mere irregularities in the proceedings which do not render them invalid,¹ or where the plaintiff's title is in dispute.² The plaintiff in such cases must make a clear right to the relief sought, or it will be denied.³ Where the condemnation of property was sought by a railroad company and, pending proceedings, the same was purchased by the president of a rival company for the purpose of obstructing the former in its acquisition of the property, it was held that a court of equity would not aid such purchaser, either by enjoining the proceedings or by enjoining an entry before compensation was made.⁴

§ 634. Injunction to prevent the use of property until the damages are paid.—Where a wrongful entry is made upon property for the purpose of appropriating it to public uses, and the owner acts with diligence, he may enjoin the further use of the property until compensation is made.¹ But, if the entry is made with the consent of the owner, upon some understanding as to the future adjustment of compensation,

⁴ *Bolton v. McShnne*, 67 Ia. 207.
§ 633.

nied. *Great Falls Manf. Co. v. Garland*, 25 Fed. R. 521.

¹ *Indiana Oolithic Limestone Co. v. Louisville, New Albany & Chicago R. R. Co.*, 107 Ind. 301; *Caskey v. Greensburg*, 78 Ind. 233; *Savings Fund & Loan Association v. Schmidt*, 15 Ia. 213; *Thorp v. Witham*, 65 Ia. 566; *Commissioners v. Espen*, 12 Kan. 531; *Nichols v. Salem*, 14 Gray, 490; *Walker v. Mad River etc. R. R. Co.*, 8 Ohio, 38. Where the injury to the owner would be slight and the detriment to the public great if the work was interrupted, an injunction was de-

² *Chesapeake & Ohio Canal Co. v. Young*, 3 Md. 480; *Hammerslough v. City of Kansas*, 57 Mo. 219; *Lanterman v. Blairstown R. R. Co.*, 28 N. J. Eq. 1.

³ *Gleason v. Jefferson*, 78 Ills. 399; *Worthington v. Bicknell*, 1 Bland, 186.

⁴ *Piedmont & Cumberland Ry. v. Speelman*, 67 Md. 260.

§ 634.

¹ *Gay v. New Orleans Pacific Ry Co.*, 32 La. An. 277.

or if the owner acquiesces in a possession taken without his knowledge, he cannot enjoin the use of his property until he has exhausted his legal remedies or they are shown to be inadequate.² Where an entry is made in good faith, as upon the consent of one representing himself as owner,³ or upon a mistaken belief of ownership,⁴ and an injunction would be of little value to the owner and a great detriment to the defendant, one will not be granted. In Ohio it has been held that, where the owner agreed with a railroad company that it might enter and construct its road and that damages should be fixed by arbitration and that if not paid within sixty days after being so fixed the company should forfeit all rights under the agreement, the owner could not enjoin the use of his property on account of non-payment for sixty days, but must be left to his legal remedies.⁵ It has been held that, where the action for damages was barred by the statute, an injunction would not lie to prevent the use of the property.⁶ A statute of Wisconsin, passed in 1858, provided that, if a railroad company should take possession of land and should fail for six months to have the damages assessed and paid, the owner might enjoin the use of his property until such payment was made.⁷ The statute was held not to apply to a case where the owner conveyed to the company for a consideration to be paid, which the company afterwards failed to pay.⁸ In the same State a law was held valid which provided that no injunction should issue until the damages had

² Richards *v.* Des Moines Valley R. R. Co., 18 Ia. 259; Hibbs *v.* C. & S. W. R. R. Co., 39 Ia. 340; Irish *v.* B. & S. W. R. R. Co., 44 Ia. 380; Evans *v.* Missouri, Ia. & Neb. Ry. Co., 64 Mo. 453; Provolt *v.* Chicago, R. I. & P. R. R. Co., 69 Mo. 633; Sturtevant *v.* Milwaukee etc. R. R. Co., 11 Wis. 63; Stretton *v.* Great Western & Brentford Ry. Co., 40 L. J. Eq. 50.

³ Pickert *v.* Richfield Park R. R. Co., 25 N. J. Eq. 316.

⁴ Erie R. R. Co. *v.* Delaware etc. R. R. Co., 21 N. J. Eq. 283.

⁵ Coe *v.* Columbus etc. R. R. Co., 10 Ohio St. 372, 411.

⁶ Mooers *v.* Kennebec & Portland R. R. Co., 58 Me. 279.

⁷ Davis *v.* La Crosse & Miss. R. R. Co., 12 Wis. 16, 25.

⁸ Vilas *v.* Milwaukee etc. R. R. Co., 15 Wis. 233.

been ascertained and the company had failed to pay, the owner having the right to institute proceedings.⁹

Where the right to relief exists at the time of filing the bill, but the defendant has the power to acquire the property, and an injunction will be prejudicial to the public or the defendant and its postponement no detriment to the plaintiff, the court will withhold the injunction until a reasonable opportunity is afforded to ascertain and pay the compensation.¹⁰

The restraining order in any case should not be too broad in its terms. Thus an order restraining a city from opening or *causing to be opened* a certain street was held erroneous.¹¹ The order should restrain the entry or threatened injury under the particular claim or color of right, or until the right has been acquired by a compliance with the law.¹²

§ 635. To prevent the laying or operating of steam railroads in streets.¹—Upon this subject the authorities are conflicting. It is generally held that, where the fee of the street is in the abutting owner, he may have the same remedies to prevent the use or occupation of his land as though the street did not exist, and consequently may enjoin its use by a railroad company until the right has been lawfully acquired by condemnation or otherwise.² In Florida and West Virginia

⁹ Andrews *v.* Farmers' Loan & Trust Co., 22 Wis. 288.

suant to regular proceedings for that purpose.

¹⁰ Young *v.* Harrison, 6 Ga. 130; Gammage *v.* Georgia Southern R. R. Co., 65 Ga. 614; Lohman *v.* St. Paul, Stillwater etc. R. R. Co., 18 Minn. 174; White *v.* Nashville etc. R. R. Co., 7 Heisk. 518.

¹² Champion *v.* Sessions County Comrs., 2 Nev. 271.

§ 635.

¹¹ Chicago *v.* Wright, 69 Ills. 318. See also Appeal of Borough of Verona, 108 Pa. S. 83. In Curran *v.* Shattuck, 24 Cal. 427, it was held that a perpetual injunction against opening a road would not prevent its being afterwards opened pur-

¹ On the subject of railroads in streets generally, and the rights of abutting owners therein, see *ante*, §§ 110-125.

² Columbus & Western Ry. Co. *v.* Witherow, 82 Ala. 190; Cox *v.* Louisville R. R. Co., 48 Ind. 178; Schurmeier *v.* St. Paul & Pacific R. R. Co., 10 Minn. 82; Harrington *v.* St. Paul & Sioux City R. R. Co.,

a contrary doctrine is held, although in the latter State it is said that peculiar circumstances might exist which would authorize an injunction in such cases.³ Where the fee of the street is in the public, it is held by some authorities that the abutting owner has private easements therein and that he may have an injunction to prevent an interference therewith by the laying of a railroad in the street.⁴ Other cases hold the contrary, even where it is conceded that the abutting owner is entitled to compensation for the damage to his property.⁵ In some cases it is held that the abutting owner may enjoin a railroad in a street whether he has the fee or not,⁶ while other cases hold exactly the opposite doctrine.⁷ In some cases the remedy in equity has been denied because the injury was slight and the remedy for compensation was deemed ample.⁸ Where an elevated railroad company was authorized to construct its road in a certain street, it was held

¹⁷ Minn. 215; *Williams v. New York Central R. R. Co.*, 16 N. Y. 97; *Washington Cemetery Co. v. Prospect Park etc. R. R. Co.*, 68 N. Y. 591; S. C., 7 Hun, 655; *Merrill v. Calkins*, 74 N. Y. 1; *Henderson v. New York Central R. R. Co.*, 78 N. Y. 423; S. C., 17 Hun, 344; *Fanning v. Osborne*, 34 Hun, 121; *People v. Law*, 22 How. Pr. 109; *Ford v. Chicago & Northwestern Ry. Co.*, 14 Wis. 609.

⁸ *Garnett v. Jacksonville etc. R. R. Co.*, 20 Fla. 889; *Spencer v. Point Pleasant & Ohio R. R. Co.*, 23 W. Va. 406; *Smith v. Same*, 23 W. Va. 451; *Hale v. Same*, 23 W. Va. 454.

⁴ *Pratt v. Buffalo City Ry. Co.*, 19 Hun, 30; *Fanning v. Osborne*, 34 Hun, 121; *Falker v. New York, West Shore & Buffalo Ry. Co.*, 17 Abb. N. C. 279; *Third Ave. R. R. Co. v. New York El. R. R. Co.*, 19 Abb. N. C. 261; *Glover v. Manhattan Ry. Co.*, 51 N. Y. Supr. Ct. 1.

⁵ *Glover v. Manhattan Ry. Co.*, 66 How. Pr. 77; *Chicago & Pacific R. R. Co. v. Francis*, 70 Ills. 238; *Stetson v. Chicago & Evanston R. R. Co.*, 75 Ills. 74; *Patterson v. Chicago, D. & V. R. R. Co.*, 75 Ills. 588; *Peoria & Rock Island Ry. Co. v. Schertz*, 84 Ills. 135; *Truesdale v. Peoria Grape Sugar Co.*, 101 Ills. 561; *Mills v. Parlin*, 106 Ills. 60.

⁶ *Savannah, Albany & Gulf R. R. Co. v. Shiels*, 33 Ga. 601; *Macon v. Harris*, 75 Ga. 761; *Dubach v. Hannibal & St. Joseph R. R. Co.*, 89 Mo. 483; *Railway Co. v. Lawrence*, 38 Ohio St. 41; *Pennsylvania R. R. Co.'s Appeal*, 115 Pa. S. 514.

⁷ *New Albany & Salem R. R. Co. v. O'Dailey*, 12 Ind. 551; *Harrison v. New Orleans Pacific R. R. Co.*, 34 La. An. 462.

⁸ *Schurmeier v. St. Paul & Pacific R. R. Co.*, 8 Minn. 118; *Zabriskie v. Jersey City etc. R. R. Co.*, 13 N. J. Eq. 314; *Booraem v. North*

that such authority did not justify the occupation of any part of an intersecting street outside the limits of the first street, and that such use would be enjoined.⁹ A right of way along a street does not justify its use for storing cars, and such use was enjoined at the instance of the abutting owner.¹⁰ The abutting owner can only enjoin the use of the street for railroad purposes in front of his own premises.¹¹ The passage of an ordinance giving authority to a company to occupy a street will not be enjoined, since the passage of the ordinance alone results in no injury to private property.¹² It is held that the attorney general may maintain an information to restrain a railroad company from laying a track in a public street without authority.¹³ As to whether a city or county can maintain such a bill, the authorities are conflicting.¹⁴ Of course, the right to use a public street for railroad purposes may be acquired in any case by obtaining the consent of the public authorities and making just compensation to the owners.¹⁵ If the plaintiff does not own the fee of the street and his property is not damaged, an injunction will not be granted.¹⁶ Where the tracks had been in use in the street for ten years without objection, it was held too late to enjoin.¹⁷

§ 636. To prevent the laying or operating of horse railroads in streets.—It has already been shown that a distinc-

Hudson County R. R. Co., 40 N. J. Eq. 557; Hamilton *v.* New York & Harlem R. R. Co., 9 Paige, 171.

⁹ Mattlage *v.* New York El. Ry. Co., 67 How. Pr. 232.

¹⁰ Pennsylvania R. R. Co. *v.* Angel, 41 N. J. Eq. 316.

¹¹ Moran *v.* Lydecker, 11 Abb. N. C. 298.

¹² Whitney *v.* New York, 28 Barb. 233.

¹³ Attorney General *v.* Morris & Essex R. R. Co., 19 N. J. Eq. 386.

¹⁴ Yes: Brooklyn Steam Transit Co. *v.* Brooklyn, 78 N. Y. 524;

Northern Central R. R. Co. *v.* Baltimore, 21 Md. 93. No: Kings County *v.* Sea View Ry. Co. 23 Hun, 180; Milwaukee *v.* Milwaukee & Beloit R. R. Co., 7 Wis. 85.

¹⁵ Heath *v.* Des Moines & St. Louis Ry. Co., 61 Ia. 11.

¹⁶ Hogan *v.* Central Pacific R. R. Co., 71 Cal. 83. See Indianapolis & St. Louis R. R. Co. *v.* Calvert, 110 Ind. 555; and compare Pennsylvania R. R. Co.'s Appeal, 115 Pa. S. 514.

¹⁷ Baltimore & Ohio R. R. Co. *v.* Strauss, 37 Md. 237.

tion is made in some of the States between horse railroads and steam roads, the former being held to be a legitimate use of a street as a public highway.¹ According to this view, the abutting owner has no more ground of complaint in case a horse railroad is laid down and operated in front of his property than he would have if a line of omnibuses was operated on the street.² But, where horse railroads are put in the same category with steam roads, the same rules and principles will apply in respect to the rights of abutting owners. They may enjoin the use of the street for such purposes in front of their property until the right has been obtained in the usual way.³ One who is interested as a taxpayer merely and does not own property upon the street in question has not sufficient interest to maintain the bill.⁴

§ 637. To prevent other uses of streets.—The abutting owner may, in general, enjoin any use of a street which is foreign to its purpose as a public highway and is calculated to produce special damage to his property. He may prevent the occupation of a street by a railroad for depot purposes,¹ or a passenger platform,² or by a private railroad leading to

§ 636.

¹ *Ante*, §§ 124, 125.

² *Hinchman v. Paterson Horse R. R. Co.*, 17 N. J. Eq. 75; *Hogen-camp v. Same*, 17 N. J. Eq. 83; *Texas & Pacific Ry. C. v. Rosedale Street Ry. Co.*, 64 Tex. 80.

³ *Milhau v. Sharp*, 27 N. Y. 611; *Craig v. Rochester City etc. R. R. Co.*, 39 N. Y. 404; *S. C.*, 39 Barb. 494; *Wetmore v. Story*, 22 Barb. 414; *People v. Law*, 34 Barb. 494; *Thayer v. Rochester City etc. R. R. Co.*, 15 Abb. N. C. 52; *Cincinnati etc. Street R. R. Co. v. Cummins-ville*, 14 Ohio St. 523; *Roberts v. Easton*, 19 Ohio St. 78. An individual suffering special damage, or the municipality, may enjoin the

construction of a horse railway upon a street without right. *Philadelphia v. Thirteenth etc. R. R. Co.*, 8 Phila. 648; *Shipley v. Continental R. R. Co.*, 13 Phila. 128.

⁴ *Davis v. New York*, 14 N. Y. 506.

§ 637.

¹ *Barney v. Keokuk*, 4 Dill. 593; aff. 94 U. S. 324.

² *Higbee v. Camden & Amboy R. R. Co.*, 19 N. J. Eq. 276; but in this case the injunction was dissolved on final hearing on the ground that the platform had been there for twenty years, that the inconvenience to the plaintiff was slight and his remedy at law ample. *S. C.*, 20 N. J. Eq. 435.

an elevator,³ or by poles and wires for electric purposes.⁴ A ditch along the highway in front of the plaintiff's property for the purpose, not of improving the highway, but of draining private property, was enjoined.⁵ Also the laying of pipes for conducting natural gas,⁶ the erection of a public market,⁷ and of a market, jail and pound.⁸ Those acting by authority of the public have been restrained from removing materials from the highway in front of the plaintiff's premises;⁹ also from unnecessarily removing trees therefrom.¹⁰

§ 638. To prevent changing the grade of a street.—The damages occasioned to abutting property by a change of grade not being a taking within the constitution, no remedy exists either to prevent such changes or recover damages therefor, unless given by statute or some special provision of the constitution.¹ Where by statute compensation is re-

³ *Mikesell v. Durkee*, 34 Kan. 509.

was refused in *Hewitt v. Western Union Tel. Co.*, 4 Mack. 424. See *Pierce v. Draw*, 136 Mass. 75.

⁴ *Conrad v. Smith*, 32 Mich. 429.

⁶ *Sterling's Appeal*, 111 Pa. S. 35.

⁷ *Atwater v. Mayer*, 29 Alb. L. J. 483.

⁸ *Lutterloh v. Cedar Keys*, 15 Fla. 306.

⁹ *Smith v. Rome*, 19 Ga. 89; *Althen v. Kelly*, 32 Minn. 280; *Robert v. Sadler*, 104 N. Y. 239. As to the right to materials in the public streets, see *ante*, § 590.

¹⁰ *Bills v. Belknap*, 36 Ia. 583.

§ 638.

¹ *Ante*, § 96. *Markham v. Atlanta*, 23 Ga. 402; *Columbus v. Storey*, 33 Ind. 195. In *Louisville v. Louisville Rolling Mill Co.*, 3 Bush, 416, an injunction was granted under somewhat peculiar circumstances to prevent a change of grade, but this case is commented upon else-

quired to be made to abutting owners for all damages to their property by reason of the change, it is held that the change will be enjoined until the compensation is made.² Under recent constitutions which required compensation to be made for property damaged or injured as well as for property taken, the right exists to recover for property damaged by a change of grade. Usually no provision has been made by statute for the assessment and payment of such damages at the instance of the public authorities. The authorities, therefore, must either agree with the owner, or refrain from making a change, or else take their chances of such suits as may be brought by those aggrieved. The usual remedy invoked is a suit by the abutting owner for damages in which it has been customary to give entire damages, that is, the just compensation for the injury to which he is entitled under the constitution. In Georgia it is held that the owner should be left to this remedy rather than that public improvements should be interrupted.³ But since, under a proper interpretation of the constitution, compensation must be made *before* private property is taken or damaged,⁴ a court of equity may take jurisdiction to prevent such damage until compensation is made. *McElroy v. Kansas City*⁵ is an interesting case of this sort. The defendant was about to cut down the street in front of plaintiff's property some fourteen feet, to its very serious damage. The plaintiff filed his bill to prevent its being done. The constitution of Missouri then in force required the compensation for property taken or *damaged* to be *first* made. The legislature, however, had made no provision by means of which the city could have such damages ascertained, and consequently it could

where. *Ante*, § 99. Cutting down a street by private parties was enjoined in *Price v. Knott*, 8 Or. 438, at the suit of the abutting owner.

² *Columbus v. Hydraulic Woolen Mills Co.*, 33 Ind. 435; *Kokomo v. Mahan*, 100 Ind. 242; *Phillips v.*

Council Bluffs, 63 Ia. 576; *Wilkin v. St. Paul*, 33 Minn. 181; *Hurford v. Omaha*, 4 Neb. 336.

³ *Moore v. Atlanta*, 70 Ga. 611.

⁴ *Ante*, § 459.

⁵ 21 Fed. R. 257, 261.

not comply with the constitution except by paying the owner whatever he demanded. The injunction was granted upon terms. The reasoning and decision of Brewer, J., are so just and admirable that we have quoted at length from his opinion on the question:

“*First.* A chancellor, in determining an application for an injunction, must regard not only the rights of the complainant which are sought to be protected, but the injuries which may result to the defendant or to others from the granting of the injunction. If the complainant’s rights are of a trifling character, if the injury which he would sustain from the act sought to be enjoined can be fully and easily compensated, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer a large inconvenience if the contemplated act was restrained, the lesser right must yield to the larger benefit; the injunction should be refused, and the complainant remitted to his action for damages. This rule has been enforced in a multitude of cases, and under a variety of circumstances, and it is one of such evident justice as needs no citation of authorities for its support.

“*Second.* When the defendant has an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle lies at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all those cases the legislature has placed at the command of the defendant means for ascertaining the value of the property. In those cases the courts have seldom stopped to inquire whether the value of the property sought to be taken was little or great, whether the injury of the complainant was large or small, but have contented themselves with holding that, as the defendant had full means for ascertaining such compensation, it was his first

duty to use such means, determine and pay the compensation, and until he did so the taking of the property would be enjoined.

“Third. Where the defendant has an ultimate right to do the act sought to be enjoined upon certain conditions, and the means of complying with such conditions are not at his command, the courts will endeavor to adjust their orders so on the one hand as to give the complainant the substantial benefit of such conditions, while not restraining the defendant from the exercise of its ultimate rights. Thus, in the case at bar, the defendant has of course the ultimate right to grade this street. As a condition of such right is a payment of damages; no tribunal has been created, no provision of law made, for their ascertainment. Hence, if possible, the court should provide for securing to the defendant this ultimate right, and at the same time give to the complainant the substantial benefit of the prior conditions.

“Fourth. In applying the rule first stated to a case like the one at bar, the court should have principal regard to three matters:

“(1.) The amount of injury to the complainant. It is obvious that a grade of a single foot in front of a city lot would work but trifling injury, while on the other hand the grade might be such as practically to destroy the value of the adjacent property. In the one case it would seem a great hardship to tie up public improvement because of some trifling injury to the complainant, the amount of which injury was not attainable by any established means, and therefore that the party might justly be left to his action for damages; while in the other case the court might well insist that the value of complainant’s property should not be wholly wrecked until such value has been paid to him.

“(2.) The court will consider the solvency of the defendant. If some irresponsible corporation should seek, in the exercise of the power of eminent domain, and under the guise of the contemplated public improvement, to do serious

damage to property, the court should properly say that the owner was not bound to take the chance of collecting his damages from such a corporation, and imperatively require the prior adjustment and payment of such damages; while, if the party attempting the improvement was a corporation of established and permanent solvency, the court might say that the complainant would run little risk in pursuing simply his action for damages.

“(3.) If the improvement was one of great public importance, the court would justly regard that as a reason for not lightly interfering with the work, while if the improvement was more of a personal speculation and for private gain, the prior protection of the complainant would be most rigorously insisted on. Thus, if in the center of a large and thriving city like the defendant some improvement was contemplated which the necessities of business proclaimed to be urgent, the court on no slight consideration should interfere to delay or restrain it; while, on the other hand, if it was some matter in the outskirts of the city, having obviously principal reference to the private speculation of the individual, and of no earnest or urgent demand of public good, the attention of the court would be properly directed to the full protection of the complainant’s prior right. I think such considerations as these, and others of a similar nature, when properly regarded by the courts, will afford ample protection to individual rights, without unnecessary interference with needed public improvements; and that until the legislature makes suitable provision for the ascertainment of damages to property not taken, the courts should be guided by them in determining all applications of this nature for an injunction.

“Now, looking at the facts of this particular case, it is evident that the injury to complainant’s lot will be serious; that the solvency of the defendant is unquestionable, and that any judgment against it can be easily collected; and also that the improvement is not one of pressing public necessity, but

in the outskirts of the city, and having reference mainly to private benefit and individual speculation. I think, therefore, that the complainant is entitled to a restraining order, but at the same time it should not be absolute and unconditional.

“The section of the constitution provides that this compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders. It is within the power of a court of chancery to provide a board of commissioners. The order, therefore, will be that, upon the giving of a bond in the sum of \$3,000, and the filing of a stipulation to accept such damages as shall be ascertained in the manner hereinafter provided in full satisfaction of all claims against the defendant, the defendant will be restrained from grading said street: provided, that at any time the defendant may, upon twenty days’ notice, apply to either of the judges of this court for the appointment of a board of commissioners of three freeholders to ascertain and report the amount of damages which complainant will sustain by reason of the grading of said street, and upon the payment of the damages so reported by such commissioners, the injunction will be vacated. The report of a majority of the commissioners will be the report of the board, and either party may appeal to the judge appointing such commissioners for a review of their report.”

§ 639. To prevent the construction of works in a particular manner.—The rights acquired by the party condemning, with respect to the use of the property taken, have already been discussed.¹ The rule of the authorities is that it is bound to construct its works with a reasonable degree of care and skill, having regard to the rights and interests of adjoining proprietors. In England a railway was enjoined from constructing an insufficient arch over a mill-race,² and

§ 639.

¹ *Ante*, § 585.² *Coats v. Clarence Railway Co.*,1 *Russ. & Mylne*, 181.

in another case from excavating near the plaintiff's house without taking the necessary and proper precautions to prevent the plaintiff's house from falling.³ But in this country it has been held that in such cases the aggrieved party will be left to his remedy at law.⁴ Where, in a proceeding to assess damages for a right of way for a railroad, the company represented that it would cross certain low lands and a lane upon a bridge, and the owner's damages were assessed on that basis, and afterwards the company changed its plan to an embankment which would interrupt access and be more injurious to the property, it was held that the owner was entitled to an injunction to prevent the construction as proposed until additional compensation was made.⁵

§ 640. To prevent the occupation or use of adjacent property not included in the condemnation.—We have already seen that by the condemnation no rights are acquired beyond the limits of the property taken.¹ Any encroachment upon private property beyond those limits is wholly unauthorized and will be enjoined.² Where, however, a highway was opened on a different line from the one legally established and used for ten years, it was held that an attempt to open it after that time on the true line would be enjoined.³

§ 641. To prevent an interference with water rights.—What interference with water rights amounts to a taking, within the meaning of the constitution, is a question which has been fully discussed in a former chapter.¹ Such an interference will be enjoined at the suit of the party injured, the right to the relief being placed upon the same grounds

³ *Briscoe v. Great Eastern Ry. Co.*, L. R. 16 Eq. Cas. 636.

⁴ *Ely v. Rochester*, 26 Barb. 133.

⁵ *Carpenter v. Easton & Amboy R. R. Co.*, 24 N. J. Eq. 249; *S. C.*, 24 N. J. Eq. 408 and 26 N. J. Eq. 168; see also *ante*, § 481.

§ 640.

¹ *Ante*, § 599.

² *Deere v. Cole*, 118 Ills. 165; *Rutledge v. Drainage Comrs.*, 16 Ills. App. 655; *Sidener v. Morris-town etc. Turnpike Co.*, 23 Ind. 623. See also *Shand v. Henderson*, 2 Dow, 519.

³ *Babcock v. Welsh*, 71 Cal. 400. § 641.

¹ Chap. iv.

as any other taking before complying with the statutory and constitutional conditions. Thus injunctions have been granted to prevent the diversion of water from a stream or pond above the plaintiff's premises,² or the obstructing³ or increasing of the flow by artificial means,⁴ or the pollution of the current,⁵ or filling it with debris.⁶ So collecting surface water in a channel and turning it upon the plaintiff's premises where it was not accustomed to flow,⁷ or discharging a sewer upon private property,⁸ or cutting off access to navigable waters,⁹ will be restrained by injunction.

§ 642. To prevent the infringement of a franchise or exclusive right.—The grant of an exclusive right to maintain a bridge,¹ ferry,² railroad³ or canal,⁴ within certain limits,

² *Lux v. Haggin*, 69 Cal. 255; *Emporia v. Soden*, 25 Kan. 588; *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Garwood v. New York Central & Harlem River R. R. Co.*, 17 Hun, 356; *Smith v. Rochester*, 38 Hun, 612; *Avery v. Fox*, 1 Abb. U. S. 246. But see *Spangler's Appeal*, 64 Pa. S. 387, where an injunction was denied because the remedy at law was deemed adequate.

³ *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Holyoke Water Power Co. v. Connecticut River Co.*, 22 Blatch. 131; but see *Arnold v. Klipper*, 24 Mo. 273.

⁴ *Baltimore v. Appold*, 42 Md. 442.

⁵ *Baltimore v. Warren Manfg. Co.*, 59 Md. 96.

⁶ *Waterman v. Buck*, 58 Vt. 519.

⁷ *Sullivan v. Phillips*, 110 Ind. 320; *Field v. West Orange*, 36 N. J. Eq. 118; *West Orange v. Field*, 37 N. J. L. 600.

⁸ *Haskell v. New Bedford*, 108 Mass. 208; *Breed v. Lynn*, 126 Mass. 367; *Morgan v. Binghamton*, 32 Hun, 602; *Van Rensselaer v. Albany*, 15 Abb. N. C. 457; S. C., 2 How. Pr. N. S. 42.

⁹ *Shirley v. Bishop*, 67 Cal. 543; *Stevens v. Erie R. R. Co.*, 21 N. J. Eq. 259.

§ 642.

¹ *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 40; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Gifford v. New Jersey R. R. Co.*, 10 N. J. Eq. 171; *Red River Bridge Co. v. Clarksville*, 1 Sneed, 176.

² *Golconda v. Field*, 108 Ills. 419; *Power v. Athens*, 99 N. Y. 592; S. C., 26 Hun, 282.

³ *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray, 1; *St. Louis R. R. Co. v. Northwestern St. Louis Ry. Co.*, 69 Mo. 65.

⁴ *Hudson & Delaware Canal Co.*

will be protected by injunction from infringement by rival or competing enterprises. Such infringement is a taking within the meaning of the constitution, for which compensation must be made.⁵ If the right is not exclusive, there is no ground for an injunction.⁶ The exclusive privilege of operating a horse railroad on certain streets of a city was protected by an injunction from interference by a dummy railroad.⁷ The laying out of a public road intersecting a chartered turnpike so as to enable travelers to avoid toll was restrained as a violation of the contract with the company.⁸

§ 643. To prevent the taking of property already devoted to public use.—The taking of property already devoted to a public use for the same or a different use, unless the authority is expressly given or necessarily implied, will be prevented by injunction. The laying of a railroad longitudinally along the right of way of another,¹ opening a highway through the depot grounds or yards of a railroad,² constructing a public ditch³ or a line of telegraph,⁴ upon a railroad right of way, or taking a ferry for a public highway⁵ under a general grant of authority, are illegal and will be enjoined. The question of right to take in such cases is discussed else-

v. New York & Erie R. R. Co., 9 Paige, 328.

⁵ *Ante*, § 137.

⁶ *Charles River Bridge Co. v. Warren Bridge*, 6 Pick. 376; *Levisay v. Delp*, 9 Bax. 415.

⁷ *Denver & S. R. R. Co. v. Denver City Ry. Co.*, 2 Col. 673.

⁸ *Franklin & Columbia Turnpike Co. v. County Court*, 8 Humph. 342.

§ 643.

¹ *Housatonic R. R. Co. v. Lee & Hudson R. R. Co.*, 118 Mass. 391; *Worcester & Nashua R. R. Co. v. Railroad Comrs.*, 118 Mass. 561; *Boston & Maine R. R. Co. v. Lowell*

& Lawrence R. R. Co.

124 Mass. 368.

² *Milwaukee & St. Paul R. R. Co.*

v. Faribault, 23 Minn. 167; *Prospect Park & Coney Island R. R. Co. v. Williamson*, 91 N. Y. 552; *S. C. 24 Hun*, 216; *Mohawk & Hudson R. R. Co. v. Artcher*, 6 Paige, 83. But see *Chicago, R. I. & P. R. R. Co. v. Town of Lake*, 71 Ills. 333.

³ *Baltimore, Ohio & Chicago R. R. Co. v. North*, 103 Ind. 486.

⁴ *Southwestern R. R. Co. v. Southern & Atlantic Tel. Co.*, 46 Ga. 43.

⁵ *Board of Supervisors v. McFadden*, 57 Miss. 618.

where.⁶ The attempt of one horse railroad to use the tracks of another,⁷ or of a railroad to cross a turnpike⁸ without making compensation as required by law, may also be enjoined.

§ 644. To prevent one railroad from crossing another.—One railroad cannot prevent another's crossing its tracks where the statutory authority exists and the conditions imposed by law are complied with.¹ But such crossing will be enjoined until compensation is made,² or if attempted in a manner or at a place not authorized by law.³ If a steam railroad is laid in a public street upon due authority, it has property rights in its tracks which cannot be taken without compensation, and a crossing will be enjoined until compensation is made.⁴ So of horse railroads in streets.⁵

§ 645. To prevent injury or damage to property not taken.—It is now well settled in England that an injunction will not lie for the protection of property which is merely injuriously affected.¹ The right to an injunction in such

⁶ *Ante*, §§ 266–276.

⁷ *Jersey & C. R. R. Co. v. Jersey City & Hoboken H. R. Co.*, 20 N. J. Eq. 61. This case was reversed in the Court of Errors on grounds not affecting the principle here stated. See 21 N. J. Eq. 550.

⁸ *Baltimore & Havre de Grace Turnpike Co. v. Union R. R. Co.*, 35 Md. 224; *Jamaica etc. Plank Road Co. v. New York etc. Ry. Co.*, 25 Hun, 585.

§ 644.

¹ *Lake Shore & Michigan Southern Ry. Co. v. Chicago & Western Indiana R. R. Co.*, 97 Ills. 506; *East St. Louis Connecting Ry. Co. v. East St. Louis Union Ry. Co.*, 108 Ills. 265.

² *Chicago & Eastern Illinois R. R. Co. v. Englewood Connecting R.*

R. Co.

17 Ills. App. 141; *Grand Rapids etc. R. R. Co. v. Grand Rapids & Indiana R. R. Co.*, 35 Mich. 265.

³ *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. S. 150; *Central Vermont R. R. Co. v. Woodstock R. R. Co.*, 50 Vt. 452; *Missouri etc. Ry. Co. v. Texas & St. Louis Ry. Co.*, 4 Wood, 360.

⁴ *Chicago & Western Indiana R. R. Co. v. St. Louis etc. R. R. Co.*, 15 Ills. App. 587.

⁵ *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. S. 150.

§ 645.

¹ *Sutton Harbor Improvement Co. v. Hitchens*, 1 DeG. McN. & G. 161; *S. C.*, 21 L. J. Ch. N. S. 73; *East and West India Docks etc. Co. v. Gattke*, 3 McN. & G. 155; *Lon*

cases depends upon the nature of the damages and of the acts which cause it. Some instances have already been discussed in the previous sections of this chapter. The actual invasion of one's premises by discharging upon them water, sewage or noxious vapors may undoubtedly be restrained.² If the damage results from the construction of works which are already executed, an injunction would be unavailing and the use of the works would not be enjoined.³

§ 646. Enjoining condemnation proceedings.—A bill in equity will not lie to enjoin proceedings for condemnation, for the reason that the mere taking of such proceedings does no injury to property,¹ and for the further reason that the grounds relied upon for an injunction may be urged in defence of the proceedings.² The making of a public im-

don & N. W. Ry. Co. *v.* Bradley, 3 McN. & G. 336; South Staffordshire Ry. Co. *v.* Hall, 1 Sim. N. S. 373; Lancashire & Yorkshire R. R. Co. *v.* Evans, 15 Beav. 322; Duke of Norfolk *v.* Tenant, 9 Hare, 744; Monchet *v.* Great Western Ry. Co., 1 Ry. Cas. 567; Glover *v.* North Staffordshire Ry. Co., 5 Eng. L. & Eq. 335; Macey *v.* Metropolitan Board of works, 33 L. J. Ch. 377; Bush *v.* Trowbridge Water Works Co., L. R. 10, Ch. App. 459. But see London & North Western Ry. Co. *v.* Smith, 1 McN. & G. 216; Hutton *v.* London & S. W. Ry. Co., 18 L. J. Ch. N. S. 345.

² Beach *v.* Elmira, 22 Hun, 158; Vick *v.* Rochester, 46 Hun, 607.

³ Bruce *v.* Canal Co., 19 Barb. 371; Buchner *v.* Chicago, Mil. & N. W. Ry. Co., 56 Wis. 403.

§ 646.

¹ Doughty *v.* Somerville etc. R. R. Co., 7 N. J. Eq. 51; Tift *v.*

County of Dougherty, 74 Ga. 340.

² Williams *v.* Etting Woolen Co., 33 Conn. 353; Dickerson *v.* Comrs. of Highways, 18 Ills. App. 88; Rich *v.* Gow, 19 Ills. App. 81; Winkler *v.* Winkler, 40 Ills. 179; Lake Shore & Mich. Southern Ry. Co. *v.* Chicago & W. I. R. R. Co., 96 Ills. 125; Western Md. R. R. Co. *v.* Patterson, 37 Md. 125; Kip *v.* New York & Harlem R. R. Co., 6 Hun, 24. A contrary conclusion was reached in Central City Horse Ry. Co. *v.* Fort Clark Horse Ry. Co., 81 Ills. 523, but the decision is opposed to both earlier and later decisions in that State. In Chicago & Southwestern R. R. Co. *v.* Swinney, 38 Ia. 182, it was held that a railroad company which had a valid agreement for a right of way could restrain the owner from prosecuting a writ *ad quod damnum* for his damages.

provement cannot be enjoined on the ground that it is unnecessary or is being made to further private ends.³

§ 647. Of ejectment: When it lies.—Ejectment is a proper remedy to recover possession of property which has been wrongfully taken or is wrongfully retained by one claiming to act under the power of eminent domain. It may be maintained where property is entered upon without any attempt to agree with the owner or to have it condemned under the statute,¹ or where an entry is made under proceedings which are void for any reason,² or where a rightful entry is made and the party condemning refuses to pay the compensation which has been assessed or agreed upon,³ or where an entry is made by agreement and upon promises which have not been fulfilled,⁴ or pending proceedings when no provision is made for it by statute.⁵ Where a railraod company went into possession under a lease for a term of

¹ *Dunham v. Hyde Park*, 75 Ills. 371; *Baldwin v. Bangor*, 36 Me. 518.

§ 647.

² *Smith v. Inge*, 80 Ala. 283; *Graham v. Columbus & Indianapolis Central R. R. Co.*, 27 Ind. 260; *Daniels v. Chicago & North Western R. R. Co.*, 35 Ia. 129; *Conger v. Burlington & S. R. R. Co.*, 41 Ia. 419; *Walker v. Chicago, Rock Island & Pacific R. R. Co.*, 57 Mo. 275; *McClinton v. Pittsburgh, Fort Wayne & Chicago R. R. Co.*, 68 Pa. S. 404; *Justice v. Nesquehoning Valley R. R. Co.*, 87 Pa. S. 28.

³ *Smith v. Chicago etc. R. R. Co.*, 67 Ills. 191; *Memphis etc. Ry. Co. v. Parson's Town Co.*, 26 Kan. 503; *Harris v. Marblehead*, 10 Gray, 40; *Kanne v. Minneapolis & St. Louis Ry. Co.*, 133 Minn. 419; *Ellis v. Pacific R. R. Co.*, 51 Mo. 200; *Moses v. St. Louis Sectional Dock*

Co., 84 Mo. 242; *Hull v. Chicago, Burlington & Quincy R. R. Co.*, 21 Neb. 371; *Adams v. Saratoga & W. R. R. Co.*, 10 N. Y. 328; *Bothe v. Railway Co.*, 37 Ohio St. 147.

⁴ *White v. Wabash, St. Louis & Pacific Ry. Co.*, 64 Ia. 281; *St. Joseph & Denver City R. R. Co. v. Callender*, 13 Kan. 496; *Blackshire v. Atchison, Topeka & Santa Fe R. R. Co.*, 13 Kan. 514; *Kanne v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 423; *Bartleson v. Minneapolis*, 33 Minn. 468.

⁵ *Hooper v. Columbus & Western Ry. Co.*, 78 Ala. 213; *Pittsburgh & Steubenville R. R. Co. v. Jones*, 59 Pa. S. 433; *Philadelphia, Newton & N. Y. R. R. Co. v. Cooper*, 105 Pa. S. 239.

⁶ *Coburn v. Pacific Lumber & Mill Co.*, 46 Cal. 31; *Chicago, St. Louis & Western R. R. Co. v. Gates*, 120 Ills. 86.

years and until ninety days after notice to quit, it was held that, after the term had expired and notice had been given, ejectment could be maintained, though the road had been foreclosed in the meantime and was being operated by a different company.⁶ Where land was taken by a railroad for its use, which afterwards conveyed it to the city of Brooklyn for a street, it was held that ejectment would lie.⁷ Where a right of way was granted by the life tenant, it was held that the reversioner could maintain ejectment after the termination of the life estate.⁸ While a railroad was in the hands of a receiver, certain property was entered upon and used without condemnation, and this use was continued by the company after the receiver was discharged. It was held that the owner could recover in ejectment, and was not barred by the fact that the receiver had given notice to present all claims and the owner had presented none.⁹ Where possession is permitted, pending an appeal, upon making a deposit of the damages awarded, the deposit must be without conditions, and, when the amount is finally settled, the whole amount must be paid or ejectment will lie.¹⁰ The deposit is at the risk of the depositor.¹¹ Where the owner appealed and the company deposited the damages awarded and took possession, and the proceedings were dismissed in the appellate court, it was held all rights under the proceedings ceased, and that ejectment would lie.¹² The owner of the fee of a highway can maintain ejectment against any person

⁶ *Green v. Missouri Pacific Ry. Co.*, 82 Mo. 653.

ver City R. R. Co. v. Callender, 13 Kan. 496; *Kanne v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 423; *Levering v. Philadelphia etc. R. R. Co.* 8 W. & S. 459.

⁷ *Strong v. Brooklyn*, 68 N. Y. 1.

¹¹ *White v. Wabash, St. Louis & Pacific Ry. Co.*, 64 Ia. 281; *Blackshire v. Atchison, T. & S. F. R. R. Co.*, 13 Kan. 514.

⁸ *Bloomfield R. R. Co. v. Van Slike*, 107 Ind. 480.

¹² *Kiecher v. Killbuck Turnpike Co.*, 33 Ind. 333.

¹⁰ *Lake Erie & Western R. R. Co. v. Kinsey*, 87 Ind. 514; *White v. Wabash, St. Louis & Pacific Ry. Co.*, 64 Ia. 281; *St. Joseph & Den-*

occupying the soil for any purpose not connected with its use as a highway.¹³ It will lie, therefore, against a railroad company which lays its tracks in the street without compensation to the owner of the fee, and though the road has been duly authorized by the public authorities.¹⁴ So it will lie for ground occupied by a toll-house which has been disused.¹⁵ Some courts hold that, upon judgment being entered for the plaintiff, execution may be stayed a reasonable time, to enable the defendant to condemn, if it wishes to,¹⁶ while others maintain the contrary.¹⁷

§ 648. When the owner is estopped to maintain the action.—Some cases hold that, where land is entered upon by consent of the owner for the purpose of being devoted to a public use,¹ or where an entry is made and works constructed with the knowledge and without objection on the part of the owner,² he will be estopped from maintaining

¹³ Woodruff *v.* Neal, 28 Conn. 165.

¹⁴ Weyl *v.* Sonoma Valley R. R. Co., 69 Cal. 202; Carpenter *v.* Oswego & Seneca R. R. Co., 24 N. Y. 655; Wager *v.* Troy Union R. R. Co., 25 N. Y. 526. In Edwardsville R. R. Co. *v.* Sawyer, 92 Ills. 377, it was held that ejectment would not lie if the track was authorized by the public authorities.

¹⁵ Fisher *v.* Coyle, 3 Watts, 407.

¹⁶ Conger *v.* Burlington & S. W. R. R. Co., 41 Ia. 419; Pittsburgh & Steubenville R. R. Co. *v.* Jones, 59 Pa. S. 433; Justice *v.* Nesquehoning Valley R. R. Co., 87 Pa. S. 28; Pittsburgh & Lake Erie R. R. Co. *v.* Bruce, 102 Pa. S. 23.

¹⁷ Bartleson *v.* Minneapolis, 33 Minn. 468; Strong *v.* Brooklyn, 12 Hun, 453.

§ 643.

¹ Trenton Water Power Co. *v.* Chambers, 9 N. J. Eq. 471; Jersey

City *v.* Fitzpatrick, 30 N. J. Eq. 97; New York etc. R. R. Co. *v.* Stanley, 34 N. J. Eq. 55; Paterson, Newark, & New York R. R. Co. *v.* Kamlah, 42 N. J. Eq. 93; Provolt *v.* Chicago, R. I. & P. R. R. Co., 57 Mo. 256; Baker *v.* Same, 57 Mo. 265; Kanaga *v.* St. Louis etc. R. R. Co., 76 Mo. 207; Tompkins *v.* Augusta & Knoxville R. R. Co., 21 S. C. 420; Texas & St. Louis R. R. Co. *v.* Farrell, 60 Tex. 237; McAuley *v.* Western Vermont R. R. Co., 33 Vt. 311; Knapp *v.* McAuley, 39 Vt. 275; Taylor *v.* Chicago, Mil. & St. P. Ry. Co., 63 Wis. 327. See Chicago etc. R. R. Co. *v.* Knox College, 34 Ills. 195; Hornback *v.* Cincinnati & Zanesville R. R. Co., 20 Ohio St. 81.

² New Orleans & Selma R. R. Co. *v.* Jones, 68 Ala. 48; St. Julien *v.* Morgan's La. & Tex. R. R. Co., 35 La. An. 924; Bryzblowicz *v.*

ejectment for the land.³ So far as regards mere acquiescence as an estoppel, it seems to us the cases are not well founded. There is no law which compels a man to protest against a wrongful entry upon his land at the peril of being held to ratify it. Both parties know their rights. The law provides a mode in which the party seeking to obtain property for public use may do so lawfully. If such party disregards the mode prescribed and enters upon property without consent, it is a wrong-doer and can acquire no rights by expending money on the property. Nor does the owner lose any rights by mere delay.⁴ Failing to agree with the owner, land was condemned for a school-house and the house built. The owner made no objection and sent a child to the school. Afterwards he brought ejectment on the ground of irregularities in the proceedings and recovered.⁵

Where works have been constructed and are in use, the public interest is sometimes urged as a reason why ejectment should not be sustained. But the individual cannot be deprived of his property for the public convenience.⁶ Where the entry is by consent, the rights of the parties must be

Missouri River R. R. Co., 3 Mc-Crary, 586.

³ "In these great public works the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of their road after it has been put in operation, whereby the public acquire important interests in its continuance." *McAuley v. Western Vermont R. R. Co.*, 33 Vt. 311, 321.

⁴ *St. Joseph & Denver City R. R. Co. v. Callender*, 13 Kan. 496.

⁵ *Crosby v. Dracut*, 109 Mass. 206.

⁶ *Hooper v. Columbus & Western Ry. Co.*, 78 Ala. 213; *Stratten v. Great Western & Bradford Ry. Co.*, 40 L. J. Eq. 50. In the latter case the court say: "With regard to what is said as to public interests, I am not inclined to listen to any suggestion of public interest as against private rights acquired in a lawful way. I do not think that the interest of the public in using something that is provided for their convenience is to be upheld at the price of saying that a person's property is to be confiscated for that purpose. A man who comes to this court is entitled to have his rights ascertained and de-

determined by the nature and terms of the consent. The prosecution of his claim for compensation will estop the owner from maintaining ejectment.⁷ "He cannot claim damages for the taking of his land and at the same time deny that his land is taken."⁸

§ 649. Trespass.—Trespass will lie for any unlawful entry upon private property under color of the eminent domain power. It is an appropriate remedy whenever an entry is made under a statute which does not give authority to condemn,¹ or before the right to enter has been perfected in the manner provided by law.² Even in those States in which

clared, however inconvenient it may be to third persons to whom it may be a convenience to have the use of his property."

⁷ *Pinkham v. Chelmsford*, 109 Mass. 225; *Gray v. St. Louis & San Francisco Ry. Co.*, 81 Mo. 126.

⁸ *Pinkham v. Chelmsford*, 109 Mass. 225, 228.

§ 649.

¹ *Thatcher v. Dartmouth Bridge Co.*, 18 Pick. 501; *Schmidt v. Densmore*, 42 Mo. 225.

² *Whitehead v. Arkansas Central R. R. Co.*, 28 Ark. 460; *Potter v. Ames*, 43 Cal. 75; *Alexander v. District of Columbia*, 3 Mackey (D. C.) 193; *Capers v. Augusta G. & S. R. R. Co.*, 76 Ga. 90; *Taylor v. Marcy*, 25 Ills. 518; *President etc. of Crawfordsville R. R. Co. v. Wright*, 5 Ind. 252; *Anderson etc. R. R. Co. v. Kerndole*, 54 Ind. 314; *Board of Comrs. v. Miller*, 82 Ind. 572; *Henry v. Dubuque & Pacific R. R. Co.*, 10 Ia. 540; *Birge v. Chicago, Mil. and St. P. Ry. Co.*, 65 Ia. 440; *Atchison, T. & S. F. R. R. Co. v. Weaver*, 10 Kan. 344; *Harlow v. Pike*, 3 Me. 438; *Storer v. Hobbs*,

52 Me. 144; *Baltimore & Ohio R. R. Co. v. Boyd*, 63 Md. 325; *Kean v. Stetson*, 5 Pick. 492; *Inhabitants of the Eighth School District v. Copeland*, 2 Gray, 414; *Wilson v. Lynn*, 119 Mass. 174; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Warren v. Spencer Water Co.* 143 Mass. 9; *Prescott v. Patterson*, 44 Mich. 525; *Hursh v. First Division of St. Paul & Pacific R. R. Co.*, 17 Minn. 439; *Schroeder v. De Graff*, 28 Minn 299; *Memphis & Charleston R. R. Co. v. Payne*, 37 Miss. 700; *Mueller v. St. Louis & Iron Mountain R. R. C.*, 31 Mo. 262; *Republican Valley R. R. Co. v. Fink*, 18 Neb. 82; *Central R. R. Co. v. Hetfield*, 29 N. J. L. 206; S. C., 29 N. J. L. 571; *Kelley v. Horton*, 2 Cow. 424; *Terpening v. Smith*, 46 Barb. 208; *Secomb v. Milwaukee etc. R. R. Co.*, 49 How. Pr. 75; *Pennsylvania R. R. Co. v. Eby*, 107 Pa. S. 166; *Buffalo Bayou etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Tait v. Matthews*, 33 Tex. 112; *Wilson v. Carpenter*, 17 Wis. 512; *Loop v. Chamberlain*, 20 Wis. 135; *Ramsden v. Manchester etc. Ry. Co.*, 1

it is held that an entry may precede the making of compensation it has also been held that if the compensation is not made in a reasonable time the party making an entry may be treated as a trespasser *ab initio*.³ The lessee may have trespass for any injury to his possession, though settlement has been made with the lessor, who has given a license to enter.⁴ The owner of the fee of a street or highway may maintain this action against one occupying the soil for a railroad,⁵ or telegraph,⁶ or other purpose inconsistent with its use as a street.⁷ The suit may be brought against the person or corporation authorizing the trespass, or against the officers, agents or servants who actually commit it,⁸ or against any or all the parties concerned in it. Any encroachment beyond the limits of the property taken is unjustifiable and a trespass.⁹ Where the statute requires a certain notice to be given to the owner, of the intention to occupy the land condemned, entry without giving such notice will be a trespass.¹⁰

Exch. 723; *Goldie v. Oswald*, 2 Dow. 534.

³ *Cushman v. Smith*, 34 Me. 247; and see *Davis v. Russell*, 47 Me. 443. But the mere fact of entry before compensation is not a trespass. *Turrell v. Norman*, 19 Barb. 262; *Louisville & Nashville R. R. Co., v. Quinn*, 14 Lea, 65.

⁴ *Baltimore & Ohio R. R. Co. v. Thompson*, 10 Md. 76; *Brown v. Powell*, 25 Pa. S. 239; *Pennsylvania R. R. Co. v. Eby*, 107 Pa. S. 166.

⁵ *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ills. 439; *Trustees v. Auburn & Rochester R. R. Co.*, 3 Hill, 567; *Seneca Road Co. v. Auburn & Rochester R. R. Co.*, 5 Hill, 170; *Mahon v. New York Central R. R. Co.*, 24 N. Y. 658; *Hussner v. Brooklyn City R. R. Co.*, 30 Hun, 409; *Starr v. Camden etc. R. R. Co.*,

24 N. J. L. 592; *Sherman v. Milwaukee etc. R. R. Co.*, 40 Wis. 645; *Blesch v. Chicago & Northwestern Ry. Co.*, 43 Wis. 183.

⁶ *Board of Trade Telegraph Co. v. Barnett*, 107 Ills. 507.

⁷ *Ridge Turnpike Co. v. Stoerer*, 6 W. & S. 378.

⁸ *Brady v. Bronson*, 45 Cal. 640; *Waller v. Martin*, 17 B. Mon. 181; *Kough v. Darcey*, 11 N. J. L. 237; *Welch v. Piercy*, 7 Ired. L. 365; *Loop v. Chamberlain*, 17 Wis. 504; *Loop v. Chamberlain*, 20 Wis. 135.

⁹ *Beyer v. Tanner*, 29 Ills. 135; *Eaton v. European & North Am. R. R. Co.*, 59 Me. 520; *Hazen v. Boston & Maine R. R. Co.*, 2 Gray, 574; *Brigham v. Agricultural Branch R. R. Co.*, 1 Allen, 316; *Sheldon v. Kalamazoo*, 24 Mich. 383. See *ante*, § 599.

¹⁰ *Kelley v. Horton*, 2 Cow. 424

Where an entry was made by consent, but on a promise to adjust the compensation, which was not done, it was held the owner could maintain trespass.¹¹ It has been held that a mortgagee having the legal title and who has not been a party to the condemnation proceedings may have trespass for an entry under the proceedings.¹² An entry under an erroneous order was held justifiable, though the error consisted in permitting an entry before compensation was made, in violation of the constitution.¹³

§ 650. Mandamus.—We have already noticed the application of this remedy for the purpose of compelling the assessment or payment of the damages for property taken or affected.¹ It is a proper remedy to compel a ministerial officer to perform an act which it is his duty to perform, or to compel a judge or other officer or tribunal to act when a proper case is presented. The remedy has been frequently invoked to compel the proper officers to open highways for use and travel where the right to do so has been perfected by proper proceedings.² In Illinois it has been held that any citizen of the town has sufficient interest to become a relator in such a proceeding,³ while directly the opposite doctrine

¹¹ Evansville etc. R. R. Co. v. Grady, 6 Bush. 144. Whether tort can be maintained where entry has been made by consent and works constructed upon the faith of such consent, see Baltimore & Hannover R. R. Co. v. Algire, 63 Md. 319; Currie v. Natchez, Jackson & Columbus R. R. Co., 61 Miss. 725; S. C., 62 Miss. 506.

¹² Wilson v. European & N. A. R. R. Co., 67 Me. 358.

¹³ Walker v. Lickens, 24 Mo. 298.

§ 650.

¹ *Ante*, §§ 613, 614.

² People *ex rel.* etc. v. Champion, 16 Johns. 61; People *ex rel.* etc. v.

Commissioners of Salem, 1 Cow. 23; *Ex parte* Sanders, 4 Cow. 544; People *ex rel.* etc. v. Commissioners of Highways, 13 Wend. 310; People *ex rel.* etc. v. Collins, 19 Wend. 56; People *ex rel.* etc. v. Griswold, 67 N. Y. 59; S. C., 2 N. Y. Supm. Ct. 351; Commissioners of Highways v. People, 38 Ills. 347. In the last case it was held that, where by law a road was required to be opened within a period of five years, the time consumed in litigation over the road was to be excluded.

³ Hall v. People *ex rel.* etc. 57 Ills. 307.

has been held in Maine.⁴ In such cases mandamus will be refused where the land has not been properly condemned or otherwise acquired,⁵ or the compensation paid or released,⁶ or where the proceedings are invalid.⁷ Nor will mandamus lie where the tribunal or officer sought to be coerced has a discretion in the matter,⁸ nor where by reason of a change in circumstances the road has become unnecessary.⁹ An officer or court having a power and discretion to exercise, judicial or otherwise, may be compelled to act,¹⁰ but not to act in a particular manner.¹¹ But a proper case must be presented requiring the officer or tribunal to act.¹²

§ 651. Remedy for damages arising from the negligent or improper construction of works.—As to the proper remedy for such damages, no controversy exists, and it is sufficient to say that all the appropriate legal and equitable remedies are open to the aggrieved party the same as though the persons responsible for the damages were not acting under the eminent domain power.¹

⁴ *Sanger v. County Comrs.*, 25 Me. 291.

⁵ *Commissioners of Highways v. People ex rel. etc.*, 4 Ills. App. 391; *People ex rel. etc. v. Curyea*, 16 Ills. 547.

⁶ *Hall v. People ex rel. etc.*, 57 Ills. 307; *Warner v. Commissioners of Hennepin County*, 9 Minn. 139; *People ex rel. etc. v. Commissioners*, 1 N. Y. Supm. Ct. 193.

⁷ *People v. Comrs.*, 27 Barb. 94; *Stewart v. Wallis*, 30 Barb. 344.

⁸ *People ex rel. etc. v. Comrs of Highways*, 103 Ills. 640; *Strathan v. County Court*, 65 Mo. 644; *People v. Commissioners*, 42 Hun, 463; *Jones v. Stafford Justices*, 1 Leigh, 584.

⁹ *Hill v. County Comrs.*, 4 Gray, 414; *Hitchcock v. County Comrs.*, 131 Mass. 519.

¹⁰ *Illinois Central R. R. Co. v. Rucker*, 14 Ills. 353; *Carpenter v. County Commissioners*, 21 Pick. 258; *Ex parte Keenan*, 21 Ala. 558; *People ex rel. etc. v. Supervisors*, 7 Wend. 530; *Town of Woodstock v. Gallup*, 28 Vt. 587.

¹¹ *Proprietors of Kennebunk Toll Bridge, Petitioners*, 11 Me. 263; *Commonwealth v. Sessions of Norfolk*, 5 Mass. 435; *Stout v. Hopping*, 17 N. J. L. 471.

¹² *People v. Judge of Recorder's Court*, 40 Mich. 64.

§ 651.

¹ *Rogers v. Kennebec & Portland R. R. Co.*, 35 Me. 319; *Eastabrooks v. Peterborough & Shirley R. R. Co.*, 12 Cush. 224; *Mellen v. Western R. R. Co.*, 4 Gray, 301; *Brewer v. Boston etc. R. R. Co.*, 113 Mass. 52; *Bagnall v. London & North.*

§ 652. **Relief in equity on account of error, mistake new evidence, etc.**—No relief can be had in equity on account of mere error in the proceedings for condemnation.¹ The proper course in such cases is to appeal.² If the right to appeal has been lost by fraud or mistake, equity might interfere in a proper case.³ A bill to set aside an award on account of newly discovered evidence was dismissed, because the newly discovered evidence was merely cumulative, and because the bill was not filed until four years after the discovery.⁴ Plaintiff's land was taken for a street. He named three commissioners and the city three to assess the damages as provided by statute. The commissioners so named could not agree. Thereupon the plaintiff consented to the appointment of a certain person as umpire, upon condition that he should consult all of plaintiff's commissioners before deciding. The umpire, however, saw only one of plaintiff's commissioners, and then sided with those of the city. Plaintiff repudiated the award, but upon being told by the city solicitor that it would make no difference as to his claim for more damages he deeded to the city and took the award. Plaintiff then filed his bill for a reassessment of his damages, and it was sustained, the court holding that the award was bad and that the plaintiff was not estopped by his deed, because he executed it under a misapprehension of his legal rights.⁵ In another case the defendant appropriated the water of a stream upon which the plaintiff had a mill. Appraisers were appointed to assess the plaintiff's damages, who was then absent in Europe. The court directed notice to certain persons supposed to have charge of the premises, but

western Ry. Co., 1 H. & C. (Exch.) 544.

² *Ibid.*

³ *People v. Wasson*, 64 N. Y. 167.

§ 652.

⁴ *Plymouth v. Russell Mills*, 7

¹ *Hamblin v. County Comrs.*, 16 Gray, 256; *People v. Wasson*, 64 N. Y. 167; *McArthur v. McEachin*, 64 N. C. 454.

⁵ *Allen*, 438.

⁵ *Walker v. City Council*, 1 Bailey Ch. (S. C.) 443.

no one appeared for the plaintiff. The appraisers were led to believe that the plaintiff had abandoned his mill and assessed his damages at a nominal sum. Upon his return the plaintiff brought suit against the company for damages and filed a bill to enjoin it from setting up the award as a defense. The injunction was granted on the ground that the appraisers proceeded on mistaken premises and erroneous information.⁶

§ 653. Compelling a railroad company to construct a highway crossing.—Where a railroad crosses a highway, it is usually made incumbent upon it by law to restore the highway to its former condition and usefulness, as nearly as practicable. This duty may be enforced by mandamus on behalf of the proper public authorities,¹ or by indictment.² In Massachusetts and Vermont it has been held that the duty cannot be enforced at the suit of the party injured,³ but in Wisconsin a contrary doctrine is held.⁴

§ 654. Other remedies.—A wrongful interference with private property or injury done thereto under color of the eminent domain power may in general be redressed by the same remedies as though such interference or injury was without such color. An action on the case will lie wherever the nature of the injury makes that the appropriate remedy.¹

⁶ *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316; see, in this connection, *Shearer v. Commissioners*, 13 Kan. 145; *Reckner v. Warner*, 22 Ohio St. 275.

§ 653.

¹ *Indianapolis etc. R. R. Co. v. Lawrenceburg*, 37 Ind. 489.

² *Pittsburgh, Va. & C. Ry. Co. v. Commonwealth*, 101 Pa. S. 192; *Louisville & Nashville R. R. Co. v. State*, 3 Head, 523.

³ *Brainard v. Connecticut River R. R. Co.*, 7 Cush. 506; *Vermont &*

Mass. R. R. Co. v. County Comrs., 10 Cush. 12; *Buck v. Connecticut etc. R. R. Co.*, 42 Vt. 370.

⁴ *Young v. Chicago & Northwestern Ry. Co.*, 28 Wis. 171.

§ 654.

¹ *Fiske v. Framingham Mfg. Co.*, 12 Pick. 68; *Baird v. Hunter*, 12 Pick. 556; *Hill v. Sayles*, 12 Met. 142; *Hill v. Sayles*, 4 Cush. 549; *Morris Canal etc. Co. v. Seward*, 23 N. J. L. 219; *Louisville & Nashville R. R. Co. v. Faulkner*, 2 Head, 65.

So of the action of forcible entry and detainer.² It has been held, however, that a statute imposing a penalty for wrongfully cutting timber on the land of another, of treble the value of the timber, does not apply to a company wrongfully entering under the power of eminent domain.³

² *Mitchell v. Illinois etc. Co.*, 68 Ills. 286; *Wolf v. Coffey*, 4 J. J. Marsh. 41. ³ *Bethlehem South Gas & Water Co. v. Yoder*, 112 Pa. S. 136.

CHAPTER XXIX.

THE DISCONTINUANCE AND ABANDONMENT OF PROCEEDINGS.

§ 655. **The right to discontinue proceedings before completion.**—We have already had more than one occasion to observe that the proceedings for condemnation are entirely under the control of the legislature. It may provide that a party, having once instituted proceedings to condemn property, shall be bound to go on and complete the proceedings and take the property. It may regulate and limit the right to discontinue, and annex such terms and conditions to the exercise of the right as it sees fit. In considering the right to discontinue in any case, regard should first be had to the statute applicable to the case. In the absence of express statutory provisions it is generally held that, where a party has instituted proceedings to condemn property, it may discontinue those proceedings at any time before confirmation of the report of commissioners, or, in case of jury trials, at any time before the case is given to the jury.¹ In

§ 655.

¹ *Joliet & Chicago R. R. Co. v. Barrows*, 24 Ills. 562; *Chicago, St. Louis & W. R. R. Co. v. Gates*, 120 Ills. 86; *Elkhart v. Simonton*, 71 Ind. 7; *Pittsburgh, Ft. Wayne & Chicago R. R. Co. v. Swinney*, 97 Ind. 586; *Burlington & Missouri R. R. Co. v. Sater*, 1 Ia. 421; *Hunting v. Curtis*, 10 Ia. 152; *Hastings v. B. & M. R. R. Co.*, 38 Ia. 316; *Corbin v. Cedar Rapids etc. R. R. Co.*, 66 Ia. 73; Application for Widening Roffignac St., 4 Rob. La. 357; *Hullin v. Second Municipal-*

ity of New Orleans, 11 Rob. La. 97; *Graff v. Baltimore*, 10 Md. 544; *North Missouri R. R. Co. v. Lackland*, 25 Mo. 515: *Same v. Reynal*, 25 Mo. 534; *St. Joseph v. Hamilton*, 43 Mo. 282; *Whyte v. City of Kansas*, 22 Mo. App. 409; *Clarke v. Manchester*, 56 N. H. 502; *Matter of Water Comrs. of Jersey City*, 31 N. J. L. 72; *Dayton & Western R. R. Co. v. Marshall*, 11 Ohio S. 497; *Schuylkill etc. Navigation Co. v. Decker*, 2 Watts, 343; *Stevens v. Duck River Navigation Co.*, 1 Sneed, 237; *Chesapeake & Ohio*

New York leave to discontinue has been granted in numerous cases before the final confirmation of the report of the commissioners.² An order confirming a report, except in two particulars, and referring it back for correction in those respects is not a final order so as to prevent a discontinuance.³ It is held in the same State, however, that the right to discontinue is not absolute, but the application is addressed to the discretion of the court, which may refuse the application altogether or impose equitable terms, such as the costs and expenses of the adverse party, as a condition of granting the application.⁴ In one case the application to discontinue was denied.⁵ In some cases it is held that it is too late to discontinue after the report of commissioners has been filed and the time to object has elapsed.⁶ Where a city charter did not provide for any confirmation of the report, but either party might appeal within ten days after the report was filed,

R. R. Co. v. Bradford, 6 W. Va. 220; see also Pillsbury v. Springfield, 16 N. H. 565.

² Corporation of New York in Matter of Dover Street, 18 Johns. 506; People v. Brooklyn, 1 Wend. 318; Matter of Canal Street, 11 Wend. 154; Matter of Anthony St., 20 Wend. 618; Martin v. Mayor etc. of Brooklyn, 1 Hill, 545; Matter of Commissioners of Washington Park 56 N. Y. 144; S. C., 2 N. Y. Sup. Ct. 637; Matter of Military Parade Ground, 60 N. Y. 319; Matter of Waverly Water Works, 85 N. Y. 478, reversing 16 Hun, 57; Matter of Department of Public Works, 2 Hun, 374; Matter of Syracuse etc. R. R. Co., 4 Hun, 311; Matter of North 13th St., 5 Hun, 175; Matter of Munson, 29 Hun, 325; Matter of Wells Ave. Sewer, 46 Hun, 534; People *ex rel.* v. Commissioners, 1 N. Y. Supm. Ct. 193; Matter of New York, West Shore & Buf-

falo Ry. Co., 1 How. Pr. N. S. 190; Hudson River R. R. Co. v. Outwater, 3 Sandf. 689; Corporation of New York v. Mapes, 6 Johns. Ch. 46.

³ Matter of Anthony St., 20 Wend. 618.

⁴ Matter of Waverly Water Works, 85 N. Y. 478; Matter of Wells Ave. Sewer, 46 Hun, 534; Matter of New York, West Shore & Buffalo Ry. Co., 1 How. Pr. N. S. 190; Hudson River R. R. Co. v. Outwater, 3 Sandf. 689. The same view is intimated in Matter of Water Commissioners of Jersey City, 31 N. J. L. 72. See also Clarke v. Manchester, 56 N. H. 502; Stevens v. Duck River Navigation Co., 1 Snead, 237.

⁵ Beekman Street, 20 Johns. 269. See also Crowner v. Watertown & Rome R. R. Co., 9 How. Pr. 457.

⁶ Crume v. Wilson, 104 Ind. 583; Pollard v. Moore, 51 N. H. 188.

it was held that after the ten days had elapsed the rights of the parties were fixed.⁷

In a case in Indiana, proceedings were instituted to condemn land for widening a street. Damages were assessed and the owner appealed. Pending the appeal the city took possession and opened the street. On appeal the damages were greatly increased. The statute provided that "if, upon appeal, the report of the commissioners as to the benefits or damages be greatly diminished or increased, the city may, upon payment of all costs, discontinue such proceedings." After verdict and before judgment the city paid all the costs and moved to discontinue, which was allowed by the trial court and sustained by the Supreme Court.⁸ The same doctrine is held in Mississippi,⁹ but in Minnesota it has been held that, where possession has been taken of the property, the party condemning cannot abandon proceedings without also giving up possession.¹⁰

§ 656. The right to abandon after the proceedings are completed.—The weight of authority undoubtedly is that, in

⁷ *People ex rel. etc. v. Common Council of Syracuse*, 78 N. Y. 56.

⁸ *Brokaw v. Terre Haute*, 97 Ind. 451. The court say: "Although the appellee, in the exercise of the power granted to it by the first provisions of the statute above cited, widened and opened the street during the pendency of the appeal, it was not, in our opinion, precluded thereby from subsequently abandoning the same, and discontinuing the proceedings which were still pending, upon ascertaining that the amount of damages awarded to the appellant, on his appeal, greatly exceeded the sum that was assessed in his favor by the city commissioners. The results that legally flowed from the action of the ap-

pellee in discontinuing the proceedings were the abandonment by the appellee of the real estate of the appellant which had been condemned for the street, and the restoration to him of its possession, and rendering the appellee liable, in an action brought for that purpose, for any damages that the appellant may have sustained which were the direct and proximate result of the proceedings and the acts of the appellee under them." P. 453.

⁹ *Louisville etc. R. R. Co. v. Ryan*, 64 Miss. 399.

¹⁰ *Witt v. St. Paul & Northern Pacific R. R. Co.*, 35 Minn. 404; *Wilcox v. Same*, 35 Minn. 439.

the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded.¹ Beasley, Chief Justice of the Court of Errors and Appeals of New Jersey, referring to the principle of a previous decision, says: "That principle in substance was this: that whenever land is sought to be taken for a public purpose, the public authorities, in the absence of any statutory provision to the contrary, have a reasonable time given them, after the ascertainment of the expense of the scheme, to decide whether to accept or refuse the land at the price fixed. On every account that rule commends itself to my judgment.

§ 656.

¹ *Hendrick v. Johnson*, 5 Porter, 208; *Hendricks v. Same*, 6 Porter, 472; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Denver & New Orleans R. R. Co. v. Lamborn*, 8 Cal. 380; *Carson v. Hartford*, 48 Conn. 68; *Stevens v. Danbury*, 53 Conn. 9; *County of Sangamon v. Brown*, 13 Ills. 207; *St. Louis etc. Ry. Co. v. Teters*, 68 Ills. 144; *Peoria & Rock Island Ry. Co. v. Rice*, 75 Ills. 329; *Chicago v. Barbier*, 80 Ills. 482; *Chicago v. Shepard*, 8 Ills. App. 602; *People v. Hyde Park*, 117 Ills. 462; *Hayes v. Board of Comrs.* 59 Ind. 552; *Wilkinson v. Bixler*, 88 Ind. 574; *Gear v. Dubuque & Sioux City R. R. Co.*, 20 Ia. 523; *Nelson v. Goodykoontz*, 47 Ia. 32; *St. Louis, Lawrence & Denver R. R. Co. v. Wilder*, 17 Kan. 239; *City of Kansas v. Kansas Pacific Ry. Co.*, 18 Kan. 331; *Cave's Executor v. Colmes*, 3 A. K. Marsh. 36; *Graff v. Baltimore*, 10 Md. 544;

State v. Graves, 19 Md. 351; *Merrick v. Baltimore*, 43 Md. 219; *Mayor etc. of Baltimore v. Musgrave*, 48 Md. 272; *Black v. Mayor etc. of Baltimore*, 50 Md. 235; *Hunt v. Whitney*, 4 Met. 603; *State ex rel. v. Board of Park Comrs.*, 33 Miun. 524; *Williams v. New Orleans, Mobile & Texas R. R. Co.*, 60 Miss. 689; *St. Joseph v. Hamilton*, 43 Mo. 282; *State v. Hug*, 44 Mo. 116; *Mabon v. Halsted*, 39 N. J. L. 640; *O'Neill v. Freeholders of Hudson*, 41 N. J. L. 161; *State v. Cincinnati & Indiana R. R. Co.*, 17 Ohio. St. 103; *Hampton v. Commonwealth*, 19 Pa. S. 329; *Schuylkill etc. Navigation Co. v. Decker*, 2 Watts, 343; *Stacey v. Vermont Central R. R. Co.*, 27 Vt. 39; *Chesapeake & Ohio R. R. Co. v. Bradford*, 6 W. Va. 220; *Evans v. James*, 4 Wis. 408; *State ex rel. v. Mills*, 29 Wis. 322; *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 How. 395; *Garrison v. New York*, 21 Wall. 196.

With respect to the land-owner, the procedure is fair and just: it calls for a reasonable valuation of his land, and if the public reject it at such estimation, he suffers, in general, no detriment; and if, in any exceptional case, any injury is done to him, he is entitled to reparation. On the other side, the rule in question is a necessity, in view of the rational conduct of public affairs: the question whether a projected improvement is wise or unwise, expedient or inexpedient, cannot be answered by any one who is ignorant of the expense that it involves, and therefore to require public agents, in handling these matters, to disregard this plain dictate of common sense, would be altogether absurd. A man of prudence relinquishes a project when he finds the cost is likely to exceed, in a large measure, its benefits; it would seem intolerably unreasonable to require the agent of the public to pursue the opposite course. In construing any statute authorizing one of these undertakings, every reasonable intent should be against reading it in a sense that would put the public in this false position. The legal effect of such acts should be held to be that they compel the land-owner to offer the public the required land at the ascertained price, and that, when such price has been finally ascertained, the public has a reasonable time within which to make an election either to accept or reject the offer.”² Similar reasoning will be found in the other cases cited. It has been held that the right to abandon is not affected by the fact that the petitioner has taken possession, pending proceedings, under a statute which provided that it might do so upon depositing a sum to be ascertained by the judge of the court in which the proceedings are pending.³ The case of *Chicago v. Bar-*

² *O'Neill v. Freeholders of Hudson*, 41 N. J. L. 161, 172, 173.

³ *Denver & New Orleans R. R. Co. v. Lamborn*, 8 Col. 380; see also *Cave's Executor v. Colmes*, 3 A. K. Marsh. 36; and *Brokaw v. Terre*

Haute, 97 Ind. 451. In *St. Louis etc. Ry. Co. v. Teters*, 68 Ills. 144, it was held that, where the railroad company was in possession, it was proper to render an absolute judgment for the damages. In *Corwith*

bian⁴ arose upon the following facts: The city of Chicago instituted proceedings to condemn property for widening State street. Damages were assessed and judgment rendered therefor in favor of the property-owners. A supplemental proceeding was then instituted for the purpose of raising the amount of the damages by a special assessment upon the property benefited. Commissioners were appointed, who made the assessment and returned it into court. Before confirmation of the assessment the city council repealed the ordinance under which the proceedings were had and abandoned the improvement. A motion was made to discontinue the whole proceeding and was granted by the court. Barbian being one of those to whom damages had been awarded, then commenced a proceeding by mandamus to compel the city to levy a tax and pay his judgment. The Supreme Court of the State denied the mandamus and sustained the right of the city to abandon at any time before actual payment. *Chicago v. Shepard*⁵ goes still further in its facts and holds that the city can abandon the improvement after the assessment of benefits has been confirmed and a large portion of it collected.

In Nebraska the statute in regard to condemnation by railroad companies provides that, if the property cannot be obtained by grant, either party may apply to the probate judge of the county for the appointment of freeholders who shall assess the damages and report in writing to the probate judge and that the probate judge shall certify the report and deliver it to the county clerk, who is required to record and index the same. The company may deposit the amount of the award with the probate judge and enter on the property. Either party may appeal to the district court, and the decision and finding of the district court are required to be trans-

v. Hyde Park, 14 Ills. App. 635, it was held that the judgment became absolute after possession taken. *Harness v. Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248;

Blake v. Dubuque, 13 Ia. 66; *Carr v. Boone*, 108 Ind. 241.

⁴ 80 Ills. 482.

⁵ 8 Ills. App. 602.

mitted to the county clerk and recorded in like manner as the award of freeholders. Under this statute it has been held that it was proper for the district court on appeal to render an absolute judgment against the company and issue execution thereon, and that the company could not after judgment abandon the location and avoid the payment of the damages.⁶ The statute was silent as to the judgment to be rendered and did not undertake to declare when rights should become vested. The court in giving their decision say: "The statute gives a railroad company almost unlimited powers in regard to what real estate it requires for its use, and, unless it is clear that this power is abused, a court would have no right to interfere. But the company must act in good faith. It cannot be permitted to condemn real estate for its use, and, after the condemnation is complete, the certificate filed with the county clerk, and the amount of the award deposited with the county judge, an appeal taken to the district court and judgment rendered against it on such appeal, be permitted to abandon the proceedings. The power of eminent domain is placed in its hands to enable it to take such real estate as it may require, at its fair value. This, if the case is appealed to the district court, is to be ascertained by the verdict of a jury, based upon the evidence. Where, as in this case, the entire property is taken, the power of the lot-owner to sell or mortgage the premises is entirely taken away while the proceedings are pending. The necessities of such owner may be very great, and the property condemned his entire estate, yet when the public good requires it he must submit to the delay in obtaining compensation for his property. But the court will not permit a railroad company to use the sovereign power of the State—that of eminent domain—as a means to enable it to obtain property at its own price, or failing to do so refuse to take it. If this could be done, the rights of property-owners along a line of railway would

⁶ *Drath v. Burlington & Missouri River R. R. Co.*, 15 Neb. 367.

indeed be insecure. But such is not the law. When a company has condemned real estate, and on appeal a judgment has been rendered against it, which remains in full force, it must like other litigants pay the judgment, and the judgment creditor is entitled to all the remedies given by law to enforce the same. It follows that the order of the district court denying the right to issue execution is reversed, and the cause is remanded to that court with leave to the plaintiff to issue execution on her judgment as in other cases."⁷

The act of 1813 in reference to the opening and enlarging of streets in the city of New York provided for an assessment of damages by commissioners appointed by the Supreme Court, who were to make report to the court. The court had power to confirm or set aside the report, and if it set it aside it could refer the question to the same or new commissioners. When, however, a report was finally confirmed, it was declared to be final and conclusive upon the parties, and the corporation was by virtue thereof declared to be seized in fee of the land. We have already referred to numerous decisions under this statute in which it has been held that, until the final confirmation of the report, the city may discontinue the proceedings.⁸ In the same cases it is declared or implied that after confirmation the city cannot abandon. The rights of the parties are fixed, subject only to the contingency of the confirmation being set aside for irregularity, mistake or fraud.⁹ In other cases rights have been held to vest upon confirmation, though title did not vest until payment made.¹⁰ Following in the line of these decisions it has been recently decided by the court of appeals that there can be no aban-

⁷ *Draith v. B. & M. R. R. Co.*, 15 N. Y. 150; *Garrison v. New York*, 21 Wall. 196.
Neb. 365-371.

⁸ *Ante*, § 655; see also *Gillespie v. Thomas*, 15 Wend. 464.

⁹ *Matter of Widening Broadway*, 61 Barb. 483; 42 How. Pr. 220; 49

¹⁰ *People v. Brooklyn*, 1 Wend. 318; *Martin v. Mayor etc. of Brooklyn*, 1 Hill, 545; *Hawkins v. Trustees of Rochester*, 1 Wend. 53.

donment after confirmation, although the statute fairly left the question open to be decided upon general principles.¹¹ In giving their decision the court say: "The company, when the report of the commissioners is made, is apprised of the sum which it will be required to pay for the lands embraced in the report, and if the valuation is, in the judgment of the company, excessive, or if, for any reason, it is regarded for the interest of the corporation not to proceed further, it may decline to do so; but, if the company elect to go on and apply for and procure a confirmation of the report, the relation of vendor and vendee is then established between the parties and the company is bound to pay the awards, or such sum as may be awarded on a second appraisal, if, on appeal by either party, as provided for in the eighteenth section, a new appraisal shall be directed. The statute does not, in express terms, impose upon the company the duty to pay the awards after confirmation of the report of the commissioners. But the court 'shall,' the statute declares, 'direct to whom the money is to be paid,' etc. It assumes that the awards are to be paid by the company to the persons, or in the manner designated in the order of the court, and the duty of the company to pay them is, we think, clearly implied. The provisions of the eighteenth section, that if, on a second appeal, the awards are increased, the difference 'shall be a lien on the land appraised,' and, if diminished, 'the difference shall be refunded to the company,' tend to support the conclusion that the confirmation of the first report determines the rights of both parties, subject only to the right of review, as to the amount of the appraisal. * * * * The confirmation of the report of the commissioners of appraisal in proceedings to acquire lands by a railroad company under the general railroad act, within the principle established in the street cases referred to, creates reciprocal rights between the company and the land-owners, and puts it beyond the

¹¹ Matter of Rhinebeck & Conn. R. R. Co., 67 N. Y. 243, 247, 249; S. C., 8 Hun, 34.

power of the company thereafter to abandon the proceedings. The order of confirmation operates as a judgment binding both parties." In a subsequent case arising under the charter of Syracuse, which did not provide for any confirmation of the report of commissioners, but gave either party a right to appeal within ten days of the filing of the report, it was held that the lapse of the ten days, no appeal being taken, had the same effect as a confirmation, and that it was then too late for the corporation to abandon the improvement.¹² "The statute declares," says the court, "that, if no appeal is taken, the common council shall direct the same commissioners who made the award to assess the amount awarded for damages upon property benefited, and upon the city at large as they shall deem just. The counsel for the city contended that some affirmative act on the part of the city was necessary to bind it, but there is nothing in the statute favoring this view. The omission to appeal from the award until the expiration of the time allowed for that purpose, rendered the award as final and conclusive as the formal confirmation provided in other statutes. During that period the common council, if they thought the awards too high, or for any reason that public interest rendered it inexpedient to proceed with the improvement, might have discontinued the proceedings. By allowing this period to elapse, they must be deemed to have acquiesced in the report, and the award must be regarded as a finality, and in the nature of a judgment which the property-owner has a vested right to have assessed and collected according to the terms of the statute. The rule sanctioned in the Washington Park case, and here indicated, while I regard it as right and just, is quite as liberal in favor of the public, and as rigorous against property-owners as can be justified consistently with the rights of the latter. It enables the municipal authorities to determine whether public interest will be subserved by consummating the improve-

¹² *People ex rel. Gas Light Co. v. Common Council of Syracuse*, 78 N. Y. 56.

ment after the expense has been ascertained, while the rights of the property-owner are uncertain until the award becomes final."¹³

These cases from New York and Nebraska are, we believe, the only ones which are contrary to the doctrine stated at the beginning of the section.¹³

Some cases which seemingly conflict with that doctrine, but which depend upon peculiar statutes, will now be noticed. Where a statute provided that upon confirmation the damages should be paid on demand, it was held there could be no abandonment after confirmation:¹⁴ Where the statute provided that the city might dismiss its petition for condemnation, as to all or any part of the property involved, at any time before final judgment in the proceedings, it was held that if it failed to dismiss before judgment it could not abandon afterwards.¹⁵ In *Wilkerson v. Buchanan County*¹⁶ an act for establishing a road provided that the commissioners should take a grant from the owners which should vest the easement in the public, and prescribed a mode for assessing the damages. After a grant had been obtained from the plaintiff and his damages assessed, but before the road was opened, the legislature repealed the act. It was held that the plaintiff was entitled to a mandamus to compel payment of the damages awarded him. The repeal of the act under which the proceedings were had after the right to damages has been vested does not divest the right,¹⁷ nor is it in the power of the legislature to do so.¹⁸ The railroad law of

¹³ In *Higgins v. Chicago*, 18 Ills. 276, it was held, following the New York cases, that the confirmation by a city council of an assessment of damages and benefits fixed the rights of the parties, and that mandamus would lie to compel the collection of the assessment and payment of the damages. But see *Chicago v. Barbian*, 80 Ills. 482.

¹⁴ *Stafford v. Mayor etc. of Al-*

bany

¹⁵ *In Higgins v. Chicago*, 18 Ills. 276, it was held, following the New York cases, that the confirmation by a city council of an assessment of damages and benefits fixed the rights of the parties, and that mandamus would lie to compel the collection of the assessment and payment of the damages. But see *Chicago v. Barbian*, 80 Ills. 482.

¹⁶ *Duncan v. Mayor of Louisville*, 8 Bush, 98.

¹⁷ *People v. Supervisors of Westchester*, 4 Barb. 64.

¹⁸ *After the plaintiff's damages*

Pennsylvania provides that upon confirming the report of reviewers the court shall enter judgment for the amount of the damages, and if the same is not paid in thirty days that execution may issue thereon as in other cases of debt.¹⁹ This contemplates an absolute judgment, and it has properly been held that payment cannot be avoided after judgment by abandoning the location.²⁰ The courts of Pennsylvania have gone further and held that the right to damages vests upon the location of a railroad, and that the right cannot be defeated by a change of location before confirmation.²¹ Where, in case of street improvements, the statute contains an imperative command that the city shall pay the damages awarded, the award becomes a debt immediately upon confirmation, for which the city is absolutely liable.²²

In some of the New England States it is held that it is competent for the legislature to vest title in the first instance and adjust the compensation afterwards. Consequently, when such proceedings have been had as perfect the right of the public to the use of land for a highway, the owner's right to damages is vested and a subsequent discontinuance of the way before the property is entered upon does not divest the right,²³ and the payment of damages may be enforced, irre-

had been assessed and the railroad partly constructed over his land, an act was passed that, where the route was abandoned before the damages were paid, the owner should only recover his actual damages. The location over plaintiff's land was abandoned. It was held that his right to the damages was complete before the passage of the act and was not affected by it. *Smart v. Portsmouth & Concord R. R. Co.*, 20 N. H. 233. Consult, in this connection, *Daley v. St. Paul*, 7 Minn. 390, and *Garrison v. New York*, 21 Wall. 196.

¹⁹ 2 Brightley's Purdon's Digest, p. 1425.

²⁰ *Neal v. Pittsburgh & Connells-ville R. R. Co.*, 31 Pa. S. 19; S. C., 2 Grant's Cases, 137.

²¹ *Beale v. Pennsylvania R. R. Co.*, 86 Pa. S. 509.

²² *Philadelphia v. Dickson*, 38 Pa. S. 247; *In re Sedgeley Ave.*, 88 Pa. S. 509; *In re Lex or Mica St.*, 12 Phila. 622.

²³ *Harrington v. County Comrs.*, 22 Pick. 263; see also *Hallock v. County of Franklin*, 2 Met. 558. After these decisions the legislature in 1842 enacted that the dam-

spective of the actual occupation of the property.²⁴ Where the statute regulates the right to abandon, the question becomes one of merely statutory construction. Where the statute provided that a railroad company must within ten days from the return of the assessment elect to abandon, it was held that an abandonment could not be made after the ten days had elapsed.²⁵ A statute contained a provision that "the board of park commissioners shall have the right, at any time during the pendency of any proceedings for the improvements authorized in this act, or at any time within thirty days after the final order of the court on any appeal from such proceedings, to abandon all such proceedings whenever it shall deem it for the interest of the city to do so." In proceedings under the act there were numerous appeals, and it was held that the proceedings were several as to each owner and that the election as to the property involved in each appeal must be made within thirty days after the determination of that appeal and that one owner could not be kept waiting for the determination of other appeals than his own.²⁶

ages should not be demandable until the property was entered upon, in case of ways laid out by county commissioners. In 1847 the provisions of the act of 1842 were extended to the ways laid out by selectmen. *Harding v. Medway*, 10 Met. 465; *Bishop v. Medway*, 12 Met. 125. In *Shaw v. City of Charlestown*, 3 Allen, 538, these statutes were held not to apply to ways laid out by city councils. But see *New Bedford v. County Commissioners*, 9 Gray, 346. There has been a similar course of decision and legislation in New Hampshire. *Hampton v. Coffin*, 4 N. H. 517; *Willey v. Effing*, 16 N. H. 58; *Clough v. Unity*, 18 N. H. 75. Such statutes apply only to an actual

discontinuance and not to a mere failure to take possession. *Kent v. Wallingford*, 42 Vt. 651.

²⁴ *Welles v. Cowles*, 4 Conn. 182; *Kimball v. Rockland*, 71 Me. 137; *Moore v. Boston*, 8 Cush. 274; *Loring v. Boston*, 12 Gray, 209; *Edmands v. Boston*, 108 Mass. 535; *Briggs v. Cape Cod Ship Canal Co.*, 187 Mass. 71; *Attorney General v. Turpin*, 3 Hen. & Munf. 548.

²⁵ *Gray v. St. Louis & San Francisco Ry. Co.*, 81 Mo. 126.

²⁶ State *ex rel.* etc. *v.* Board of Park Comrs. of Minneapolis, 33 Minn. 524. For other cases under particular statutes see *Kirtland v. Meriden*, 39 Conn. 107; *Derby v. Gage*, 60 Mich. 1; *Ryan v. Hoffmann*, 26 Ohio St. 109.

§ 657. What constitutes an abandonment.—In most of the cases which have arisen, the intention to abandon has been manifested by affirmative acts. But this intention may be manifested in other ways. Where a statute required the final order establishing a highway to be filed with the town clerk within ten days from its date, a failure to do so was held to constitute an abandonment of the proceedings.¹ Where a motion to accept an award was made and lost in a county board, it was held to amount to a vote to abandon.² The failure to pay the damages within a reasonable time after their final determination will itself constitute an abandonment of any right to take the property under the proceedings had.³ What will constitute a reasonable time must, of course, depend upon circumstances. Four years has been held to be an unreasonable delay, constituting an abandonment, and in the same case it is said that after one year, no offer to pay having been made, the assessment would become *functus officio*.⁴

§ 658. The owner's right to recover for damages occasioned by proceedings which have been abandoned.—We have already referred to cases holding that, upon the discontinuance of proceedings before judgment, the court had authority to impose equitable terms, such as the payment to the owner of his costs and expenses in the case.¹ This however is op-

§ 657.

¹ *Breese v. Poole*, 16 Ills. App. 551.

² *Mabon v. Halsted*, 39 N. J. L. 640; *O'Neill v. Freeholders of Hudson*, 41 N. J. L. 161. In the first case it was also held that the election, once made, was final, and that a subsequent resolution to pay the award and take the land did not affect the rights of either party;

³ *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Chicago v. Barbian*, 80 Ills. 482; *State ex rel.*

v. Cincinnati & Indiana R. R. Co., 17 Ohio St. 103.

⁴ *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306.

§ 658.

¹ *Ante*, § 655; also *Clarke v. Manchester*, 56 N. H. 502; *Matter of Water Commissioners of Jersey City*, 31 N. J. L. 72; *Matter of Waverly Water Works*, 85 N. Y. 478; *Hudson River R. R. Co. v. Outwater*, 3 Sandf. 689; *Stevens v. Duck River Navigation Co.*, 1 *Sneed*, 237.

posed to the current of authority, which is that the right to discontinue is absolute and cannot be fettered with conditions by the court. Legal costs may, of course, be imposed. In various suits in which the right to abandon has been in question, it has been intimated by the court that a suit would lie on the part of the owner to recover his costs and expenses and perhaps other damages to which the proceedings have subjected him.² If, pending proceedings, possession has been taken of the property sought to be condemned, the abandonment of such proceedings renders such possession wrongful from the beginning, and a suit will lie for any damages occasioned by the entry and possession.³ But the *gravamen* of such a claim is not the institution and abandonment of the proceedings, but the trespass committed. A number of suits, however, have been brought to recover damages which have been occasioned by the institution and prosecution of proceedings that were afterwards abandoned. As these are not numerous and the question is an important one, it may be well to notice them briefly.

In *Carson v. City of Hartford*⁴ the facts were as follows: The common council on May 24, 1874, passed an ordinance for opening a certain street. An assessment of damages and benefits was made by the board of street commissioners and filed with the city clerk on September 2, 1874. Various appeals were taken to the court of common pleas which were not determined until 1877. In August, 1877, the street commissioners made a report to the council showing the amount of damages and benefits as finally adjusted, and for reasons given recommended that the improvement be abandoned. This was done by resolution passed October 27, 1877.

² *Gear v. Dubuque & Sioux City R. R. Co.*, 20 Ia. 523; *Graff v. Mayor etc. of Baltimore*, 10 Md. 544; *State v. Graves*, 19 Md. 351; *North Missouri R. R. Co. v. Lackland*, 25 Mo. 515; *Same v. Reynal*, 25 Mo. 534.

³ *Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Swinney*, 97 Ind. 586; *Hullin v. Second Municipality of New Orleans*, 11 Rob. La. 97; *Van Valkenburgh v. Milwaukee*, 43 Wis. 574.

⁴ 48 Conn. 68.

Carson brought his action on the case against the city for damages. A demurrer was sustained to the declaration. The first count was abandoned. The third count was based on a statute as to the discontinuance of highways which the court declared was not applicable. As to the second and fourth counts, the court say:

"In the second count the allegations are—that in May, 1874, the council laid out a street over the plaintiff's land, and appraised damages to him therefor to the amount of \$8,200; that he had made preparations for the erection of a building upon his lot; that the council discontinued the street in October, 1877; that at the first-named date the land was worth \$12,000; that by the action of the council he was deprived of the use of, and was prevented from selling it, for the period of three years; and that during that time it greatly depreciated in value—to his damage the sum of \$15,000.

"Although the allegation is that more than three years intervened between the first and final acts of the council, no blame for the delay is imputed. As we have said that no way was laid out, the count must stand upon the proposition that if the council considers, for any period however brief, the matter of laying out a way, and a provisional award of damages is made to the owner of land if it shall be taken, and he is delayed thereby in the sale, or omits to make profit by the use of it, the city is responsible in damages.

"But, the council considered only—did not take. By considering, no new relation between the city and the land came into being; for at all times the land of the plaintiff and of every other owner is exposed to the right of the public to take it for public use. By considering, the taking became more probable than before; but it remained only a possibility; his exclusive possession was not interrupted; the power to sell was not taken from him; his use was made less profitable only by his apprehension lest a possibility might ripen into a certainty. Presumably the award of damages included the loss resulting from his breach of contract, as well as the

value of the land; doubtless the award would prevent a sale for more than the valuation; but the prevention of a sale for more than a fair price constitutes no invasion of the rights of property for which the law furnishes any redress. Moreover, as with notice to the plaintiff of each act of the council there went notice that it was considering merely, and had not determined, if he has suffered loss by non-use it must be charged to his mistake in forecasting its action.

* * * * *

"In the fourth count the allegations are that the defendants are an incorporated city, vested with powers granted and subject to duties imposed by their charter and laws of the State; that in May, 1874, the plaintiff was the owner therein of a piece of land valuable only for building, and which could yield no revenue except for rents of buildings thereon; that previous to that date he had entered into a contract for the completing of an unfinished building thereon; that on that date the defendants, intending to injure and prejudice him, did, in violation of their legal duties, pass a vote proposing to lay out a highway which should include most of his land; did deceitfully advise him that the vote was a valid lay-out; did by their lawful agents forbid him from completing the building which he had commenced; did unlawfully endeavor to and did intimidate him and prevent him from completing it; did further deceitfully and in violation of their duties advise and notify him and all other citizens that the vote was a lawful lay-out, by making an assessment of benefits conferred and an appraisal of damages inflicted thereby, as if there had been a lawful lay-out; did appear by attorney upon the trial of appeals from said assessments; did wrongfully and unnecessarily prolong the proceedings upon said vote until October 24, 1877, and did upon the last-named day rescind the vote; that during the period between these dates he was prevented from building on the land; was deprived of rents therefrom which he otherwise would have received, was put to great expense for wit-

nesses and counsel upon the trial of said appeals, was prevented during said period from selling the land by reason of the cloud upon his title and right to sell resulting from the unlawful acts of the defendants, and that at the first date the land could have been sold for \$10,000, and at the last could not be sold for more than \$4,000; all of which he avers is to his damage the sum of \$10,000.

"But the vote of the council, the assessment by the commissioners, and the appearance in court by the attorney, were acts within legal permission. No one of them, nor all combined, constituted a declaration to the plaintiff that a street had been laid out, nor a promise that it would be. They contained no false statement as to the past; none at all as to the future. The 'deception' was self-imposed by his erroneous inference of the future from the past. The 'intimidation' had this extent, that he was made fearful lest he should not so read the future as to make the greatest profit from his land; but this is not the fear for which the law gives damages. And the allegation that the city 'did wrongfully and unnecessarily prolong the proceedings,' is too vague and general to support a judgment. It points neither to an act, nor to an omission to act, for the purpose of delay, and is without suggestion as to whether the obstruction was for a day or a year. Moreover, it calls upon us to say that, of legal necessity, the intervention of three and one-half years between the first and last votes would of itself and under all circumstances subject the city to damages. This we cannot do. But, while preserving to the council the privilege of considering after knowledge, we do not say that it cannot abuse this privilege; nor that as a consequence of such abuse the city may not be compelled to indemnify land-owners who have suffered loss by inexcusable delay."⁵

In *Mallard v. La Fayette*⁶ the council on February 16, 1848,

⁵ The same doctrine is approved award after the proceedings had in *Stevens v. Danbury*, 53 Conn. 9, been abandoned.

which was a suit to recover the ⁶ 5 La. An. 112.

passed a resolution to take certain property. Commissioners were appointed who made a report on May 4, 1848, and on May 15, before confirmation, the city discontinued the proceedings. The plaintiffs sued for damages, claiming that while the proceedings were pending they could not dispose of their property, that it had depreciated in value, and that the city should make good the depreciation. The court held that there was no cause of action. In another case in the same State, proceedings were twice undertaken to open a certain street, and twice abandoned. The plaintiff was warned not to continue the erection of buildings which he had begun, and refrained from doing so. He claimed for loss of rents and other damages. A recovery was sustained, but the grounds of recovery are not very satisfactorily stated.⁷ The court say: "These suits against private rights should therefore be commenced only in case of indispensable necessity, and when the corporations are in a situation to afford immediate and ample indemnity. They should be prosecuted in strict conformity to law and to a speedy termination. The fact of great delay and abandonment of the suit is *prima facie* evidence that they were unnecessary; and, until fully justified by proof, must subject the corporation to indemnify those who are injured by them. The municipal history of this and other cities shows, that these suits are a great burden to the corporations, encourage jobs and speculations, besides often causing great injury to individuals; and we are not disposed to reverse a judgment which may tend to discourage them, unless it be manifestly erroneous. We cannot conceive any reasonable excuse for the municipality to commence such a proceeding twice, and finally abandon it, after keeping the suffering proprietor in suspense for more than eighteen months, and have no hesitation in pronouncing that it is legal and equitable that they should pay the actual damages suffered."

⁷ *McLaughlin v. Municipality No. 2*, 5 La. An. 504.

A series of decisions in Maryland has settled the law of that State to be that the owner of property may recover for damages caused by any unreasonable delay either to prosecute or abandon proceedings.⁸

In Mayor etc. of Baltimore *v.* Musgrove the city passed

⁸ In Norris *v.* Mayor etc. of Baltimore, 44 Md. 598, the matter is quite fully discussed, though it was a proceeding by mandamus to recover interest on an award. The particular relief sought was denied, but the court intimated that redress might be had in another form of action. The court say: "But, while we are of the opinion the appellants cannot recover this amount as interest, it by no means follows they are without remedy in the premises, or that they cannot recover an equivalent sum in an action for damages. It has not been decided that the property-owner is without remedy in such a case, and must pocket his loss. On the contrary, this court, while sustaining the right of the city to abandon the improvement, and repeal the ordinance authorizing it, has very explicitly decided, that where the owner has suffered loss by the acts or *delay* of the corporation, the city may be made liable, and he may have his redress in another form of proceeding for any loss or damage he may have sustained by the conduct of the city authorities in the premises. Graff *v.* Mayor & C. C. of Balt., 10 Md. 544. Looking to the ordinances, which prescribe the mode of making these improvements, as to the right of the city to abandon the work, we find there must be some unavoidable delays for which the city cannot be made liable, and if loss results to the

property-owners therefrom, they are without remedy. Thus the election to abandon cannot be fairly made until all assessments and damages are finally settled, thereby placing before the city council a definite ascertainment of the whole cost of the work; nor can the work of opening a street from one point to another be properly commenced until the city has acquired the right to take all the property through which it may pass. In doing this some of the owners may be satisfied with the valuation made by the commissioners, while others may exercise the right of appeal and have the amount ascertained by a jury. For delay thus authorized by law and necessarily preventing an immediate certain ascertainment of the entire cost, it would be unjust to hold the city responsible. It must also be observed in this connection that, before an ordinance authorizing an improvement of this character can be passed, application for it must be made and notice of such application given. 2 Code (Public Local Laws), Art. 4, Secs. 837, 838. These applications are usually made and the action of the city authorities in most cases invoked by parties interested in property to be taken or enhanced in value by the proposed improvement. In view of these considerations we are of opinion the city is not responsible for any loss occasioned by delays of this

an ordinance for the improvement of Jones Falls, and appointed a board of commissioners to take charge of the whole matter of condemning the necessary property and carrying out the improvement. These commissioners notified Musgrove that his tannery would be taken and that he should

character. But, when the assessments have been finally settled, the city can then fairly exercise its election to abandon the enterprise or pay the assessments and proceed with the work. For losses to owners occasioned by delay, subsequently occurring, through failure of the city authorities thus to abandon or pay, it is, we think, just and right the city should be held liable, and this is what we understand to be the effect of the decision in Graff's case. It is obviously unjust for the city to hold condemnation over property for years, neither paying the assessment nor abandoning the improvement. The effect of so doing is in most cases to inflict loss and injury upon the owner, and it would be a reproach to the law if he was denied a remedy therefor. It was therefore a just and proper decision that gave him his action in such a case. As to what the measure of damages should be, no general rule applicable to all cases can be laid down. But, where the property, as in this case, consists of a vacant and unimproved lot, from which the owner derived neither rents nor profits, it is not difficult to fix a just standard. The inquisition in contemplation of law establishes what was the actual *market value* of the property to be taken at the time of the condemnation. Tide Water Canal Co. v. Archer, 9 G. & J., 479; Moale v.

Mayor & C. C. of Balt., 5 Md. 314. This alone is what the jury are authorized to assess as damages in such cases, and the jury in this particular case were instructed to that effect. After this inquisition, thus fixing the *then actual market value* of the property, the condemnation hung over it, and the assessment was not paid for more than ten months thereafter. The practical effect of this condemnation was to deprive the owners of all beneficial use of the property. They could not thereafter improve it, except at the risk of having their improvements taken by the city without compensation, at any time it might choose to proceed with the work of opening the street. They could not avail themselves of its enhanced value in the market by a sale of it, because no one would buy it at an advance so long as the city held the right to take it at the valuation fixed by the inquisition. Under such circumstances, the true measure of damages for the injury and loss occasioned by the delay in payment, is interest upon the market value of the property as ascertained by the inquisition, for the time the delay was without justifiable excuse. If it be then assumed (facts, however, which the record does not clearly disclose), that on the 22d of January, 1874, all assessments for damages for this improvement had been finally settled, and

close out his business as soon as he could, as they wanted possession at the earliest moment. He accordingly closed out his business in course of the next six months, after which his place remained idle for a year, when, concluding the improvement would not go on, he resumed business. Various appeals were taken on the question of damages, and before they were all finally determined the improvement was formally abandoned. Musgrove sued for damages. The right to abandon was reaffirmed, and the court found that there had been no unreasonable delay on the part of the city in doing so. As to the notice, the court held that the commissioners had no authority to give it and consequently that the plaintiff had no right to rely upon it. The gist of the case is that no recovery can be had for abandonment merely, but only for unreasonable delay to abandon.⁹

Black *v.* Mayor etc. of Baltimore,¹⁰ was a suit for damages based on unreasonable delay in the prosecution and abandonment of proceedings to open a street. The ordinance was passed on June 10, 1871. Proceedings were instituted which lay along until May, 1875, without anything being done, when the ordinance was repealed and the improvement abandoned. The points decided on the first appeal are thus stated in the opinion of the court on the second appeal:

“*First.* Where a property-owner has suffered actual damage by the culpable or unreasonable delay of the city authorities in prosecuting a work of this kind, or in determining to abandon it, he is entitled to be indemnified for his

no appeal to this court from any of them had been taken, or if taken had been abandoned, and all assessments for benefits had in like manner been settled and adjusted, we have no doubt that, in an action to be brought by the appellants against the city for loss and injury to them, the standard of damages should be interest on the sum ascertained by the inquisition until the same was

paid. But they are not entitled to a mandamus to enforce its payment until in such an action the jury have ascertained the amount of their verdict, and a judgment thereon has been rendered against the city. For these reasons the order dismissing the petition for a mandamus must be affirmed.”

⁹ 48 Md. 272.

¹⁰ 50 Md. 235, and 56 Md. 333.

loss, whether the delay complained of occurs before or after the assessment of damages and benefits has been completed.

“*Second.* The question whether such a culpable or unreasonable delay has occurred, or in other words the question of negligence on the part of the defendant, is one for the jury to decide, under the instructions of the court.

“*Third.* Where an ordinance for condemning and opening a street has been passed, and remains unexecuted, or but partially carried into effect, and the property-owner acquiesces in the delay, he cannot maintain an action for damages caused thereby. In order to entitle him to maintain an action against the city for alleged negligence in such case, he must prove that some action has been taken on his part, whereby the city has been put in default; such as a remonstrance, or application made to the proper city authorities to go on with the work or to repeal the ordinance. In the absence of some action of this kind on the part of the property-holder, the city authorities would be justified in concluding that no person is suffering loss or damage by the delay, and negligence cannot be imputed to the city.

“*Fourth.* As to the measure of damages, the rule was declared that the plaintiffs can only recover for such special damages as they actually suffer from the fault and negligence of the defendant.”

On the second trial of the case the plaintiff proved repeated remonstrances and applications to the commissioners who were charged with the duty of executing the ordinance, also to the city solicitor and to individual members of the council. This was held sufficient to rebut the presumption of acquiescence in the delay. The question whether the delay was unreasonable and negligent was left to the jury and a verdict and judgment for the plaintiff were sustained.

In *Bergman v. St. Paul, Stillwater & Taylor's Falls R. R. Co.*,¹¹ the plaintiff brought suit to recover for his loss of

¹¹ 21 Minn. 533.

time, attorneys' fees and expenses in defending a condemnation proceeding instituted by the defendant and afterwards abandoned. A judgment sustaining a demurrer to the complaint was affirmed by the Supreme Court, which says:

"If the plaintiff is entitled to recover, it must be by virtue of some contract, express or implied, or of some positive rule of law conferring upon him a right of action, or upon the ground that defendant has been guilty of tort. Certainly there is no contract here, nor is there any positive rule of law upon which the plaintiff can base a right of action. Neither is there anything in the complaint tending to show any tortious or malicious conduct on the part of the defendant. On the contrary, defendant's proceedings are expressly admitted to have been duly and regularly taken, as provided by law, and there is nothing whatever to raise a suspicion that defendant's motives or purposes in instituting, conducting or dismissing the proceedings, were not entirely proper. In other words, the complaint does not set up a cause of action in tort, nor assume to do so."

In *Leisse et al. v. St. Louis & Iron Mountain R. R. Co.*¹² it appeared that the defendant company, on July 23, 1872, commenced proceedings to condemn the land of plaintiffs for a branch railroad. An award of commissioners was made and set aside by the court, and thereupon the company, on December 19, 1873, dismissed the proceeding. Plaintiffs then brought suit for damages occasioned by the proceedings, claiming "that, prior to the institution of the proceedings, the railroad company had given out that it proposed to, and would, locate its road over and across the lot of Leisse and Lange; that, in consequence of this announcement, they were unable 'for years to lease, improve, or in any manner use and employ' their land; that they were themselves compelled to lease and rent other property; that, during the pendency of this suit, the said land was virtually condemned, idle,

¹² 2 Mo. App. 105; 5 Mo. App. 585; 72 Mo. 561.

useless, subject to the payment of taxes by Leisse and Lange, and to the loss of interest on the money therein invested; that, by said proceedings, it was rendered unsalable; that the appellants were put to much trouble, expense and annoyance by said proceedings; were obliged to fee counsel for about eighteen months, at great cost, and for all this they claimed \$10,000 damages." A demurrer to the complaint was sustained; the defendant stood by its demurrer and judgment was entered for the plaintiffs which was reversed on the ground that a joint action would not lie, the plaintiffs being tenants in common.¹³ On the second trial the plaintiff Leisse obtained a judgment which was affirmed by the Court of Appeals and the Supreme Court.¹⁴ The opinion of the Court of Appeals as to liability was approved by the Supreme Court. The case seems to go upon the ground that the railroad company by dismissing the proceeding virtually admitted that the taking was not necessary, and, therefore, that the proceedings were not in good faith.¹⁵

¹³ 2 Mo. App. 105.

¹⁴ 5 Mo. App. 585; 72 Mo. 561.

¹⁵ The court say: "It seems wholly inadmissible that the railroad company should be at liberty to declare that a particular piece of property, or a particular series of lots or tracts of land, will be taken as necessary for the location, change or modification of its line of road; to arrest wholly, by this declaration, any improvement and beneficial occupation of the lots in question; to ruin their market value temporarily at least, perhaps permanently, except with reference to the projected use (all other uses being rendered impossible), and, after an interval more or less protracted, to abandon the proposed line; to say, with all gravity, that the alleged necessity was a loose

form of expression, signifying, at most, that it might be convenient to have the property if the price was sufficiently depressed, but that it was not of so pressing a nature as to prevent the present discontinuance of proceedings to acquire land, the tendency of the price of real estate being downward, and the natural operation of such discontinuance being to depress its value in the particular locality; and that for all this the land-owner should be without recourse on the corporation. * * * We, therefore, think the actual losses inflicted on the land-owner, by the institution and maintenance of the proceedings to condemn his land, are revocable when those proceedings are discontinued; and that in the estimate of these losses will be

In the subsequent case of *Whyte v. City of Kansas*,¹⁶ in the Court of Appeals, the city passed an ordinance to widen Main street, which would take four feet of the plaintiff's property. At the time the ordinance was passed plaintiff had commenced the erection of a building on the old line of the street. Having learned of the passage of the ordinance he changed his foundations to correspond with the proposed new line and completed the erection of his building. Nothing more was ever done concerning the improvement. It was held that the facts gave the plaintiff no cause of action.

In *Martin v. Mayor etc. of Brooklyn*¹⁷ proceedings were instituted to take land for a street. The commissioners made their report, but the trustees refused to present it for confirmation, and so virtually abandoned the improvement. The plaintiff brought suit for damages occasioned by the proceedings. In giving their decision, the court say: "But he complains that a cloud has been brought over his title, that he has been prevented from raising money on his land, and incurred other disadvantages by the delay. Truly, as the plaintiff's counsel said, the action is one of the first impression, at least in this respect. He avers, that on the faith of the proceedings being consummated, he had pulled down his rope-walks and stone building on the land, and built in another place; that he has erected three new buildings in reference to one of the contemplated streets; and that the opening of the streets would have benefited his other lands, etc. The speculative disadvantage arising from such proceedings being kept pending for a long time may be considerable; but we cannot recognize them as the subject of an action against the officers commissioned to prosecute such

included any loss of rent occasioned by the pending of the proceedings, and the threat of subjecting the property to the use of the road. So long as this threat continues, it is an injury and hindrance to the owner. If the railroad com-

pany intends condemning the land at all, it should proceed without delay. If it has abandoned the design, it should say so in an unequivocal manner, and at once."

¹⁶ 22 Mo. App. 409.

¹⁷ 1 Hill, 545.

proceedings, or the corporation which they represent. In the nature of things such officers must exercise a discretion on the question whether the public shall be finally committed; and courts must hold such consequences as are here complained of to be *damnum absque injuria*. A contrary rule would be ruinous to all those who engage as commissioners in carrying through this sort of improvement. It is said, the trustees should have at least decided one way or the other, within a reasonable time. Such is, no doubt, the duty of every officer who is required by law to decide. But can an action be brought by a party for unreasonable delay, when the officer has a discretion to decide one way or the other? and that, too, in respect to a public improvement, the complainant having no individual right to demand that the officer shall decide one way or the other? I think not."

In *Van Valkenburg v. Milwaukee*¹⁸ the suit was in part for acts done on the plaintiff's lots under proceedings which had been abandoned, and in part for loss of rents occasioned by the pendency of the proceedings. The court say: "We think this action may be maintained to recover such damages to him (the plaintiff) as were the direct and proximate result of the condemnation proceedings and the acts of the city under them." In afterwards commenting on this case the Supreme Court interpret it as holding that a recovery may be had for damages arising from the interference with the possession only.¹⁹ In the case last cited proceedings were commenced on April 26, 1875, to open a street over the plaintiff's property, which were abandoned on November 8, 1875. On July 16, 1877, new proceedings were commenced for the same purpose and abandoned on February 23, 1878. The plaintiff claimed for loss of rents and depreciation of her property. The court holds that no action will lie on the ground merely that proceedings have been instituted and

¹⁸ 43 Wis. 574.

¹⁹ *Feiten v. Milwaukee*, 47 Wis. 494, 499.

abandoned, and intimates that none will lie for mere delay in prosecuting the proceedings.²⁰

§ 659. Statutes giving a right to recover for damages occasioned by proceedings.—Many statutes of this sort exist at the present time, but they are of such recent date that

²⁰ The complaint to which a demurrer was sustained was as follows: "The complaint is in trespass on the case. Plaintiff is the owner of a certain lot in the twelfth ward of the city, and on the lot there are valuable improvements, among which is a large two-story frame building used for business and dwelling purposes. On April 26, 1875, the city concluded that that part of said premises on which the house is situated became necessary for opening a street. Upon its application, a jury was appointed May 3, 1875, to determine as to the necessity. The jury promptly reported that it was necessary, but the city necessarily delayed further action in the premises until October 4, 1875, when it confirmed the report of the jury, and directed its board of public works to make an assessment of benefits and damages. On November 8, 1875, the condemnation proceedings, by resolution of the common council, were rescinded and abandoned. The plaintiff complains that, in consequence of the proceedings so instituted, it became and was generally understood that the part of the lot on which the building is situated would be taken for the purpose of a street, and that by reason thereof she proved unable to let the premises at a fair rent during the time while such proceedings were pending, and for a considerable period

thereafter, to her damage of one thousand dollars. For a second cause of action, the plaintiff complains that on July 16, 1877, condemnation proceedings were again instituted. Notice was given, a jury appointed, a report made, the report of the jury confirmed, and an assessment of benefits and damages ordered. In the course of these proceedings, on February 14, 1878, the board of public works, pursuant to a resolution of the council, caused notice to be given in the official papers that the building would be sold at public auction; and on February 23, 1878, the said board, pursuant to said notice, entered the plaintiff's land, and did then and there sell the building, which was of the value of \$2,500. About two months thereafter the city again abandoned and discontinued these condemnation proceedings, in the course of which the plaintiff's building was sold as aforesaid. The plaintiff complains that in consequence of these proceedings many persons were deterred and prevented from renting the premises; that her property has become depreciated in value; and that she has been greatly injured in her rents, revenues and profits, and in the value of her real estate, to the amount of three thousand dollars." *Feiten v. City of Milwaukee*, 47 Wis. 494-495.

but few cases have arisen under them. Where a statute provides that the owner of land shall be indemnified for the trouble and expense to which he has been put and the damages to his property which have been occasioned by proceedings which have been discontinued or abandoned, the indemnity must be sought in a separate suit, and cannot be had in the condemnation proceeding.¹ Under a statute giving indemnity for "trouble and expense" occasioned to the owner by proceedings, no recovery can be had for "disquietude, vexation and annoyance" to which he has been subjected, or for uncertainty as to whether the improvement would be made. "The word 'trouble' in the statute refers to trouble from which some material or pecuniary injury results, involving labor and the expenditure of time, or occasioning inconvenience to the owner in the use and occupation of the land; all of which may be estimated in damages by a standard common to all cases."²

§ 660. Notice to treat under English statutes.—The interests of the individual are as a rule much more fully protected, as against the exercise of the eminent domain power, by the laws of England than by the constitutions and laws of the United States. Upon the giving of notice to treat, the rights of the parties are at once fixed. "The notice gives the proprietor a right to insist upon the company taking that which they have given notice of their intention to take. It constitutes a sort of inchoate contract; at all events, the situation of vendor and purchaser is created, for which, however, the sum to be paid, which is a material part of ordinary contracts, remains to be ascertained. The right may be enforced in a court of equity when the price is fixed, and an action may be brought in a court of law upon an award or verdict."¹

§ 659.

¹ Drury *v.* Boston, 101 Mass. 439; Minneapolis & Northwestern R. R. Co. *v.* Woodworth, 32 Minn. 452.

² Whitney *v.* Lynn, 123 Mass. 338, 343.

§ 660.

¹ Lloyd's Compensation, p. 45, 862

§ 661. New proceedings for the same purpose as former proceedings which have been abandoned.—Proceedings which have been discontinued before completion¹ or which have proved ineffectual because defective² are no bar to new proceedings for the same purpose. But, where proceedings were duly had to lay out a highway, and an order was made establishing the way upon the payment of the damages awarded, it was held to assume the character of a binding adjudication, and new proceedings to lay out the same way resulting in an order establishing the way upon the payment of a less sum as damages were quashed on certiorari.³ In *Rogers v. City of St. Charles*⁴ it appeared that the city in 1867 took proceedings to widen a certain street. The proceedings were admitted to have been regular, and Rogers was awarded \$1,000 for property of his which would be taken by the improvement. The city did not take the property, and after the lapse of a year Rogers instituted a mandamus proceeding to compel the city to pay the damages. The city claimed to have abandoned the improvement and the right to do so was sustained by the Supreme Court.⁵ Rogers then erected a building upon his lot. When this was about completed the city commenced new proceedings for the same purpose, resulting in an award of only \$450 to the plaintiff. Under these proceedings the city took possession of the lot and Rogers sued for the value of the lot. The city

and see, generally, Same, chap. iii; *Queen v. Birmingham & Oxford Junction Ry. Co.*, 6 Ry. Cas. 628; 4 Eng. L. & Eq. 276; *Walker v. Eastern Counties Ry. Co.*, 6 Harr. 594; *Salisbury v. Great Northern Ry. Co.*, 17 A. & E. N. S. 840; 79 E. C. L. R. 840. The rule was held not to apply to commissioners acting on behalf of the public whose means were limited. *Queen v. Commissioners of Woods & For-*

ests

ests, 15 A. & E. N. S. 761; 69 E. C. L. R. 761.

§ 661.

¹ *Corbin v. Cedar Rapids, Iowa Falls & Northwestern Ry. Co.*, 66 Ia. 73.

² *Lehigh Valley R. R. Co. v. Dover & Rockaway R. R. Co.*, 43 N. J. L. 528.

³ *Hupert v. Anderson*, 35 Ia. 578.

⁴ 3 Mo. App. 41.

⁵ *State ex rel. Rogers v. Hug*, 44 Mo. 116.

relied upon the new proceedings and a tender of the \$450. The court found that the new proceedings were void for not showing any previous attempt to agree with the owner. A judgment in favor of the city was reversed, with an intimation that the first award was binding upon the city.⁶

A statute of Ohio provides as follows: "When a municipal corporation takes an appropriation of land for any purpose specified in this chapter, and fails to pay for or take possession of the same within six months after the assessment of compensation shall have been made, as hereinbefore provided, the right of the corporation to make such appropriation on the terms of the assessment so made, shall cease and determine; and any lands so appropriated shall be re-

⁶ The court say: "But we are of opinion that this value is fixed by the first award; that this is binding upon the city, except in the event of the abandonment of the design of widening the street; and that it is not competent for the city, adhering to its original purpose to widen the street, to have recourse, tentatively, to a number of juries, to reject such findings as *it* does not think eligible, and to fasten upon and hold the citizen to the first one which places an estimate in its eyes sufficiently low upon the property upon which the condemnation is sought. Argument would be wasted upon the unreasonableness and thorough injustice of such a course of action. No illustration can make them plainer than the mere statement of the proposition. It is a matter of experience—and, if experience were wanting, the faintest sagacity would discern beforehand—that the projecting of an improvement involving the opening or widening of a street, whatever may be its

effects on adjacent property, is certain to depress the value of the ground which, in the event of the opening or widening, will become public. It is still more true that, so long as it remains uncertain whether a particular piece of land will be condemned for public use, all profitable private use of it is at least suspended. The resulting injury is proportioned to the time during which the uncertainty continues, and if to influences so disastrous upon the interests of the land-holder be added a power, on the part of the corporation exercising, by delegation, the right of eminent domain, to impanel as many juries as may seem expedient, and to reject every award which, in its own eyes, is not small enough, the owner of the property having, in the meantime, no voice or right of resistance against such oppression, a condition of things would be presented which we believe to be unwarranted by any constitutional government where spoliation is forbidden by the fundamental law."

lieved from all incumbrance on account of the proceedings in such case, or the resolution of the council making the appropriation; and the judgment or order of the court, directing such assessment to be paid, shall cease to be of any effect, except as to the costs adjudged against the corporation." The same statute appears to have been extended to railroad companies. In construing this statute it has been held that after the six months have elapsed new proceedings can be taken for the same purpose.⁷

§ 662. When entry is to be made or possession taken in a specified time, what is sufficient.—Where a statute required that, when a highway was established it should be opened within five years or be deemed to be vacated, it was held that it must be opened for its *entire length* within the time limited.¹ A statute of Massachusetts provides that the laying out of a highway shall be void as against the owner of land taken unless possession is taken within two years from the time when the right to take possession first accrues, and that an entry for the purpose of constructing any part of the way shall be deemed a taking possession of all the lands included in the lay-out.² Of course, under this statute, an entry upon a part is a constructive entry upon the entire location.³ Acts done before the right of possession accrues may be considered as showing or explaining the character and purpose of acts done afterwards.⁴ But an entry for the purpose of construction and acts done before the right of possession accrues will not alone be sufficient. Something must be done after the right accrues and within the two years.⁵ An entry and partial construction of the road within

⁷ Trustees of Cincinnati Southern Ry. Co. v. Haas, 42 Ohio St. 239.

² Statutes of 1869, c. 303, § 1; Wilcox v. New Bedford, 140 Mass. 570, 571, note.

§ 662.

³ Poor v. Blake, 123 Mass. 543.

¹ Green v. Green, 34 Ills. 320; Wragg v. Penn Township, 94 Ills. 11.

⁴ Wilcox v. New Bedford, 140 Mass. 570.

⁵ Ibid.

the two years by town officers, though without due authority from the town, was held sufficient when acquiesced in by the town at the time, and ratified after the two years had expired.⁶

§ 663. **Improvements pending proceedings.**—Theoretically, the taking of property and paying of just compensation therefor should be concurrent, and the whole process should be begun and completed in a day. Practically, this is impossible. Improvements and new undertakings must be considered before they are decided upon. When the property to be taken has been designated, negotiations must be had with the owner for its purchase. If these fail, proceedings must be instituted, notice given and the damages ascertained. All these matters require time. From the time when the taking of particular property is first talked about until the damages are paid or the duty to take otherwise irrevocably fixed, the fate of the property is uncertain. The right of the owner to use and enjoy the property until it is actually taken is undoubted.¹ But his right to place improvements upon it and to recover the value of such improvements presents a question of more difficulty. Somewhere in course of the proceedings a point of time must be fixed upon with reference to which the damages shall be assessed and to which the title shall relate. We have heretofore given our reasons for selecting the filing of the petition as the point of time referred to in the absence of any statutory provision.² But, wherever that point of time is fixed, up to that point of time the owner may put improvements upon his property and recover their value, but after that point of time improvements will be made at the risk of being taken without compensation. This seems to us the

⁶ *Gilkey v. Watertown*, 141 Mass.

§ 663.

317.

¹ *Stewart v. County*, 2 Pa. S. 340.

² *Ante*, § 477.

plain conclusion from the reason of the matter. The authorities do not present any well-defined rule upon the subject.

In Pennsylvania it has been held that it was competent for the legislature to provide for the making of a map of proposed blocks and streets in a city, and that from the time such map was completed the owners would be precluded from improving the land embraced in the lines of such proposed streets, or, if such improvements were made, their value could not be recovered, though the streets might not be actually opened and damages paid until years after the completion of the map.³

In *City of Portland v. Lee Sam*⁴ the city council on July 11, 1876, directed a survey and plat to be made for the widening of Second street. On August 5, an ordinance was passed for making the improvement. Viewers were appointed on August 21, who reported on August 31. The report was confirmed on September 19. On July 5, 1876, the owner of a lot to be taken made a contract for the erection of a building thereon. The building was commenced before August 21, and completed before September 19. The court held that the rights of the parties were not fixed until the report of reviewers was confirmed, that until then the owner had a right to go on with his improvements, that he was entitled to damages to his property as it was on September 19, and on appeal could recover them.⁵

³ *Forbes Street*, 70 Pa. S. 125; *In re Sedgeley Ave.*, 88 Pa. S. 509; and see *ante*, § 144.

⁴ 7 Or. 397.

⁵ The court say: "The common council were under no obligation to adopt the report made by the viewers or pay for the property proposed to be taken. It was entirely optional with them whether they would go on with the widening of the street or abandon it

altogether, and it would be unjust to hold that it was the duty of the respondents to cease working on their building as soon as the viewers made their report or go on with the improvements at the peril of losing all expenditures incurred by them while awaiting the uncertain action of the common council." Substantially the same conclusion was reached upon similar facts in *Matter of Wall Street*, 17 Barb. 617.

Where an owner made some improvements upon property after a railroad had been staked out over it, it was held he was entitled to damages thereto, unless they were made in grossly bad faith.⁶ In another case it was held that the owner was not entitled to recover for the destruction of a partly-erected smelting furnace which was begun after notice that the land would be taken, although before proceedings instituted.⁷ Where a house was commenced in the line of a proposed highway, after surveyors were appointed to lay out the road, it was held that the house was an unlawful encroachment.⁸ In *Driver v. Western Union R. R. Co.*,⁹ it appeared that the plaintiffs bought lots seven, eight, nine and ten in January, 1870, for the purpose of erecting a planing-mill thereon, and immediately thereafter commenced the erection of a building. Upon being notified by the railroad company that it would want lot seven, plaintiffs moved their foundations so as not to occupy any part of that lot with their building. Proceedings were commenced to condemn lot seven in March, and on May 7 an award was made and deposited. The building was completed about May 1. The railroad caused a large depreciation to the mill, and the company claimed that, as the mill was built after notice that the railroad would take lot seven, and to a large extent after

In *Corporation of New York v. Mapes*, 6 Johns. Ch. 46, it was held that an injunction would not lie to prevent the improvement of property proposed to be taken for a street, but in the previous case it was intimated by one judge that an injunction with ample security would be a proper remedy.

⁶ *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 Minn. 122.

⁷ *Schuylkill Navigation Co. v. Farr*, 4 W. & S. 362. "They would be entitled to little if any damage, being aware that, for all

practical purposes, the intended erection must be destroyed, or its value greatly impaired, by the proposed alteration of a dam. It would be their own folly to proceed with their work when put upon their guard by a notice that the company intended to improve the navigation in the manner stated, a right to which they were unquestionably entitled under their charter."

⁸ *State v. Waldron*, 17 N. J. L. 369.

⁹ 32 Wis. 569.

proceedings were commenced, the company was not liable for such depreciation. The court held otherwise, that the title did not vest until the award was made and deposited, that until then the company could have discontinued, and consequently until then the owner might improve his property as he liked.

CHAPTER XXX.

LIMITATIONS TO ACTIONS AND PROCEEDINGS.

§ 664. Where compensation need not be first made, the owner may be required to present his claim for damages within a time limited.—In those jurisdictions in which it is held that compensation need not precede or be concurrent with the taking, statutes limiting the time within which the owner may apply for damages and barring any claim not made within the time limited have, we believe, been uniformly sustained.¹ In the cases cited limitations of ten years,² five years,³ two years,⁴ and one year⁵ were sus-

§ 664.

¹ Harper *v.* Richardson, 22 Cal. 251; Lincoln *v.* Colusa Co., 28 Cal. 662; White Water Valley Canal Co. *v.* Ferris, 2 Ind. 331; Nelson *v.* Fleming, 56 Ind. 310; Goddard *v.* Boston, 20 Pick. 407; Monagle *v.* County Comrs., 8 CUSH. 360; Russell *v.* New Bedford, 5 Gray, 31; People *ex rel.* Green *v.* Michigan Southern R. R. Co., 3 Mich. 496; Smith *v.* McAdam, 3 Mich. 506; People *v.* Canal Appraisers, 9 Barb. 496; Rexford *v.* Knight, 11 N. Y. 308; Viers *et al.* Petition, Tappan, Ohio, 56; Reckner *v.* Warner, 22 Ohio St. 275; Anderson *v.* McKinney, 24 Ohio St. 467; Malone *v.* Toledo, 34 Ohio St. 541; Carolina Central R. R. Co. *v.* McCaskill, 94 N. C. 746; Waring *v.* Cherew & Darlington R. R. Co., 16 S. C. 416; Simms *v.* Memphis etc. R. R. Co., 12 Heisk. 621; Ruehl *v.* Voight, 28 Wis. 153; Janssen *v.* Lammers, 29 Wis. 88. In Pennsylvania the pro-

vision in the constitution of 1874 that "no act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided," was held to abrogate the limitation of one year in which to present a claim for damages in road cases. *In re Grape St.*, 103 Pa. S. 121.

² Ruehl *v.* Voight, 28 Wis. 153; Janssen *v.* Lammers, 29 Wis. 88.

³ Simms *v.* Memphis etc. R. R. Co., 21 Heisk. 621.

⁴ White Water Valley Canal Co. *v.* Ferris, 2 Ind. 331; Nelson *v.* Fleming, 56 Ind. 310; Carolina Cent. R. R. Co. *v.* McCaskill, 94 N. C. 746; Waring *v.* Cherew & Darlington R. R. Co., 16 S. C. 416.

⁵ Goddard *v.* Boston, 20 Pick. 407; Russell *v.* New Bedford, 5

tained. A law providing that claims for damages by laying out a road not presented to the viewers should be barred, was upheld in Ohio.⁶ In the case cited the owner appeared before the viewers at the time appointed, for the purpose of presenting his claim for damages. One viewer being absent, the view was postponed for two days. The claimant then left town, and did not get back until after the view on account of a railroad accident, and his claim was not presented. The court held, however, that the claim was barred.⁷ A similar statute has been upheld in Kansas. Just as the owner was ready to start for the purpose of presenting his claim before the viewers his mother was taken suddenly and dangerously ill and soon after died. He remained to attend her and so missed the opportunity to present his claim.⁸ In another case the bar of the statute was sustained though the owner had no actual notice of the meeting of viewers, and for that reason failed to present his claim.⁹ The cases referred to were bills for injunctions, which could only proceed upon the basis of the proceedings being void. Whether relief could not have been had in some of the cases referred to, on the ground of accident or mistake, presents another ques-

Gray, 31; *People ex rel. Green v. Michigan Southern R. R. Co.*, 3 Mich. 496; *Smith v. McAdam*, 3 Mich. 506; *People v. Canal Appraisers*, 9 Barb. 496; *Rexford v. Knight*, 11 N. Y. 308; *Malone v. Toledo*, 34 Ohio St. 541.

⁶ *Reckner v. Warner*, 22 Ohio St. 275.

⁷ See also *Viers' Petition*, Tappan, Ohio, 56; and *Anderson v. McKinney*, 24 Ohio St. 467.

⁸ *Shearer v. Commissioners of Douglas Co.*, 13 Kan. 145.

⁹ *Cupp v. Commissioners of Seneca Co.*, 19 Ohio St. 173, 184. The court say: "The whole proceeding is substantially *in rem*. Juris-

diction over the person of the parties is not necessary. The act in question relates to and affects only the remedy, and not the rights of the parties, and is therefore within the general scope of the legislative power. The constitutional provision referred to does not take away that power. It defines and guarantees the *right* of the party to his land, or to a sure and adequate compensation therefor. The *remedy*—the proceeding by which that right is to be effected—is still left to legislative discretion. We fail, therefore to see wherein the act in question violates the constitution."

tion.¹⁰ In California a statute requiring the owner to sue the county within ten days after the laying out of a road was sustained by the Supreme Court.¹¹ Where a statute provided that claims for damages should be presented to the board of supervisors within thirty days from a given time, unless sufficient excuse for not doing so was shown by affidavit, it was held the board were not the final or exclusive judges of what was a sufficient excuse, but that their decision might be reviewed on appeal.¹² An application for damages for land taken for a railroad was required to be made to county commissioners within three years from the filing of the location. It was held that filing the application within three years with a clerk of the board who had no authority to receive it, when it was not acted upon until after the three years, was insufficient.¹³ Where plaintiff failed to make his claim for damages for land taken for a turnpike within a year, as required, and afterwards the legislature authorized a new company to complete the road, it was held that the claim was not revived.¹⁴ Where a remainder man filed his petition for damages within the time limited, it was held that it might be amended by joining the life tenant after the time had expired.¹⁵ In Pennsylvania it has been held that the general statute of limitations applies to a special statutory proceeding for damages.¹⁶

§ 665. When the statutory remedy accrues.—Ordinarily the right to damages accrues when the right or title of the

¹⁰ *Ante*, § 652.

¹¹ *Harper v. Richardson*, 22 Cal. 251; *Lincoln v. Colusa Co.*, 23 Cal. 662; see also *Potter v. Ames*, 43 Cal. 75.

¹² *Warner v. Doran*, 30 Ia. 521.

¹³ *Charles River Branch R. R. Co. v. County Comrs.*, 7 Gray, 389.

¹⁴ *Callison v. Hedrick*, 15 Gratt. 244.

¹⁵ *Woodbridge v. Cambridge*, 114 Mass. 483.

¹⁶ *Forster v. Cumberland Valley R. R. Co.*, 23 Pa. S. 371. It is held as a general rule that such statutes should be strictly construed. *Terre Haute & Indianapolis R. R. Co. v. Scott*, 74 Ind. 29; *Lawrence Railroad Co. v. Cobb*, 35 Ohio St. 94; *Commissioners v. Allen*, 25 Kan. 616.

party condemning becomes complete. No general rule can be laid down for ascertaining this point of time. The statute sometimes declares that upon the performance of certain acts the title shall vest, and in other cases it is left more or less to inference. Where the right to apply for damages was limited to one year from the laying out of a highway, it was held in one case that the laying out was not complete until the report of the lay-out was filed in the town clerk's office,¹ and in another case that the statute began to run from the adjudication of the mayor and aldermen that the improvement would be of common convenience and necessity, and directing that the street be laid out.² In case of damages by flowage, the statute begins to run when the dam is completed and put in operation,³ and not from the time when damage is first sustained.⁴ Where a dam is built sufficient to raise water to a certain height which would injure plaintiff, but the dam is used at a less height so as not to injure him, the plaintiff is entitled to damages because it is optional with the miller to what height he will raise the water.⁵ In a similar case in Pennsylvania, it was held the plaintiff's action did not arise until actual damage was done.⁶ But, where the height of the flooding was to be fixed by commissioners, it was held that the statute began to run from the award of such commissioners.⁷ Where water was taken from a stream to supply a canal, to the damage of plaintiff's mill, and was restored by reason of injury to the canal within the two years allowed for claiming damages, and after several years the canal was repaired and the water retaken, it was held that the claim was barred.⁸ Authority

§ 665.

¹ Brookline *v.* County Comrs., 114 Mass. 543.

² Loring *v.* Boston, 12 Gray, 209.

³ Heard *v.* Proprietors of the Middlesex Canal, 5 Met. 81.

⁴ Call *v.* County Comrs., 2 Gray, 232.

⁵ Town *v.* Faulkner, 56 N. H. 255.

⁶ Union Canal Co. *v.* Keiser, 19 Pa. S. 134.

⁷ Essex Co. *v.* County Comrs., 7 Gray, 450.

⁸ Mill *v.* White Water Valley Canal Co., 4 Ind. 431. See also

was given a town to construct a dam and reservoir for storing water. Any one whose property was taken or damaged was required to apply for damages within three years after the construction of the dam. It was held that a petition for damages for percolation was barred after the three years, though the petitioner's land was not affected within the three years.⁹ Where an act for taking water provided that application for damages should be made within three years "from the time when the water was first actually withdrawn or diverted," it was held that the statute began to run from the time of the first abstraction of water for the purposes contemplated, and not when it was first withdrawn in quantities injurious to the plaintiff.¹⁰ Water withdrawn for the purpose of testing engines, by order of the engineer of the town, was held a withdrawal within the meaning of the act, and a claim filed more than three years after such withdrawal, but within three years from the first withdrawal to supply the town, was held barred.¹¹ Under the Massachusetts statutes the filing of the location of a railroad has been held to vest the right to damage.¹²

§ 666. When an action accrues for consequential damages.—The remedy for such damages is usually sought in a common law suit, and the general statute of limitations applies.¹ The action accrues when the damage is sustained by the plaintiff, and not when the causes are first set in motion which ultimately produce the damage.²

Haskell v. County Comrs., 9 Gray, 341.

⁹ *Davis v. New Bedford*, 133 Mass. 549.

¹⁰ *Ipswich Mills v. County Comrs.*, 108 Mass. 363.

¹¹ *Tileston v. Brookline*, 134 Mass. 438.

¹² *Charlestown Branch R. R. Co. v. County Comrs.*, 7 Met. 78. To same effect, *Moore v. Boston*, 8 *Cush.* 274.

§ 666.

¹ *Houston & T. C. R. R. Co. v Chaffin*, 60 Tex. 553.

² *Powers v. Council Bluffs*, 45 Ia. 652; *Miller v. Keokuk & Des Moines Ry. Co.*, 63 Ia. 680; *Omaha etc. R. R. Co. v. Standen*, 22 Neb. 343; *Valley Ry. Co. v. Franz*, 43 Ohio St. 623; *Roberts v. Reed*, 16 East, 215; but see *Drake v. Chicago etc. Ry. Co.*, 63 Ia. 302; *ante*, §§ 624, 625.

§ 667. **For change of street grade.**—As such damages can only be recovered in most of the States by virtue of some special statutory provision, the terms of the statute must be strictly complied with. It may definitely limit the time within which suit must be commenced or claim made, as within one year after completion of the work,¹ or within twenty days after the publication of a certain notice.² In the former case the action does not accrue until the completion of the entire work, including the change of grade of the sidewalks;³ and if, after the work is commenced but before its completion, property affected is transferred, the right to damages is in the grantee.⁴ Where, however, the right to such damages is given in general language and no remedy or limitation is prescribed, the better rule is that the right to damages accrues when the change is actually made.⁵ Some courts, however, hold that the action accrues when the change is ordered by the common council.⁶

§ 667.

¹ *Erskine v. Boston*, 14 Gray, 216.

² *Matter of Beale Street*, 39 Cal. 495.

³ *Baker v. Taunton*, 119 Mass. 392.

⁴ *Page v. Boston*, 106 Mass. 84.

⁵ *Hempstead v. Des Moines*, 63 Ia. 36; *Mulholland v. D. M. & W. R. R. Co.*, 60 Ia. 740; *Jennings v. Le Roy*, 63 Cal. 397; *Brown v. Lowell*, 8 Met. 172; *Tyson v. Milwaukee* 50 Wis. 78.

⁶ *McCarthy v. St. Paul*, 22 Minn. 527; *Matter of Change of Grade of 5th and 6th Streets*, 12 Phila 587; *Campbell v. Philadelphia*, 108 Pa. S. 300; *Healey v. New Haven*, 49 Conn. 394. The right to recover damages for a railroad in a street accrues when the road is built. *Chicago & Eastern Ills. R. R. Co. v. Loeb*, 118 Ills. 203; *Pratt v. Des Moines N. W. Ry. Co.*, 72 Ia. 249; *Frankle v. Jackson*, 30 Fed. R. 398.

INDEX.

[THE REFERENCES ARE TO THE SECTIONS.]

ABANDONMENT, (See DISCONTINUANCE.)

- of location, when it defeats claim for damages, 624.
- of mill site, what constitutes, 305.
- of proceedings, right of, before completion, 655.
 - right of, after completion, 656.
 - what constitutes, 657.
- owner's right to recover damages in case of, 658.
- statutes giving a right to recover in such cases, 659.
- right to recover the award in case of, 612.
- effect of, upon new proceedings for the same purpose, 661.
- right of, under English statutes, 660.
- of public use, what amounts to, 597.
 - transfer by party condemning not, 594.
 - repeal of charter does not operate as, 594.
 - reversion in case of, 596.
 - right to improvements in case of, 598.

ABATEMENT,

- of dam unless damages paid, 619.

ABUTTING OWNERS UPON STREETS,

- rights of, generally, 100, 114, 122.
- right of, to recover for various uses of streets, 92-134. (See CHANGE OF GRADE, STREETS AND HIGHWAYS, TAKING.)
- right to recover damages in case of vacations, 134.
- remedies of, for unlawful use of street, 116, 635-637. (See STREETS AND HIGHWAYS.)
- injunction to prevent certain uses of streets, 635-637. (See INJUNCTION.)
 - to prevent change of grade, 638.

ACCESS, (See ABUTTING OWNERS, RIPARIAN RIGHTS.)

- to highway, right of, 100, 114, 122.
 - impeding or preventing, whether a taking, 100, 114, 118, 122.
 - impeding by works not in front of property a *damaging*, 227.
- to public waters, right of, 79-83.
 - impeding or preventing is a taking, 81-84.
 - cases holding the contrary, 85.

[THE REFERENCES ARE TO THE SECTIONS.]

ACCIDENT,

as ground for setting aside the report or verdict, 523.

ACCRETIONS, (See RIPARIAN RIGHTS.)

right to, 79, 83.

ACQUIESCEENCE, (See ESTOPPEL, WAIVER.)

as a bar to an injunction, 634.

ACTION,

at common law, when proper, 607, 609.

to recover value of land appropriated without proceedings, 623.

form of, on award or judgment, 609.

when it accrues for consequential damages, 666. (See LIMITATIONS.)

when for change of grade, 667. (See CHANGE OF GRADE.)

ADDITIONAL DAMAGES,

right to recover, 564-577. (See AWARD OR JUDGMENT.)

ADJOINING PROPRIETORS, (See TAKING.)

law of, applies to owners of property taken for public use, 585. (See RIGHTS IN PROPERTY CONDEMNED.)

ADJOURNMENTS,

by commissioners, etc., 418.

notice of, 384.

ADMINISTRATOR,

has no power to convey, 289.

as a party, 320. (See PARTIES.)

ADMISSIONS, (See EVIDENCE.)

when competent evidence, 439.

AD QUOD DAMNUM,

writ of, 402.

AGREEMENTS. (See ATTEMPT TO AGREE, CONTRACTS.)**AIR,**

right to pure, 152.

pollution of, a taking, 152.

ALABAMA,

constitutional provisions of, 15.

ALLEYS. (See STREETS AND HIGHWAYS.)**AMENDMENT,**

of notice, 398.

of petition, 349, 357, 358, 361, 398.

of return to writ of certiorari, 547.

by adding or dismissing parties, 337, 349.

power of commissioners to amend their report, 423.

power of court to amend report of commissioners, 529.

ANSWER,

propriety of, 390.

[THE REFERENCES ARE TO THE SECTIONS.]

APPEALS, (See CERTIORARI, WRIT OF ERROR.)

- granting and regulating of, in control of legislature, 537.
- may be given on conditions, 581.
- legislature may provide for, after final termination of proceedings, 558.
- when the proper remedy, 543, 557.
- when it lies, construction of particular statutes as to, 535.
 - when statute makes decision of inferior tribunal final and conclusive, 536.
 - who entitled to appeal, parties, 538.
 - estoppel to take or prosecute, 556.
 - party condemning cannot, from order to pay over money deposited, 616.
- practice in taking, 537.
 - when statute silent as to mode of taking, 537.
 - under particular statutes, 537.
 - the proper parties, 538.
 - the notice required, 539.
 - time of taking, 537, 555.
- practice in appellate court, 540.
 - consolidation of appeals, 537.
 - objections not available, 347.
- effect of, on parties and proceedings, 541, 631.
 - as a waiver of notice, 379.
- costs on, 559, 562.
- limitations as to time of taking, 555.
- possession pending, 580.
- to the Supreme Court, 550-553.
 - when it lies, 550.
 - construction of constitution as to right of, 536.
 - when decision of lower court made final and conclusive by statute, 536.
 - construction of statutes as to when it lies, 552.
 - what orders may be appealed from, 551.
 - practice in Supreme Court, 553.

APPEARANCE,

- when a waiver of notice, 379.

APPLICATION. (See PETITION.)

APPORTIONMENT, (See LANDLORD AND TENANT.)

- of rent, 483.
- of damages, 326, 483.

APPROPRIATION OF PROPERTY, (See AUTHORITY TO CONDEMN,

EMINENT DOMAIN, TAKING.)

- what may be taken, 262-287.

- all property subject to the power, 262.

[THE REFERENCES ARE TO THE SECTIONS.]

APPROPRIATION OF PROPERTY—*Continued.*

- what may be taken, no matter how affected by contracts, etc., 265.
- money, choses in action and all kinds of personal property, 263.
- public lands, 264.
- property held by grant from the State or condemning authority, 264.
- property of educational institutions, 265.
- corporate property and franchises, 274.
- exclusive rights and privileges, 275.
- property already devoted to public uses, 266–276.
 - lands held for use of the general government, 264.
 - railroad property for highways, 266.
 - for another railroad, 267.
 - for railroad crossing, 268.
 - for canal, ditch, park or telegraph, 269.
 - toll bridges, ferries, turnpikes, canals and mills, 271.
 - parks, cemeteries, public school property, 272.
 - property of gas and water companies, 272.
 - tide waters, 273.
 - navigable streams, 273.
 - general principles in regard to taking such property, 276.
- what may be taken under particular statutes, 255, 256, 281, 285, 287.
- what estate or interest may be taken generally, 277.
 - under particular statutes, 278.
- how much may be taken generally, 279.
 - under particular statutes, 280.
 - all cannot be taken when only part can be used, 204.
- designating the property to be taken, 286, 307.
- priority of right to appropriate particular property, 307.
- preliminaries essential to the right of appropriation, 301–310. (See
 ATTEMPT TO AGREE; PRELIMINARIES.)
- statutes prohibiting the taking of improvements and enclosures, 281–284. (See AUTHORITZ TO CONDEMN.)
- order in which the appropriation must be made, 395.
- injunction to prevent the taking of property already devoted to public uses, 643. (See INJUNCTION.)

ARBITRATION,

- to fix the just compensation, 429

ARKANSAS,

- constitutional provisions of, 16.

ARTIFICIAL STREAMS. (See STREAMS.)

ASSIGNEE,

- of damages awarded, rights of, 630.

[THE REFERENCES ARE TO THE SECTIONS.]

ASSESSMENT OF DAMAGES, (See COMMISSIONERS, JURY, JUST COMPENSATION, PRACTICE, TAKING.)

measure of damages when entire tract taken, 463.
when part taken just compensation includes damages to the remainder, 464.
whether benefits may be considered in reduction of damages, 465-471. (See BENEFITS.)
special constitutional provisions as to benefits, 472.
statutory provisions as to benefits and measure of damages, 473.
benefits or damages to a different tract, 474.
what constitutes a different tract, 475.
what are special benefits, 476.
time with reference to which the damages should be estimated, 477.
general principles in estimating value, 478.
what is meant by "market value," 478.
whether value for particular uses may be considered, 479.
speculative inquiries as to a possible use or improvement of the property improper, 480.
may show capabilities of the property and uses to which it is adapted, 478-480.
may not show an intended use, 480.
whether proper to consider how the work is to be constructed, 481.
damages from improper construction and use to be excluded, 482.
when there are different estates or interests, 483.
apportionment between landlord and tenant, 483.
damages to franchises connected with the property taken, 484.
when the title is subject to restrictions, conditions, etc., 485.
whether value of trees, crops, minerals, etc., is to be considered, 486.
injury to business, loss of profits, etc., 487.
damage to fixtures and personal property; cost of removal, 488.
when one railroad crosses another, § 489.
when one railroad takes the use of another's tracks, 490.
when a highway crosses a railroad, 491.
when a railroad is laid across or along a turnpike, 492.
when a railroad is laid in a public street, 493.
damages from noise, smoke, cinders, etc., 493.
measure of damages for change of grade, 494.
for viaducts, causeways, etc., in streets, 495.
various elements of damages when part of tract taken, 496.
danger from fire, 497.
cost of fencing, 498.
interest, 499.
when property which is subject to a public easement of way is taken for a street, 500.
enhancement caused by the work or improvement, 501.
the right or estate acquired for public use should be considered, 502.

[THE REFERENCES ARE TO THE SECTIONS.]

ASSESSMENT OF DAMAGES—*Continued.*

- extent of the use may be considered, 503.
- cost of improvements which may be assessed against the property not to be considered, 504.
- expense of proceedings cannot be included, 504.
- miscellaneous items of damage held not allowable, 504.
- reserving rights or easements or requiring things to be done in lieu of money, 505.
- measure of damages in mill cases, 506.
- whether damages by an unlawful entry may be included, 507.
- where entry is made and works constructed before obtaining title, 507.
- when the owner is estopped to claim damages, 508.
- principles which should govern as to prospective damages, 566.
- right to recover for improvements made pending proceedings, 663.
- mandamus to compel, 614.

ASSESSMENTS,

- for taxation, not evidence of value, 448.

ASSUMPSIT,

- when it lies on an award or judgment, 609.

ATTEMPT TO AGREE, (See CONTRACT.)

- necessity of, 301.
- how alleged in petition, 301, 304, 357.
- how proven, 301, 304.
- what is a sufficient, 302.
- what the record should show respecting, 301.
- how excused or waived, 303.

AUTHORITY TO CONDEMN. (See APPROPRIATION OF PROPERTY.)

- must emanate from the legislature, 237.
- must be expressly given, 240.
- not implied from authority to construct works, 240.
- must provide for compensation, 452.
- and for notice, 368.
- may be given by general or special act, 241.
- and to individuals or corporations, foreign or domestic, 242.
- a personal trust and not transferable, 243.
- of corporation, not lost by lease of its property and franchises, 244.
- conflict between different authorities having power over the same territory for the same purpose, 250.
- whether it can be exercised when no mode pointed out, 252.
- must be strictly pursued, 253, 509.
- and strictly construed, 254.
- successive appropriations, 259.
- construction of statutes conferring authority, 255-260.
- as to location, 255, 256.

[THE REFERENCES ARE TO THE SECTIONS.]

AUTHORITY TO CONDEMN—*Continued.*

as to change of location, 258.

as to meaning of words "to," "from," "at" or "near," 257.

and of words "land," "ground," etc., 285.

of statutes prohibiting the taking of dwellings, 281, 284.

 of other buildings and structures, 282, 284.

 of gardens, orchards, yards and other enclosures, 283, 284.

as to what may be taken under. (See APPROPRIATION OF PROPERTY.)

AWARD OR JUDGMENT, (See PRACTICE, PROCEEDINGS.)

action on, 609, 610.

conflicting claims to, 627.

interest on, 499.

damages presumed to be included in, 564–575.

 statement of the question, 564.

 general doctrine of the decisions, 565.

 the same criticised, 566.

 damages by construction of the works, 567.

 by works on land to which the assessment does not relate, 568.

 by interfering with the right of support, 569.

 by bringing a street to grade, 570.

 by interfering with streams, 571.

 or with surface or subterranean waters, 572.

 by blasting, trespass and the like, 573.

 by improper construction or negligent use of works, 574.

 by changes in the plan of construction, 575.

claims based upon mistake in making the assessment, 576.

statutes giving a remedy for damages not foreseen or estimated, 577.

whether it should be joint or several, 515.

BENEFITS,

whether to be considered in estimating the just compensation 465–471.

 the decisions classified, 465.

1. Cases holding that benefits cannot be considered at all, 466.

2. Cases holding that special benefits only can be set off against damages to the remainder, but not against the value of the land taken, 467.

3. Cases holding that benefits, both general and special, may be set off against damages to the remainder, but not against the value of the part taken, 468.

4. Cases holding that special benefits only may be set off against both the value of the part taken and damages to the remainder, 469.

5. Cases holding that benefits, both general and special, may be set off against both damages to the remainder and the value of the part taken, 470.

conclusions on the subject, 471.

[THE REFERENCES ARE TO THE SECTIONS.]

BENEFITS—*Continued.*

- special constitutional provisions respecting, 472.
- statutory provisions respecting, 473.
- to a different tract may not be considered, 474.
- what is meant by a different tract, 475.
- special, what are, 476.
- opinion of witnesses as to amount of, 486.
- whether to be considered in suits for damages by change of grade, 494.

BETTERMENTS, (See SPECIAL ASSESSMENTS.)

BLASTING,

- damage by, not a taking, 146.
- and not included in the award, 573.

BOND,

- as security for just compensation, 458.
- giving of does not suspend other remedies, 609.
- remedy on, 617.

may be required in case of appeals, 587.

refunding, when may be required of owner, 616.

BOOM,

- is a public use, 71, 177.
- right of riparian owner to construct, 71.

damages by the operation of, whether remediable, 63, 67.

BRIDGES AND FERRIES, (See FRANCHISE, TAKING.)

- are a public use, 168.
- cannot be taken for highway without express authority, 271.
- competing, when a taking, 136–138.
 - when a *damaging*, 228.
- when right to maintain is exclusive, an interference is a taking, 137.
- what is such an interference, 138.

exclusive right to maintain protected by injunction, 642.

authority to bridge navigable streams not implied, 273.

how construed, 66, 85.

damage by interfering with current a taking, 66, 85.

BUILDINGS. (See IMPROVEMENTS.)

construction of statutes prohibiting the taking of, 282–284.

BURIAL GROUND. (See CEMETERY.)

BUSINESS,

- injury to, not a taking, 147,
- and not to be considered in estimating damages, 487.

CALIFORNIA,

constitutional provisions of, 17.

CANAL,

- for transportation, a public use, 169.
- for mining or irrigation, whether a public use, 169, 184.
- taking railroad property for, 269.

[THE REFERENCES ARE TO THE SECTIONS.]

CANAL—*Continued.*

- may not be taken longitudinally without express authority, 271.
- transfer of property and franchises pertaining to, 594.
- removing structures from in case of abandonment, 598.
- exclusive right to maintain, protected by injunction, 612.

CASE,

- action of, when the proper remedy, 452, 624, 654.

CAUSEWAYS,

- in streets, liability for damages by, 109.

CEMETERY,

- a public use, if not exclusive, 176.
- when may be taken for other public uses, 272.
- petition for, should show that its privileges are open to the public, 353.

CERTIORARI,

- its nature and office generally, 542.
- when it lies and when the proper remedy, 543, 557.
- application for the writ, 544.
- notice of the application should be given, 544.
- adverse party may show cause against, 544.
- when granted and when refused, 545.
- form and effect of the writ, 546.
- return to the writ, 547.
- proceedings on the return, 548.
- what are sufficient grounds for quashing the proceedings, 301, 549.
- estoppel to prosecute, 556.
- appeals to the Supreme Court in, 550.
- costs in, 562.

CESTUI QUE TRUST,

- not a necessary party, 321.
- bill by to obtain damages awarded, 627.

CHANGE OF GRADE, (See STREETS AND HIGHWAYS, TAKING.)

- early English cases as to, 92.
- leading American cases as to, 94, 95.
- damages by, whether a taking, 94–104.
 - Ohio doctrine, 98.
 - Kentucky doctrine, 99.
- damages by interfering with right of support, 101.
 - by encroachment of filling, 102.
 - by interfering with surface water, 103.
 - or with streams, 104.
- damage to business, 109.
 - to pipes of water company, 109.
- liability for, when made for purpose of forming a dike, 109.
- liability of turnpike company for, 109.
- liability for, when unlawful, 105.

[THE REFERENCES ARE TO THE SECTIONS.]

CHANGE OF GRADE—*Continued.*

- or when negligently done, 106.
- power to make, a continuing one, 107.
- power of city to make compensation for, 109.
- statutes giving compensation for, 207-218.
 - are liberally construed, 216.
 - what constitutes a change within purview of, 211, 217.
 - remedy under, 207, 208, 210, 213.
 - when the right accrues, 208, 209, 211, 214, 217, 667.
 - measure of damages, 208, 209, 217, 494.
 - estoppel to claim damages under, 217.
- may recover for, under words "damaged" or "injured," in constitutions, 223, 224.
- when the right to compensation accrues, 667.
- measure of damages, 494.
- injunction to prevent change, 638.

CHANGE OF USE, (See TAKING.)

- when a taking, 140, 141.
- when unauthorized, 596.

COLLEGES. (See EDUCATIONAL INSTITUTIONS.)

COLORADO,

- constitutional provisions of, 18.

CHOSES IN ACTION,

- may be taken, 263.

COLLATERAL ATTACK,

- upon proceedings, 600-606.
- general considerations, 600.
- if jurisdiction exists, errors do not vitiate as a rule, 601.
 - exceptions to the rule, 603.
- what is essential to jurisdiction, 602. (See JURISDICTION.)
- what the record should show, 604.
- parol evidence to aid or impeach the record, 605.
- estoppel to question the proceedings collaterally, 606.

COMMISSIONERS, (See JURY, PRACTICE, PROCEEDINGS, REPORT OR VERDICT.)

- summoning, selecting and appointing, 400-404.
- mandamus to compel appointment of, 404.
- qualifications of, 405.
- what the record should show as to their qualifications, 407.
- vacancies, effect of and how filled, 408.
- must take the oath required, 411.
- form and sufficiency of the oath, 412.
- waiver of defective oath, 414.
- what the record should show as to oath taken, 414.
- time and place of meeting, 415.

[THE REFERENCES ARE TO THE SECTIONS.]

COMMISSIONERS—*Continued.*

- right of, to hear evidence, 416.
- mode of procedure by, 416.
- what questions may be considered by, 417.
- adjournments of, 418.
- whether a majority may act or decide, 419.
- receiving *ex parte* communications, 420.
- receiving entertainment, 421.
- other improprieties, 422.
- power of, to reconsider or amend report, 423.
- may not reserve easements or require things to be done in lieu of giving money, 505.

COMMON LAW,

- action for damages when proper, 607-608.

- action for value of lands appropriated without proceedings, 623.

COMPENSATION. (See **JUST COMPENSATION.**)

COMPLAINT. (See **PETITION.**)

CONDEMNATION. (See **APPROPRIATION OF PROPERTY, AUTHORITY TO CONDEMN, PROCEEDINGS.**)

CONDITIONS. (See **CONTRACTS.**)

- As to conditional awards, 516.

CONFIRMATION, (See **REPORT OR VERDICT.**)

- form and effect of the order of, 532.

- setting aside order of, 534.

CONNECTICUT,

- Constitutional provisions of, 19.

CONSEQUENTIAL DAMAGES, (See "DAMAGED," ETC., TAKING.)

- statutes imposing liability for, 246.

CONSOLIDATION OF CASES, 427.

CONSTITUTIONAL PROVISIONS,

- of the different States, 14-52.

- States with no provisions, 9.

- not declaratory, but limitations, 10.

- provision in Federal constitution does not apply to the States, 11.

- to be liberally construed in favor of private rights, 341.

- effect of change in, upon works in progress and pending proceedings, 12.

- changes imposing additional liabilities, 12, 246.

- ambiguities of, 53.

- value of English precedent in construing, 93.

- benefit of, may be waived, 167.

- meaning of the word property in, 55.

- construction of, as to what constitutes a taking, 53-156. (See **TAKING.**)

- a public use, 157-206. (See **PUBLIC USE.**)

[THE REFERENCES ARE TO THE SECTIONS.]

CONSTITUTIONAL PROVISIONS—*Continued.*

just compensation, 451–534. (See ASSESSMENT OF DAMAGES, JUST COMPENSATION.)

damage or *injury* to property not taken, 231–336. (See “DAMAGED,” “INJURED,” ETC.)

as to whether benefits may be considered, 464–476. (See BENEFITS.)

application of, to the right of trial by jury, 311–313.

to the question of notice, 341, 363–368. (See NOTICE, PARTIES.)

to the question of costs, 559. (See COSTS.)

to the question of possession, finding proceedings, 578–583.

to the right of appeal, 536.

CONSTRUCTION. (See CONSTITUTIONAL PROVISIONS, STATUTES.)

CONSTRUCTION OF WORKS,

damages by, whether included in the assessment, 567.

damage by, on land to which the assessment does not relate, 568.

damages from changes in plan of, 575.

will be enjoined until compensation paid, 633.

in a particular manner when enjoined, 639.

CONTRACT, (See ATTEMPT TO AGREE.)

power to obtain property by, 288.

parties must be competent to make, 289.

sufficiency of descriptions in, 290.

the title acquired by, 291.

effect of words in, as creating a condition precedent or subsequent, 292.

effect of conveyance as to damages to other property, 293.

evidence of oral stipulations cannot be received to modify written, 295.

may be enforced by specific performance, 296.

may be enforced, by and against whom, 297.

oral, validity and effect of, 298.

particular contracts construed, 299.

CONTRACTORS,

cannot exercise power of eminent domain vested in principal, 243.

power to take material, etc., 243

CONVEYANCE, (See CONTRACT.)

of land taken is subject to claim for compensation, 621.

of property, when competent evidence of value, 444.

CORPORATION,

foreign or domestic, may be authorized to condemn, 242.

may condemn, though all its property and franchises leased, 244.

property and franchises of, may be taken, 274.

power of, to obtain property by agreement, 288.

legal incorporation of, how questioned and proved, 391.

COST,

of property, when competent evidence of value, 444.

[THE REFERENCES ARE TO THE SECTIONS.]

COSTS,

- general principles in regard to, 559.
- in the absence of special statutory provisions, 560.
- under particular statutes, 561.
- in case of appeals, reviews, etc., 562.
- miscellaneous cases as to, 563.

COURTS,

- power of, to amend or modify report of commissioners or confirm in part, 529.
- of United States, jurisdiction of, 315.

COUNTY COMMISSIONERS,

- action of, upon report, 519.

COVENANT, (See CONTRACT, LANDLORD AND TENANT.)

- of city for quiet enjoyment not broken by itself taking 264.

CROPS,

- whether value of, to be considered in estimating damages, 486.

CROSSINGS,

- of highway by railroad, right to compensation, 118.
 - may be done under a general authority, 270.
- of one railroad by another under a general authority, 268.
 - measure of damages, 489.
 - injunction to prevent, 644.
- of railroad by highway, measure of damages, 491.
- specific performance of agreements to build, 296.
- expense of constructing, as an element of damage, 496.

CROSS-PETITION,

- when proper, 360.

CUL DE SAC,

- land may be taken for, 166.

DAM, (See MILLS AND WATER POWER.)

- suit to abate, unless damages paid, 619.

DAMAGES,

- as to assessment and measure of. (See ASSESSMENT OF DAMAGES.)
- as to the right to recover. (See "DAMAGED," ETC., JUST COMPENSATION, TAKING.)
- measure of, for railroad in street, 129, 493.
 - for water taken, 62, 13.
- to business by change of grade, 109, 487.
- release of, 294.
- acceptance and payment of as an estoppel, 606. (See ESTOPPEL.)
- opinions of witnesses as to amount of, 436.
- what is a sufficient finding as to, in report or verdict, 512.
- inadequate or excessive, as ground for setting aside report or verdict, 524.

[THE REFERENCES ARE TO THE SECTIONS.]

DAMAGES—*Continued.*

statutes giving a remedy for damages not foreseen or estimated, 577.
right to, as between grantor and grantee, 318, 319, 625, 627.
 as between heirs, devisees and personal representatives, 320, 627.
 as between mortgagor and mortgagee, 324, 627.
when vested are beyond legislative control, 612.
when the right to, accrues, 665–669.
right to recover, when proceedings abandoned, 658, 659.
right to recover additional damages, 564–577. (See AWARD ON VERDICT.)
are a lien until paid, 620.

“DAMAGED,” “INJURED,” “INJURIOUSLY AFFECTED.” (See TAKING.)

the terms synonymous, 222.
statutes giving damages for change of grade, 207–218.

 Indiana, 207.
 Iowa, 208.
 Massachusetts, 209.
 Minnesota, 210.
 Missouri, 211.
 New Jersey, 212.
 New York, 213.
 Pennsylvania, 214.
 Rhode Island, 215.
 Tennessee, 216.
 Wisconsin, 217.
 other States, 218.

statutes giving damages for railroads in streets, 219.
 in other cases, 220.

constitutional provisions giving compensation for property “damaged,” “injured,” etc., 15, 16, 17, 18, 22, 23, 35, 36, 44, 48, 51.
comments thereon, 221.

construction of as applied to damages caused, by change of grade, 223, 224

 by railroads in streets, 225.
 by other uses of streets, 226.
 by interfering with ways not in front of property, 227.
 by competing ferries and bridges, 228.
 by impeding access by water, 229.
 by vibrations, dust, smoke, cinders, etc., 230.
 by obstructing light, 231.

the words intended to enlarge the right to compensation, 232.
and include any physical injury not held to be a taking, 233.

any interference with rights appurtenant to property, not held to be a taking, 234.

[THE REFERENCES ARE TO THE SECTIONS.]

"DAMAGED," ETC.—*Continued.*

and generally any damage arising from an interference with a right public or private not held to be a taking, 235.
damages not embraced by the words in question, 236.
remedy to recover for property "damaged," etc., 624.
measure of damages, 625.

injunction to prevent damaging before compensation, 645.

DAMNUM ABSQUE INJURIA. (See "DAMAGED," ETC., TAKING.)

DEBT, (See REMEDIES.)

will lie on award or judgment, 609.

DEDICATION,

not a, to recognise a street by map or deeds after proceedings to establish it, 610.

DEED, (See CONTRACTS.)

of right of way, sufficiency of description, 290.

DEFENCES, (See PRACTICE.)

to application, 386–399.

to suit on an award or judgment, 610–612.

DEFENDANT. (See PARTIES.)

DEFINITION,

of "certiorari," 542.

of "due process of law," 365.

of "eminent domain," 1, 2.

of a "franchise," 135.

of "good cause," 520.

of the phrase "just compensation," 462.

of "market value," 478.

of "the police power," 6.

of "property," 54, 58.

of a "stream," 60.

of "sufficient cause," 520.

of a "tax," 4.

of the words "to," "from," "at" or "near" in statutes relating to location, 257.

of the "war power," 8.

DELAWARE,

constitutional provisions of, 20.

DELEGATION,

of the authority to condemn, 243.

DEMURRER,

to the petition or application, 389.

DEPOSIT,

of damages for the purpose of obtaining possession, 579, 580.

at whose risk, 580.

right of owner to immediate possession of, 581.

proceedings by owner to obtain, 616.

[THE REFERENCES ARE TO THE SECTIONS.]

DEPOT,

land may be taken for, 170. (See PUBLIC USE.)
specific performance of agreements to build, 296. (See SPECIFIC PERFORMANCE.)

DESCRIPTION,

in petition of property taken or location, general requisites, 350.
descriptions held sufficient, 351.
descriptions held insufficient, 352.
in report or verdict generally, 510.
in case of highways, 511.

DESTRUCTION, (See NECESSITY.)

of building, to prevent spread of fire, not a taking, 7.

DEVISEES,

when proper parties, 320.
when entitled to the compensation, 320.

DIKES. (See LEVEES, DIKES, ETC.)**DISCONTINUANCE, (See ABANDONMENT.)**

of proceedings, right to, before completion, 655.
whether absolute, 655.
as affected by possession, 655.
on appeal; appellant may dismiss appeal, 541.
petitioner may dismiss petition, 541.

DIVERTING,

of stream a taking, 62.

DOWER, (See PARTIES.)

nature of, in its different stages, 323.
whether owner of, should be made a party, 323.

DRAINS,

referred by some to police power, 186.
but properly to eminent domain power, 187.
the question of public use, 185-197.
decisions of California, 189.
of Indiana, 190.
of Iowa, 191.
of Nebraska, 192.
of New Jersey, 193.
of New York, 194.
of North Carolina, 195.
of Ohio, 196.
of Oregon, 197.
of Wisconsin, 198.
of other States, 199.

description of location in petition for, 350-352.

cannot be laid along right of way of railroad, 269.

interference with, on farms an element of damage, 496.

[THE REFERENCES ARE TO THE SECTIONS.]

DUE PROCESS OF LAW,

what is, 341, 365.

requires notice in condemnation proceedings, 365.

DWELLINGS,

construction of statutes prohibiting the taking of, 281, 284.

EASEMENT,

destruction or impairment of a taking, 142.

EDUCATIONAL INSTITUTIONS,

property of may be taken, 265.

EJECTMENT,

when it lies, 647.

when owner estopped to maintain, 648.

when execution will be stayed to enable defendant to condemn, 647.

ELEVATED RAILROADS, (See RAILROADS.)

in streets, not a legitimate use, 123.

right of abutting owner to compensation, 123.

measure of damages, 493.

ELECTRICITY,

apparatus for distributing may be laid in streets, 130.

EMINENT DOMAIN, (See APPROPRIATION OF PROPERTY, AUTHORITY TO CONDEMN, TAKING.)

origin of the phrase, 3 n. 2.

definitions of, 1.

definitions of, considered, 2.

nature of the power, 3.

not a reserved right or estate, 3.

not limited to a taking for public use, 1.

a necessary attribute of sovereignty, 3, 237.

not possessed by territorial governments unless by grant, 3 n. 7, 237.

distinguished from taxation, 4.

from special assessments or betterments, 5.

from the police power, 6.

from the destruction of property in case of necessity, 7.

from the war power, 8.

power of, delegated by the people to the legislature, 9.

but limited by the constitution, 10.

constitutional limitations of the different States respecting, 14-52.

power of, vested in the legislature, 237.

and can only be exercised by virtue of legislative enactment, 237.

the time and manner of its exercise in discretion of legislature, 237.

the necessity of its exercise for the legislature, 238.

those vested with the power the sole judges of when it shall be exercised, 239.

and of the extent and propriety of exercising it, 239.

all property subject to the power of, 262 *et seq.*

[THE REFERENCES ARE TO THE SECTIONS.]

EMINENT DOMAIN—*Continued.*

mill acts an exercise of, 182, 183.
drainage laws an exercise of, 187.

ENTRY,

what constitutes, 583, 662.
before complying with the law enjoined, 631.

EQUITY, (See INJUNCTION, SPECIFIC PERFORMANCE.)

no remedy in, for correction of errors in proceedings, 557.
relief in, on account of error, mistake, new evidence, etc., 652.
bill to make costs a lien on land taken sustained, 563.
bill to compel an assessment of damages, 615.

ERROR, (See APPEAL, CERTIORARI, ESTOPPEL, WAIVER, WRIT OF ERROR.)

when it vitiates the proceedings collaterally, 601, 603.
no defence to suit on award, 610.
no relief in equity on account of, 652.

ESTOPPEL, (See also ACQUIESCENCE, WAIVER.)

to claim damages for railroad in street, 120.
to deny title, 441.
to recover damages for property taken or affected, 508.
to insist upon irregularities in the proceedings, 514.
to object to the report or verdict, 531.
to obtain writ of certiorari, 545.
to prosecute an appeal or certiorari, 556.
to question the proceedings collaterally, 606.
to recover the damages awarded, 610.
to maintain ejectment, 648.

EVIDENCE, (See ASSESSMENT OF DAMAGES.)

the general rules of, apply, 430.
competency of, generally, 431.
the burden of proof, 426, 432.
competency of witnesses generally, 433.
disqualifications at common law, 433.
limiting the number of witnesses, 434.
opinions as to value, 435.
as to amounts of damages or benefits, 436.
who competent to give such opinions, 437.
value of such opinions, 437.
opinions as to other matters, 438.
admissions and declarations, 439.
whether owner must prove title, 440.
what is sufficient proof of title, 442.
estoppel to deny title, 441.
sales of similar property, 443.
cost of the property or of improvements thereon, 444.

[THE REFERENCES ARE TO THE SECTIONS.]

EVIDENCE—Continued.

- sale of property damaged after the damaging, 445.
- offers to buy or sell, 446.
- purchases by the party condemning, 447.
- assessment for taxation, 448.
- reports of commissioners, 449.
- value for particular uses, 479.
- erroneous rulings in regard to as grounds for setting aside the report or verdict, 523.
- parol, to aid or impeach the record, 605.
- right of commissioners to hear, 416.

EXCEPTIONS,

- to the petition or application, 389.

EXCLUSION,

- any interference with right of, a taking, 149.

EXCLUSIVE RIGHTS AND PRIVILEGES, (See FRANCHISES.)

EXECUTION,

- on award or judgment, when proper, 533.

- stay of, in ejectment to enable defendant to condemn, 647.

EXECUTORS,

- deed by when valid, 289.

- as parties, 320.

EXPERT TESTIMONY, (See EVIDENCE, OPINIONS.)

- federal, (See UNITED STATES.)

FEDERAL CONSTITUTION,

- provisions of as to eminent domain does not apply to States, 11.

FEES,

- may be taken, 277.

- whether acquired under particular statutes, 278.

- rights of owner of, in land taken for railroad purposes, 584-588.

- for streets and highways, 589-590.

- for turnpikes, 59.

- for flowage by dam, 592.

- for other public uses, 592.

- when taken land does not revert, 596.

FENCES,

- cost of, as an element of damage, 498.

- specific performance of agreements to build, 296.

FERRY, (See BRIDGES AND FERRIES.)

- exclusive right to maintain protected by injunction, 642.

FILING,

- of the petition, necessity of, 345.

FIRE,

- danger from, an element of damage, 497.

FIRE LIMITS,

- establishing of, not a taking, 156.

[THE REFERENCES ARE TO THE SECTIONS.]

FISHERY,

interfering with held not a taking, 85.

FIXTURES,

questions in regard to, in estimating damages, 488.

FLOODING, (See MILLS, TAKING.)

of land is a taking, 67, 71, 87.

when owner of fee may not prevent by filling, 592.

FLORIDA,

constitutional provisions of, 21.

FORCED SALES,

of property held for public use, 595.

FORCIBLE ENTRY AND DETAINER,

when it will lie, 654.

FORDING,

destroying of, held not a taking, 85.

FORECLOSURE,

of property held for public use, 594, 595.

of railroad, effect upon property and franchises, 596.

FRANCHISE,

definition of, 135.

may be taken or impaired for public use, 136-139, 274, 275.

what amounts to a taking of, 136-139.

when not exclusive, 136.

when exclusive, bridges and ferries, 138.

railroads, turnpikes, etc, 139.

damage to, connected with property taken, 484.

infringement of exclusive, prevented by injunction, 642.

FRAUD,

effect of, in obtaining release, 294.

FREEHOLDERS,

who are, within statutes as to qualifications of jurors, etc., 405.

FREIGHT-HOUSES,

land may be taken for, 170.

GARDENS,

construction of statutes prohibiting the taking of, 283, 284.

GAS,

works to supply, a public use, 173.

pipes for, in streets, when a taking, 129.

when enjoined, 637.

works, when may be taken for other public uses, 272.

GEORGIA,

constitutional provisions of, 22.

"GOOD CAUSE,"

definition of, 520.

[THE REFERENCES ARE TO THE SECTIONS.]

GRADE, (See CHANGE OF GRADE.)
duty of city to establish, 109.
power to establish a continuing one, 107.
what constitutes an establishment of, 207, 208, 209, 211, 215, 216.

GRANTOR AND GRANTEE.
which the proper party, 318, 319.
which entitled to the compensation, 318, 319, 334, 625.

GRASS, (See HERBAGE.)

GRIST-MILL, (See MILLS AND WATER POWER.)

GROUND,
meaning of, in statutes giving authority to condemn, 285.

GUARDIAN,
deed by, without order of court, void, 289.

GUARDIAN AD LITEM,
should be appointed for infants, 328.

HEALTH,
works to promote, a public use, 201.

HEIRS,
when proper parties, 320.
when entitled to the compensation, 320.

HERBAGE,
right to on railroad right of way, 587.
on streets and highways, 590.

HIGHWAYS, (See STREETS AND HIGHWAYS.)

HOMESTEAD.
husband may grant right of way through, 289.
how divested by proceedings, 322.

HORSE RAILROADS,
whether a legitimate use of a street, 124.
whether the abutting owner is entitled to compensation, 124.
cannot occupy streets without authority, 125.
authority, how given and construed, 125.
crossing of by other railroads, 268, 644.
injunction to prevent the laying or operating of, in streets, 636.
to prevent the crossing of, by other railroads, 644.
to prevent use of tracks of, by other roads, 643.
to protect exclusive right of, in street, 642.

HUSBAND AND WIFE,
as parties, 322.
husband's deed of separate property of wife invalid, 289.
inchoate dower of wife, how divested, 323.

ILLINOIS,
constitutional provisions of, 23.

[THE REFERENCES ARE TO THE SECTIONS.]

IMPROVEMENTS,

- right to make, pending proceedings, 144, 663.
- how described in notice, 376.
- right to, when land reverts, 598.

INDICTMENT,

- against a railroad for failure to restore highway, 653.

INDIANA,

- constitutional provisions of, 24.

INFANTS,

- as parties, 328.
- appointment of guardian ad litem for, 328.

INJUNCTION,

- to prevent entry or interference under invalid statute, 452.
- to prevent the further use of property until damages paid, 618, 634.
 - when withheld to enable a condemnation to be had, 634.
- to prevent entry or construction before complying with the law, 631.
 - grounds of jurisdiction, 632.
 - when refused, 633.
 - plaintiff's title must be clear, 633.
- to prevent laying or operating steam railroads in a street, 635.
- to prevent laying or operating horse railroads in streets, 636.
- to prevent other uses of streets, 637.
- to prevent a change of grade, 638.
- to prevent the construction of works in a particular manner, 639.
- to prevent the removal of materials or trees from a street, 637.
- to prevent the use of adjacent property not included in the condemnation, 640.
- to prevent an interference with water rights, 63, 641.
- to prevent the infringement of a franchise or exclusive right, 612.
- to prevent taking property already devoted to public use, 643.
- to prevent one railroad crossing another, 644.
- to prevent injury or damage to property not taken, 645.
- to prevent the prosecution of proceedings, 646.
- order should not be too broad, 634.
- right to, when barred by conduct of owner, 633.

INJURIOUSLY AFFECTED, (See "DAMAGED," ETC.)

INJURY, (See "DAMAGED," ETC., TAKING.)

INSTRUCTIONS, 410, 428.

IOWA,

- constitutional provisions of, 25.

IRRIGATIONS,

- works for, a public use, 169, 202.

IRREGULARITIES,

- in proceedings, no defence to suit on the award, 610.

[THE REFERENCES ARE TO THE SECTIONS.]

INTEREST,

- the question of interest generally, 499.
- allowance for, in estimating damages, 499.
- on the award or judgment, 477, 489.

JAIL,

- use of street for, may be enjoined, 183, 637.

JOINDER,

- of parties, 336, 337.
- of different improvements in one proceeding, 359.
- of different owners or different tracts in one appeal, 537, 588.

JOINT TENANTS AND TENANTS IN COMMON,

- as parties, 327, 538.

JUDGMENT,

- nature of the lien of, 325.
- in condemnation proceedings, form of, 533.
 - interest on, 499.
 - action on, 609, 610.
- when final as respects an appeal, 551.

JUDGMENT CREDITOR,

- whether a necessary party, 325.
- may enforce lien if not made a party, 629.

JUDICIARY.

- what constitutes a public use, a question for, 158.

JURISDICTION. (See VENUE.)

- of U. S. courts, 315.

- notice essential to, 602.

- when acquired, errors do not vitiate the proceedings collaterally, 601.

JURORS, (See COMMISSIONERS.)

- qualifications of, 405.

JURY, (See PRACTICE, REPORT OR VERDICT.)

- right to, in condemnation cases, 311, 312.

- special, disagreement of, 409.

- presiding officer of, his qualifications, duties, etc., 410.

- view of premises by, 424.

- effect to be given the view, 425.

- trial by, right to open and close, 426.

- instructions to, 428.

- not bound by the opinions of witnesses as to value, 435.

JUST COMPENSATION, (See ASSESSMENT OF DAMAGES, TAKING.)

- meaning of the phrase, 462.

- right to compensation when the constitution is silent, 451.

- statutes which authorize a taking must provide for compensation, 452.

- taking for public roads without compensation in N. J. and Penn., 453.
- time of making compensation under express constitutional provisions, 454.

- when the constitution is silent on the subject, 455, 456, 608.

[THE REFERENCES ARE TO THE SECTIONS.]

JUST COMPENSATION—*Continued.*

distinction between a taking by the public and by private parties as to securing the compensation, 457.
what is sufficient security when taking by private parties, 458.
conclusions as to time of making compensation, 459.
must be made in money, 460, 505.
the legislature cannot fix nor prescribe rules for its compensation, 461.
measure of damages and elements to be considered, 463-508. (See
ASSESSMENT OF DAMAGES.)
the question of benefits, 465-476. (See BENEFITS.)

KANSAS,

constitutional provisions of, 26.

KENTUCKY.

constitutional provisions of, 27.
doctrine of as to damage by change of grade, 99.

LACHES, (See ACQUIESCENCE, WAIVER.)

as a bar to relief by injunction, 635.

LAKES AND PONDS,

title to bed of, 76.
rights of riparian owners on, 76 *et seq.*
rights of owners upon outlets of, 62 n. 14.

LAND,

meaning of, in statutes giving authority to take, 285.

LANDLORD AND TENANT,

apportionment of damages between, 483, 627.
effect of taking upon covenants of lease, 483.
apportionment of suit, 483.
one cannot recover from the other on ground of error in division, 627.
both necessary parties, 326.
may be joined in the same proceeding, 336.
lessee cannot exercise lessor's authority to condemn, 243.

LATERAL RAILROADS,

when a public use, 171. (See PUBLIC USE.)

LEADING CASES,

as to what constitutes a taking, 58, 59.

LEGISLATURE, (See AUTHORITY TO CONDEMN, STATUTES.)

not limited except by the constitution, 10.

is vested with the eminent domain power, 237.

has plenary power with reference to time and manner of its exercise, 237.

may confer authority to condemn on whom it pleases, 242.

power to impose additional liabilities, 246.

power to legalize defective proceedings, 261.

may determine what estate or interest may be taken, 277.

power of, over inchoate dower, 323.

[THE REFERENCES ARE TO THE SECTIONS.]

LEGISLATURE—*Continued.*

- power of, to remove disqualifications of interest in commissioners, etc., 405.
- cannot fix the compensation or prescribe rules for its computation, 461.
- may authorize confirmation of report or verdict to be set aside, 531.
- has plenary power in granting and regulating appeals unless limited by constitution, 537.
- may open proceedings for review after their final termination, 558.
- cannot take away vested right to damages, 612.

LEVEES, DIKES, etc.,

- whether a public use, 200.
- easement of, in Louisiana, 150.

LIABILITY. (See "DAMAGED," ETC., OR TAKING.)

- additional, created by change in constitution, 312.
- imposed by statute, 246.

LICENSE,

- oral, effect of, 298.
- to hunt and fish, not an interest requiring compensation, 332.

LIEN. (See JUDGMENT CREDITORS, PARTIES.)

- how enforced, when owner not made a party, 629.

LIFE ESTATE,

- how valued, 483, 627.

LIFE TENANT,

- deed from does not affect reversioner, 289.
- may authorize use of land, 289.
- is a necessary party, 326.
- may be joined with reversioner, 336.
- held entitled to use of damages for life, 627.

LIGHT,

- obstruction of, actionable under word *damaged* in constitution, 231.

LIMITATIONS,

- to exercise of powers, 247.
- to claim for damages by change of grade under statute, 215.
- in respect to taking appeals, 555.
- within which to make the claim for compensation, 664.
- when the statutory remedy accrues, 665.
- when the remedy accrues for consequential damages, 666.
- when, for a change of grade, 215, 667.

LOCATION. (See AUTHORITY TO CONDEMN, APPROPRIATION OF PROPERTY.)

- meaning of words "to," "from," "at" or "near," in respect to, 257.
- construction of statutes as to, 255-258.
- power to change, 258.
- priority of, 305, 306.
- what constitutes a, completed, 306.

[THE REFERENCES ARE TO THE SECTIONS.]

LOCATION—*Continued.*

description of, in petition, 350-352.
in notice, 376.
in report or verdict, 510, 511.

LOUISIANA,

constitutional provisions of, 28.

MAINE,

constitutional provisions of, 29.

MANDAMUS,

to compel the appointment of commissioners, 387, 404.
to compel a new assessment on account of errors, 557.
to compel an allowance for costs, 563.
to compel an assessment of damages, 614.
to compel the levy and collection of an assessment of benefits, 611.
to compel payment of award, 613.
to compel the opening of highways, 650.
to compel a tribunal to act, 650.
to compel railroad to restore highway at crossing, 653.

MAP. (See PRELIMINARIES, SURVEYS.)

MARKETS,

a public use, 174.
in streets, not a legitimate use, 132.
and may be enjoined, 637.

MARKET VALUE,

definition of, 478.

MARRIED WOMEN. (See DOWER, HUSBAND AND WIFE.)

MARYLAND,

constitutional provisions of, 30.

MASSACHUSETTS,

constitutional provisions of, 31.

MATERIALS,

right to in railroad right of way, 587.
in streets and highways, 590.

MEASURE OF DAMAGES. (See ASSESSMENT OF DAMAGES.)

MICHIGAN,

constitutional provisions of, 32.

MILL PONDS,

crossing of by railroad or highway, 271.
right of owner of fee to fill, 592.

MILLS AND WATER POWER,

whether a public use, 178-183.
early laws in regard to, 178 n. 3.
mill acts an exercise of the eminent domain power, 183.
contrary decisions, 182.
priority of right to appropriate a particular site, 305.

[THE REFERENCES ARE TO THE SECTIONS.]

MILLS AND WATER POWER—*Continued.*

proper parties in proceedings for, 384.

measure of damages for flowage, 506.

MINERALS,

whether value of, to be considered in estimating damages, 486.

MISTAKE,

as ground for setting aside report or verdict, 523.

in making assessment, remedy for, 576.

relief in equity on account of, 652.

MINING,

works for, whether a public use, 169, 184.

MINNESOTA,

constitutional provisions of, 33.

MISJOINER,

of parties, 337.

MISSISSIPPI,

constitutional provisions of, 34.

MISSOURI,

constitutional provisions of, 35.

MONEY,

may be taken under eminent domain power, 263.

compensation must be made in, 460.

MORTGAGE,

purchasers under, cannot exercise authority to condemn, 248.

by party condemning is subject to claim for compensation, 621.

MORTGAGEES,

are necessary parties, 324.

claims of, upon the damages awarded, when not made parties, 324.

remedies of, against the land, when not made parties, 628.

not affected by deed from mortgagor, 289.

may be joined with mortgagor, 336.

MOTION TO DISMISS,

when proper, 389.

MUNICIPAL CORPORATIONS,

liability of, for change of grade, 92-109.

for damages caused by surface water, 103.

for interfering with natural stream, 104.

for an unlawful change of grade, 105.

for negligence in making change of grade, 106.

for ditch in street enlarged by erosion, 109.

for permitting railroad in street, 625.

power of to establish grades a continuing one, 107.

to make compensation for change of grade, 108.

to authorize steam railroads in streets, 116.

to authorize horse railroad in streets, 125.

to obtain property by agreement, 288.

[THE REFERENCES ARE TO THE SECTIONS.]

MUNICIPAL CORPORATIONS—*Continued.*

- right of, to compensation for steam railroads in street, 119.
 - for horse railroads in streets, 125.
- whether they may enjoin use of street by railroads, 635.
- cannot condemn property beyond limits without express authority, 240.
 - nor map territory into streets and blocks and forbid improvements on streets, 144.
- motives of, in exercising power of eminent domain immaterial, 239.
- sufficiency of ordinance or resolution involving a taking, 308.
- effect of change in form of government on pending proceedings, 249.
 - of giving different corporations power to make improvements in the same territory, 250.
- of making the provisions in the charter of one apply to another corporation, 260.

NATURAL BARRIERS,

- against waters, right to protection of, 91.
 - interfering with, a taking, 91.

NAVIGATION, (See STREAMS, WATERS.)

- improvement of, is a public use, 177.
- right to improve, paramount to rights of riparian owners, 71.

NEBRASKA,

- constitutional provisions of, 36.

NECESSITY,

- injury or destruction of property in cases of, 7.
- entries in case of, justifiable, 145.
- for exercising power of eminent domain for the legislature, 162, 238.
- as affecting question of public use, 162.
- lack of, as a defence to the application, 393.
- what is a sufficient finding as to, in the report or verdict, 513.

NEGLIGENCE,

- in bridging stream, 66, 571.
- in constructing or maintaining sewers, 86.
- in making change of grade, 106.
- by interfering with surface water, 572.
- damages caused by, not a taking, 154.
 - and not to be considered in the proceedings for just compensation, 482.
 - remedy for, 651.

NEIGHBORHOOD ROADS. (See PRIVATE ROADS AND STREETS AND HIGHWAYS.)

NEVADA,

- constitutional provisions of, 37.

NEW HAMPSHIRE,

- constitutional provisions of, 38.

NEW JERSEY,

- constitutional provisions of, 39.

[THE REFERENCES ARE TO THE SECTIONS.]

NORTH CAROLINA,

has no constitutional provisions as to eminent domain, 41.

NOTICE,

constitutional requirements as to, 363-368.

cases holding that notice need not be given, 363.

cases holding that notice must be given, 364.

due process of law requires notice, 341, 365.

what the notice should contain, 366.

how to be given, 367.

by publication or posting, whether sufficient, 367.

personal, when required, 367.

giving of, when not required by statute, 368.

the statutory notice is jurisdictional and must be given, 369.

meaning of "reasonable notice" in statutes, 370.

form of, 371.

specifying time and place, 372.

how signed, 373.

describing the property taken, 374.

stating the nature or purpose of the proposed action, 375.

describing the location or improvement, 376.

meaning of the terms "owners," "occupants," etc., in statutes as to, 377.

serving, publishing, posting, etc., 378.

waiver of, by appearance or otherwise, 379, 541.

actual, not equivalent to legal, 379.

record must show a compliance with the statute as to, 382.

who is bound or affected by a particular notice, 380.

proof of, how made, 381.

who may take advantage of a want or defect of, 383.

of adjournments and other steps in the proceedings, 384.

parties once in court must take notice of subsequent proceedings, 384.

to one tenant in common not good as to others, 327.

one entitled to, not bound if not notified, 385.

in case of appeals, 539.

waiver of, by taking an appeal, 541.

of application for certiorari, 544.

defective, when ground for quashing proceedings in certiorari, 549.

essential to jurisdiction, 602.

to treat under English statutes, effect of, 630.

NUISANCE,

abating of, not a taking, 156.

when a private wharf in public waters is not, 80.

damages from noise, smoke, cinders, etc., 493.

OATH,

of commissioners, failure to take, renders proceedings invalid, 411.

its form and sufficiency, 412.

[THE REFERENCES ARE TO THE SECTIONS.]

OATH—*Continued.*

what the record should show as to the oath taken, 413.
waiver of defective oath, 414.

OBJECTIONS,

to the application, 386-399. (See PRACTICE.)
to the report or verdict, time and manner of presenting, 527.
practice in hearing, 528.

OCCUPANTS,

who are, within statutes as to notice, 377.

OFFICERS,

public officers as parties, 329.
presiding over special juries, their qualifications, duties, etc., 410.

OFFERS,

to buy or sell, whether competent evidence, 446.

OHIO,

constitutional provisions of, 42.
doctrine of, as to change of grade, 98.

OIL,

pipe lines for, a public use, 172.

OPEN AND CLOSE,

right to, 426.

OPINIONS,

of witnesses as to value, 435.
as to amount of damages or benefits, 436.
as to other matters, 438.

who competent to give, 437.

ORAL AGREEMENT,

inconsistent with written contract, invalid, 295.
waiving damages, when valid, 298.
validity and effect of, 298.

ORCHARDS,

construction of statutes prohibiting the taking of, 283, 284.

ORDER, (See AWARD OR JUDGMENT.)

when final so as to permit an appeal, 551.

ORDINANCE OF 1787,

provisions of, as to eminent domain, 14.

ORDINANCES,

involving the taking of property, when sufficient, 308.

OREGON,

constitutional provisions of, 43.

OWNER,

meaning of, in statutes as to parties and notice, 335, 377.

how described in petition, 349.

in report or verdict, 514.

right of, to recover from one to whom damages have been awarded
and paid, 627.

[THE REFERENCES ARE TO THE SECTIONS.]

OYSTER BEDS,
property in, 85.

PARKS,
a public use, 175.
may be established over railroad property subject to use by railroad, 269.
when may be taken for other public uses, 272.

PAROL

evidence, when received to aid or impeach the record, 605.

PARTIES,

in general, 317.

grantor and grantee, 318.

when contract executory, 319.

persons in possession under oral contract or gift, 319, 331.

heirs, devisees and personal representatives, 320.

persons in adverse possession, 331.

trustees and cestui que trust, 321.

husband and wife, 322, 323.

mortgagees, 324.

judgment creditors, 325.

other lienors, 325.

life tenants, lessees and reversioners, 326.

tenants in common and joint tenants, 327.

infants, 328.

towns and public officers, 329.

persons in possession of public lands, 330.

licensees, 332.

the proper plaintiff, 333.

when initiative in owner, 334.

who are "owners," "occupants," "persons interested," etc., 335.

joinder of, 336.

new parties, 337, 338.

effect of death or change of title pending proceedings, 338.

effect of omitting a necessary party, 339.

what constitutes making a person a party, 340.

general conclusions in regard to parties, 341.

the owner of any right or interest should be made a party, 341.

statement of, in petition, 349.

in case of appeal, 538.

owner may sue on award to unknown owners, 609.

in suits to recover for property damaged or injured, 625.

in actions of trespass, 649.

PARTNERSHIP,

an award in name of, invalid, 514.

[THE REFERENCES ARE TO THE SECTIONS.]

PENALTY,

for cutting timber, held not to apply to party entering under eminent domain power, 654.

PENDING PROCEEDINGS, (See PROCEEDINGS, PRACTICE.)

how affected by change in constitution or laws, 12, 245.

PENNSYLVANIA,

constitutional provisions of, 44.

PENT ROADS. (See PRIVATE ROADS, AND STREETS AND HIGHWAYS.)**PERCOLATION,**

taking water of stream or pond by, 62.

damage by, a taking, 87.

PERSONAL PROPERTY,

may be taken under power of eminent domain, 263.

what is a taking of, 53.

nothing can be allowed for removal of, from land taken, 488.

PERSONAL REPRESENTATIVES,

when proper parties, 320.

when entitled to the compensation, 320.

"PERSONS INTERESTED,"

meaning of, in statutes as to parties, 335.

PETITION,

when necessary, 343.

when not, 344.

in whose name it should be, 333.

addressing, signing, verifying, filing, 345-347.

when required to be signed by a certain proportion of the property or of its owners, 346.

right of signers to withdraw, and effect, 346, 347.

when required to be signed by persons of a particular description, 347.

general requisites as to form and substance, 348.

statement of parties, owners and persons interested, 320, 349.

description of the property or location, 350.

descriptions held sufficient, 351.

descriptions held insufficient, 352.

stating the purpose of the taking, 353.

when should show necessity of the taking, 354.

statement of title, 355.

stating the nature of the injury or damage, 356.

must show inability to agree, 301, 304, 357.

when the neglect or refusal of some other tribunal to make the improvement should be shown, 358.

joinder of improvements in, 359.

amendments of, 361.

waiver of defect in, 362.

[THE REFERENCES ARE TO THE SECTIONS.]

PETITION—*Continued.*

insufficient, is ground for quashing proceedings on certiorari, 549.
when sufficient to give jurisdiction, 602.
cross petition when proper, 360.
for certiorari, 544.

PETITIONERS,

disqualified to act as commissioners, etc., 405.

PETROLEUM TUBES,

open to public, are a public use, 172.

PIER. (See **WHARF**.)

PLAINTIFF. (See **PARTIES**.)

PLANS. (See **PRELIMINARIES, SURVEYS**.)

PLEA,

propriety of, 390.

PLEASURE DRIVES,

a public use, 166-175.

POLICE POWER,

definition of, 6.

distinguished from eminent domain, 6.

cannot be bargained away, 156.

limitations of the power in respect to property, 156.

what attempted exercises of it amount to a *taking*, 156.

decisions referring drainage laws to, 186.

POLLUTION,

of water a taking, 65, 90.

of the atmosphere a taking, 152.

PONDS. (See **LAKES AND PONDS**.)

POSSESSION,

general principles in regard to obtaining, 578.

pending proceedings, 578.

upon a tender or deposite of the damages awarded, 579.

pending an appeal, 580.

upon giving security, 582.

what constitutes a taking of, 583.

of right of way by railroad, whether exclusive, 586.

as affecting the right to abandon proceedings, 655.

what is sufficient, to save the rights acquired by proceedings, 662.

POSTING,

of notice, what is sufficient, 378.

POUND,

use of street for, when enjoined, 637.

POWER OF EMINENT DOMAIN. (See **EMINENT DOMAIN**.)

POWER OF THE STATE,

over private property, 2.

respecting public property, 2.

[THE REFERENCES ARE TO THE SECTIONS.]

PRACTICE, (See APPEAL, AMENDMENT, ASSESSMENT OF DAMAGES, AWARD, COMMISSIONERS, COURTS, JURISDICTION, NOTICE, PARTIES, PETITION, REPORT OR VERDICT.)
may be changed at pleasure of legislature, 245.
right to a jury, 311-312. (See JURY.)
what tribunal is sufficient, 313.
venue of proceedings, 316.
objections to the application.
 general considerations, 386.
 when the application is to a ministerial officer, 387.
 when to a court, 388.
 manner of raising objections apparent upon the face of the papers, 389.
 manner of raising other objections, 390.
 propriety of a plea or answer, 390.
 questioning the legal incorporation of the petitioner, 391.
 controverting a compliance with the conditions imposed by statute, 392.
 denying the necessity of the proposed taking, 393.
 prior proceedings for the same purpose as a bar, 394.
 other objections, 395.
 defences when proceedings instituted by the owner, 396.
 practice in hearing, 397.
 obviating objections by amendment, 398.
 waiver of objections by going to a hearing, 399.
securing the tribunal to assess damages, 400-410.
 appointment of commissioners, 400-404.
 order or warrant for commissioners or jury, 401.
 the writ of ad quod damnum, 402.
 mandamus to compel the appointment of commissioners, 404.
 qualifications of commissioners, etc., 405.
 vacancies in the tribunal, effect of and how filled, 408.
disagreement of special juries, effect of, 409.
the presiding officer of special juries, his qualification duties, etc., 411.
the oath required, 411-414. (See OATH.)
by and before commissioners, 415-423. (See COMMISSIONERS.)
before a jury.
 view of the premises, 424.
 effect to be given thereto, 425.
 right to open and close, 426.
 as to consolidation and separate trials, 427.
 instructions, 428.
when issues may be submitted to arbitration, 429.
of the report or verdict and action thereon, 509-534. (See REPORT OR VERDICT.)
in case of appeals, 535-558. (See APPEALS.)

[THE REFERENCES ARE TO THE SECTIONS.]

PRELIMINARIES, (See ATTEMPT TO AGREE.)

- designating the property, 307.
- maps, plans, surveys etc., 307.
- when an ordinance, resolution or vote of a corporate body is required, 308.
- when a previous refusal of some other tribunal is essential, 309.
- petition or recommendation when required, 310.
- an estimate of cost when required, 310.
- miscellaneous decisions, 310.

PRELIMINARY SURVEYS,

- entry for, not a taking, 145.

PRESUMPTION,

- as to damages included in the award, 564-575. (See AWARD OR JUDGMENT.)

PRIORITY OF RIGHT,

- to appropriate specific property, 305-306. (See APPROPRIATION OF PROPERTY.)

PRIVATE ROADS,

- whether a public use, 167.
- authority to open strictly construed, 256.
- cannot be laid along a public road, 270.

PRIVATE STREAMS. (See STREAMS.)

PRIVATE USE, (See PUBLIC USE.)

- taking for, unauthorized, 157.

PROFITS,

- of business, whether may be considered in estimating damages, 487.

PROOF,

- burden of, 426-432.
- of notice, how made, 381.

PROPERTY,

- powers of the State over, 2.
- definition of, 54, 58.
- meaning of the word in the constitution, 55.
- right to flow of streams is, 61.
- right of riparian owners on public waters is, 78.
- in building erected in public waters, 85.
- in oyster-beds, 85.
- of all descriptions subject to the power of eminent domain, 262.

PROCEEDINGS, (See ASSESSMENT OF DAMAGES, AWARD OR JUDGMENT, PRACTICE.)

- power to change mode of, 245.
- effect of repeal or amendment of statutes, 245-247.
- effect of change in constitution, 12.
- effect of change in municipal government, 249.
- cannot be had under acts of one State for damages caused by works in another, 251.

[THE REFERENCES ARE TO THE SECTIONS.]

PROCEEDINGS—*Continued.*

- defective, when may be legalized, 261.
- right to jury trial in, 311-312.
- what tribunal is sufficient, 313.
- nature of, generally, 314.
- whether a "suit," "action," "special proceeding," etc., 314, 536.
- jurisdiction of U. S. courts, 315.
- removal to U. S. courts, 315.
- venue of, 316.
- when quashed on certiorari, 549.
- right to discontinue before completion, 655.
- right to abandon after completion, 656.
- what constitutes an abandonment, 657.
- improvements pending proceedings, 663.
- when enjoined, 646.

PRESCRIPTION,

- right to land for public use may be acquired by, 300.

PRESCRIPTIVE RIGHT,

- of railroad to occupy a street, 120.

PROHIBITIVE LEGISLATION,

- not a taking of private property, 150.

PROSPECTIVE DAMAGES,

- principles with reference to, in making the assessment, 566. (See ASSESSMENT OF DAMAGES.)

PUBLIC, THE,

- rights of in navigable streams, 69, 71.

PUBLIC LANDS,

- persons in possession of, when entitled to compensation, 143, 330.
- are subject to State's power of eminent domain, 264.

PUBLIC USE,

- the question of, a judicial one, 158.
- confusion existing as to the meaning of the words, 159.
- use may be public though local or limited, 161.
- the question of, not affected by the agency employed, 160.
- nor by the necessity or lack of necessity for the taking, 162.
- the words "public use" a limitation, 163.
- doctrines of the cases stated, 164.
- proper construction of the words, 165.
- highways of all kinds are 166.
- when private roads are, 167.
- toll roads, bridges and ferries, 168.
- canals to be used as highways, 169.
- canals for irrigation and mining, 169.
- railroads and their necessary appurtenances, 170.
- tenement houses for employes not, 170.
- lateral railroads, 171.

[THE REFERENCES ARE TO THE SECTIONS.]

PUBLIC USE—*Continued.*

- telegraph and telephone lines, 172.
- petroleum tube lines, 172.
- sewers, gas and water supply, 173.
- buildings for the transaction of the public business, 174.
- public schools, markets, alms-houses, 174.
- parks and pleasure drives, 175.
- cemeteries, 176.
- improvement of navigation, 177.
- booms, 71 n. 9, 177.
- whether mills and water power are, 178–183.
- whether development of mines is, 184.
- drainage of wet and overflowed lands, 185–199.
- levees, dikes, etc., to prevent the overflow of land, 200.
- promotion of the public health is, 201.
- works for irrigation are, 202.
- property taken for the use of the United States is, 203.
- miscellaneous cases of taking held not for public use, 205.
- combination of public and private use in the same act or proceeding, 206.

PUBLICATION,

- of notice, what is sufficient, 878.

QUALIFICATIONS,

- of commissioners, etc., 405.

RAILROAD,

- rights of, as a riparian proprietor, 62 n. 3.
- cannot be constructed below high water mark without compensation, 84.
- liability for interfering with surface water, 89.
- in streets, not a legitimate use, 111.
- right to compensation generally, 112.
 - when fee in abutting owner, 113.
 - when fee in public, 114, 115.
- authority to occupy, how granted, 116.
 - and construed, 117.
- measure of damages for, 121.
- when owner estopped to claim damages for, 120.
- liability to municipality for, 119.
- statutes giving damages for, 219.
- depreciation caused by, is damage or injury within constitutions, 225.
- across highways, right to compensation, 118.
- exclusive right to maintain, how violated, 139.
- may be compelled to execute works for the public safety and welfare, 156.
- are a public use, 170, 171.

[THE REFERENCES ARE TO THE SECTIONS.]

RAILROAD—Continued.

- construction of acts as to location of, 255, 256, 280.
- power to change location of, 258.
- when property of, may be taken for highways, 266.
 - for another railroad, 267, 268, 269.
 - for canal, ditch, park, telegraph, etc., 269.
- when may take property already devoted to public use, 270, 272.
- contracts for right of way,
 - sufficiency as to description, 290.
 - who competent to make, 289.
 - construction of, 299.
- priority of right to appropriate specific property, 306.
- what constitutes a completed location, 306.
- measure of damages when one road crosses another, 489.
 - when one road takes use of another's tracks, 490.
 - when a highway crosses a railroad, 491.
 - when laid across or along a turnpike, 492.
 - when laid along a public street, 493.
- liability for additional damages, 564–577. (See **AWARD OR JUDGMENT.**)
- must not interfere with rights of adjoining proprietors, 584.
- subject to maxim *sic utere tuo ut alienum non laedas*, 585.
- whether its possession of right of way exclusive, 586.
- right to trees, herbage, materials, etc., on right of way, 587.
- right to transfer property and franchises, 594.
- effect of repeal of charter of, 594.
- right to remove improvements in case of abandonment, 598.
- no right to encroach beyond land taken, 599.
- when enjoined from laying or operating tracks in streets, 635.
 - from using street for depot or platform, 637.
 - from infringing another company's exclusive right, 642.
 - from crossing another road, 644.
- when ejectment will lie against railroad in street, 647.
- may be compelled to restore highway at crossing, 653.

RECOMMITTALS,

- of the reports of commissioners, etc., 530.

RECORD,

- what it should show generally, 518–604.
 - as to notice, 382.
 - as to the qualifications of commissioners, 406.
 - as to the oath taken, 413.
- when sufficient collaterally, 600–606. (See **COLLATERAL ATTACK.**)
- parol evidence to aid or impeach, 605.

RECORDING,

- of the report or verdict, what constitutes, 518.

[THE REFERENCES ARE TO THE SECTIONS.]

REFERENCE,

to ascertain rights in damages deposited, 616.

REHEARING,

before commissioners, etc., 423, 530.

RELEASE,

of damages, what amounts to, 294.

by married woman, 289.

by owner, effect of, 294, 396.

REMEDIES,

for the unlawful occupation of street by a railroad, 116.

under statutes giving damages, 207, 208.

for a change of grade, 210, 213.

on contracts with parties condemning, the usual remedies lie, 296.

when the statutory remedy is exclusive, 607, 624.

when not exclusive, 608.

for the recovery of just compensation,

by action on the award or judgment, 609.

defences to such action, 610.

when the damages are payable from an assessment of benefits, 611.

in case of non-entry or abandonment of the taking, 612.

by mandamus to compel payment, 613.

to compel an assessment of damages, 614.

by bill in equity for the same purpose, 615.

by enjoining use or possession until damages are paid, 618, 631.

by suit to abate dam unless damages paid, 619.

by enforcing claim as a vendor's lien, 620.

or against those claiming under the party condemning, 621, 622.

by common law suit for value of land appropriated, 623.

to obtain damages which have been deposited, 616.

upon bonds given to secure damages, 617.

for property damaged, injured or injuriously affected, 624, 625.

for damages by negligence, 651.

in case of conflicting claims to the damages awarded, 627.

of mortgagees of the land taken, 628.

of the owners of other liens and interests, 629.

of an assignee of the damages awarded, 630.

inequity on account of error, mistake, new evidence, etc. 652.

for a wrongful interference with private rights by injunction, 631-646. (See INJUNCTION.)

by ejectment, 647, 648.

by action on the case, 654.

by action of trespass, 649.

by action of forcible entry and detainer, 654.

by mandamus when proper, 650.

[THE REFERENCES ARE TO THE SECTIONS.]

RENT, (See LANDLORD AND TENANT,) apportionment of, 483.

REMOVALS,

right of, to U. S. courts, 315.

REPEAL, (See STATUTES.)

of railroad charter, effect upon right of way, 594.

REPORT OR VERDICT.

power of commissioners to reconsider or amend, 423.

not competent evidence of value, 449.

requisites generally, 509, 513.

should not reserve easements or require things to be done in lieu of money, 505.

describing the property taken or location of the improvement, 510, 511.

what is a sufficient finding on the question of damages, 512.

on the question of necessity or public utility, 513.

whether the award should be joint or several, 514.

describing the owners of property taken or affected, 514.]

conditional and alternative awards, 516.

time of making extensions, etc, 517.

recording of, 518.

confirmation of, by non-judicial bodies, 519.

by courts, general principles, 520.

what are sufficient grounds for setting aside, in general, 520, 521.

irregularities on the part of the commissioners, 522.

accident, mistake or error of judgment, 523.

inadequate or excessive damages, 524.

departure from the petition in laying out a highway, 525.

miscellaneous grounds of objection, 526.

the time and manner of presenting objections, 527.

practice in hearing objections, 528.

when objectors are estopped, 531.

the order confirming its form and effect, 532.

power of court to amend or modify or confirm in part, 529.

when order of confirmation may be set aside, 534.

form of judgment to be entered on the verdict of a jury, 533.

rehearings, recommittals, reviews, etc., 530.

effect of delay in asking for confirmation, 526.

RES ADJUDICATA, 394.

RESOLUTION. (See ORDINANCE.)

REVERSION,

of lands taken for public use, 596, 597.

right to improvements in case of, 598.

REVERSIONERS,

as parties, 326.

REVIEW OF PROCEEDINGS. (See APPEAL, CERTIORARI.)

[THE REFERENCES ARE TO THE SECTIONS.]

REVIEWS, 530.

RHODE ISLAND.

constitutional provisions of, 45.

RIGHTS IN THE PROPERTY CONDEMNED,

in land taken for railroad right of way, 584, 586.

maxim sic utere tuo ut alienum non laedas applies, 585.

 right to trees, herbage, materials, etc., 587.

in property taken for other railroad uses, 583.

in land taken for highways, right of the public, and owner of the fee generally, 589.

 right to trees, herbage, materials, etc., 590.

in land of turnpike companies, 591.

in land taken for other uses, 592.

when fee taken, 593.

transfers by the party condemning, 594.

forced sales by creditors, 595.

reversion when public use abandoned, 596.

what amounts to an abandonment, 597.

rights limited to land taken, 599.

right to take possession, 578-583. (See **Possession**.)

RIPARIAN RIGHTS,

on private navigable streams, 69.

are subject to right of public to improve navigation, 71.

on public navigable streams, 73.

in public waters, 77-83.

 enumeration of, 83.

 are property, 78.

 injury to a taking, 81, 84, 85.

injunction to prevent an interference with, 641.

of city, in a stream, 62.

of railroad company in stream crossed, 62 n. 3.

right to construct booms, 71.

RIVER, (See **STREAMS**.)

SALES,

 proof of, when competent, 443, 445.

SCHOOLS,

 a public use, 174.

 when property of, may be taken for other uses, 272.

SECURITY,

 what is sufficient, to satisfy the constitution, 458.

 possession upon giving, 582.

SEEPING. (See **PERCOLATION**.)

SERVICE,

 of notice, how made, 378.

SET-OFF,

 of assessment of benefits in suit on an award of damages, 610.

[THE REFERENCES ARE TO THE SECTIONS.]

SEWER,

 damages from insufficient, 86.

 city may not discharge upon private property, 86, 641. (See IN. JUNCTION.)

 may be constructed in streets without compensation, 127.

 a public use, 173.

 right to discharge into stream, 65.

SIC UTERO TUO UT ALIENUM NON LÆDAS,

 applies to proprietors of lands taken for public use, 566, 585.

SIGNING,

 of petition, 345-347.

 of notice, 373.

SMOKE,

 injury by, is damage within constitution, 230.

SOUTH CAROLINA,

 constitutional provisions of, 46.

SPECIAL LAWS. (See STATUTES.)

SPECIFIC PERFORMANCE,

 of agreements to convey, 296.

 to build depots, fences, crossings, etc., 296.

 of oral agreement when partly performed, 298.

 bill in nature of, to compel assessment of damages, 615.

SPECIAL ASSESSMENTS,

 distinguished from eminent domain, 5.

STATUTE OF FRAUDS,

 applies to agreements for right of way, etc., 298.

STATUTES, (See AUTHORITY TO CONDEMN, LEGISLATURE.)

 construction of, giving damages for change of grade, 207-218.

 giving damages for railroads in streets, 219.

 in other cases, 220.

 as to authority to condemn, 240.

 as to location, 255-258.

 as to the estate or interest which may be taken, 278.

 when the provisions of one statute are adopted by another or extended to another jurisdiction, 260.

 as to appeals, 552.

 relating to procedure and practice may be changed at pleasure of legislature, 245.

 imposing additional liabilities, validity of, 246.

 effect of repeal of, after damages assessed, 247.

 on pending proceedings, 247.

 expiration of, effect on pending proceedings, 247.

 repeal of, by implication, 248.

 conflict between general and special laws, 248.

 have no extra territorial effect, 251.

 giving naked authority to condemn whether available, 252.

[THE REFERENCES ARE TO THE SECTIONS.]

STATUTES—*Continued.*

- giving authority to condemn must be strictly pursued, 253.
- must be strictly construed, 254.
- must provide for compensation, 452.
- legalizing defective proceedings, 261.
- as to benefits and measure of damages, 473.
- making decision final and conclusive, effect of as to appeals, 536.
- opening proceedings for review, 558.
- giving a remedy for damages not foreseen and estimated, 577.
- permitting possession upon a tender or deposit of the damages awarded, 579.

STOCKHOLDERS,

- whether disqualified to act as commissioners, 405.

STEAM,

- pipes for distribution of, may be laid in streets, 130.

STREAMS, (See RIPARIAN RIGHTS, TAKING, WATERS.)

- definition and classification of, 60.

- title to the bed of, 60.

- rights in the flow of, 61.

- artificial, rights in, 62 n. 16.

- obstructing or diverting water of, a taking, 62.

- increasing flow of, a taking, 63.

- rights in water added to, 63.

- reasonable use of, a question of fact, 64 n. 1.

- no right to render current irregular, 64.

- pollution of, a taking, 65.

- prescriptive right to foul, 65.

- changing current by works in, upon or across, 66, 101.

- embankment preventing overflow on one side, 66.

- effect of authority to bridge, 66.

- damages by extraordinary floods and ice gorges, 67 n. 10.

- works which set back the water, 67.

- making private stream public or navigable, 68.

- rights in private navigable streams, 69.

- closing one of two channels of, 71 n. 4.

- public, what are, 72.

- rights of riparian owners on, 73. (See RIPARIAN OWNERS.)

- interfering with flow of, a taking, 74.

- damage to authorized works in, 75.

- right to protection of natural barriers against overflow of, 91.

- damages by interfering with, when presumed to be included in the award, 571.

- right of railroad to take water from stream crossed, 585.

STREETS AND HIGHWAYS, (See PRIVATE ROADS, TAKING.)

- damages from change of grade, 92-109. (See CHANGE OF GRADE.)

- rights of abutting owners on, 100, 114, 122.

[THE REFERENCES ARE TO THE SECTIONS.]

STREETS AND HIGHWAYS—*Continued.*

- railroads not a legitimate use of, 111.
- right to compensation for railroads in, 112-125. (See RAILROADS.)
- elevated railroads in, not a legitimate use, 123.
- horse railroads in, whether a legitimate use, 124.
- what uses of, are legitimate, 126.
- may be used, and without compensation, for sewers and drains, 127.
 - for water pipes, 128.
 - for gas pipes, 129.
 - for distributing steam, electricity, etc., for general consumption, 130.
 - for cistern for sprinkling, 133.
 - for stationary street lamps, fire plugs, drinking fountains, etc., 133.
- may not be used without compensation, for telegraph or telephone lines, 131.
 - for markets, 132.
 - for a jail or lock-up, 133.
 - for a pound or hack stand, 133.
- damages from tunnel or causeway in, 109.
- liability for changes in relative width of sidewalk and roadway, 109.
- vacation of, whether a taking, 134.
- when taken for turnpike, owner of fee not entitled to compensation, 141.
- highway adjacent to, but not taking one's land, whether a taking, 148.
- are a public use, 166.
 - though they accommodate but one family, 166.
 - or are cul-de-sacs, 166.
 - or are for pleasure driving, 166.
 - or though expense is paid by private parties, 166.
- whether they shall be laid out, not a judicial question, 166, 239.
- statutes giving damages for railroads in streets, 219.
- depreciation caused by railroads in, is damage or injury within constitution, 225.
- construction of acts as to location of, 255, 256.
- when railroad property may be taken for, 266.
- when they may be taken for other public uses, 270.
- sufficiency of ordinance, or resolution to open or widen, 308.
- petition for, when sufficient as to signatures, 346, 347.
 - as to description of location, 350-352.
- joinder of different improvements in one proceeding, 359.
- description of location in the report or verdict, 510, 511.
- the way laid out must correspond with the petition, 525.
- measure of damages in various proceedings connected with, 491, 493, 494. (See ASSESSMENT OF DAMAGES.)

[THE REFERENCES ARE TO THE SECTIONS.]

STREETS AND HIGHWAYS—*Continued.*

- damages by bringing street to grade to be included in assessment for land taken, 570.
- rights of the public and owner of the fee generally, 589.
- right to trees, herbage, materials, etc., 133, 590.
- injunction to prevent illegal use of, 635-638. (See **INJUNCTION.**)
 - to prevent change of grade, 647.
- when owner of fee may maintain ejectment, 647.
 - when trespass, 649.

SUPPORT, RIGHT OF,

- abutting owner has, in soil of street, 101.
- interference with, a taking, 151, 585.
- damages by interfering with, whether presumed to be included in the award, 569.

SUBTERRANEAN WATERS,

- rights respecting, 90.
- damages by interfering with, whether a taking, 90.
 - whether included in the award, 572.

SUFFICIENT CAUSE,

- definition of, 520.

SUPERSEDEAS,

- when writ of certiorari operates as, 546.

SUPREME COURT,

- when appeals lie to, in condemnation proceedings, 550.
- practice in, 553.

SURFACE WATER,

- rights respecting, 88.
- interfering with such rights, a taking, 88, 89.
- damages by, from grading streets, 103.
- damages by interfering with, whether included in the award, 572.
- railroad must not interfere with adjacent owner's rights respecting, 585.
- and may be enjoined from so doing, 641.

SURVEYORS. (See COMMISSIONERS)

SURVEYS. (See PRELIMINARY SURVEYS.)

- when required as preliminary to proceedings, 307.

SWITCH YARDS,

- land may be taken for, 170.

TAKING, (See APPROPRIATION OF PROPERTY, "DAMAGED.")

- what constitutes, general principles, 53-56.

- changes which the law has undergone, 57.

- leading cases, 58, 59.

- the question considered with reference to interfering with flow of stream, 61, 70, 74, 104, 571.
- increasing flow of stream, 63.
- interfering with regularity of flow, 64.

[THE REFERENCES ARE TO THE SECTIONS.]

TAKING—*Continued.*

- polluting water of stream, 65.
- changing current of stream, 66.
- flooding land, 67, 87.
- damages by improving navigation, 71.
- damage to authorized works on public stream, 75.
- injury to riparian rights, 84, 85.
- cutting off access to public waters, 81, 85.
- interfering with fishery, 85.
- making a private wharf public, 85.
- destroying a fording, 85.
- interfering with flow of surface water, 89, 103, 572.
- pollution of subterranean waters, 90, 572.
- interfering with natural barrier against water, 91.
- interfering with right of support, 101, 151, 569.
- change of street grade, 94–109, 570.
- railroads in streets, 110–125.
 - elevated railroads in streets, 122, 123.
 - horse railroads in streets, 124, 125.
 - sewers and drains in streets, 127.
 - water pipes in streets, 128.
 - gas pipes in street, 129.
- telegraph or telephone lines in streets, 131.
- use of street for markets, 132.
- other uses of streets, 133.
- vacating streets, 134.
- impairing franchises, 136.
- impairing exclusive franchise, 137.
 - in case of bridges and ferries, 138.
 - in case of turnpikes, railroads, etc., 139.
- a ferry landing on a highway, 141.
- a railroad over a turnpike, 141.
 - or over a canal bank, 141.
- a line of telegraph on a railroad right of way, 141.
- laying out turnpike as a public way, 141.
- change of use or additional use, 140–141.
- imposing a different or additional burden on land, 141.
- impairing or destroying easements, 142.
- interfering with one in the wrongful possession of public lands, 143.
- mapping into streets and blocks for future improvement, 144.
- entry for preliminary surveys, 145.
- necessary entries, 145.
- entry for U. S. coast survey, 145.
- injuries by blasting, 146.
- injury to business, 147.

[THE REFERENCES ARE TO THE SECTIONS.]

TAKING—Continued.

- highways laid out adjacent to, but not taking one's land, 148.
- interfering with right of exclusion, 149.
- passing under land by tunnel, 149.
 - or over by wires, etc., 149.
- levees in Louisiana, 150.
- polluting the atmosphere, 152.
- damages from negligence, 154.
- damages by construction of works, 507, 568.
- various exercises of the taxing power, 155.
 - of the police power, 156.
- establishing fire limits, 156.
- abating nuisances, 156.
- prohibiting noxious trades, 156.
- various miscellaneous cases, 153.

by the State, what constitutes, 454.

TAX,

- definition of, 4.
- distinguished from exercise of eminent domain, 4.
- whether a taking in any case, 155.

TAX-PAYERS,

- whether disqualified to act as commissioners, 405.

TELEGRAPH AND TELEPHONE,

- a public use, 172.
- in streets—whether a taking, 131.
 - whether a *damage* within constitution, 226.
 - injunction to prevent, 637.
- on railroad right of way, whether a taking, 141, 269.
- when may be laid along turnpike, 271.
- rights of owner of fee of land taken for, 592.

TENANTS IN COMMON. (See JOINT TENANTS.)

TENNESSEE,

- constitutional provision of, 47.

TERMINI. (See LOCATION.)

TERRITORY,

- does not possess power of eminent domain, 3 n. 7.
- unless by grant, 237.

TEXAS,

- constitutional provision of, 48.

TITLE,

- to the bed of streams, 60.
- to lakes and ponds, 76.
- statement of, in petition, 355.
- whether owner must prove, 440.
- what is sufficient proof of, 442.
- estoppel to deny, 441.

[THE REFERENCES ARE TO THE SECTIONS.]

TRACT,

what constitutes an entire tract with reference to the question of damages and benefits, 475.

TRANSFER,

of property held for public use, 594.

not an abandonment of the public use, 597.

by party condemning is subject to claim for compensation, 621.

TOWNS,

as parties, 329.

TOWN MEETINGS,

action of, in laying out highways, 519.

TOWNSHIP ROADS. (See PRIVATE ROADS AND STREETS AND HIGHWAYS.)

TIDE WATERS. (See RIPARIAN RIGHTS, STREAMS, WATERS.)

TIME, (See LIMITATIONS.)

how specified in the notice, 372.

of making compensation, 451-459.

with reference to which damages should be estimated, 477.

of makng the report or verdict, 517.

within which to take appeal or certiorari, 555.

TRESPASS,

action of, for damages under invalid statute, 452.

damages by, whether may be included in assessment of just compensation, 508.

beyond land condemned, actionable, 574.

action of, when it will lie, 649.

TREES,

whether value of, to be considered in estimating damages, 486.

right to, on railroad right of way, 587.

in streets and highways, 590.

removal of, from street, when enjoined, 637.

TRIBUNAL. (See COMMISSIONERS, JURY, PRACTICE, PROCEEDINGS.)

TRUSTEES,

as parties, 321.

with power of sale entitled to damages awarded, 616.

TUNNEL,

in street, whether a taking, 109.

under land a taking, 149.

in street, a *damage* within constitution, 226.

TURNPIKE,

liability of, for change of grade, 109.

owner of fee entitled to compensation for railroad on, 113.

exclusive right to maintain, how violated, 139.

protected by injunction, 642.

a public use, 168.

cannot be taken for highway without express authority, 271.

[THE REFERENCES ARE TO THE SECTIONS.]

TURNPIKE—*Continued.*

- when made a public road owner of fee not entitled to compensation, 141.
- measure of damages when a railroad is laid on, 492.
- rights of the owner of the fee and of the franchise, 591.
- right to transfer property and franchises, 594.

UNITED STATES,

- constitutional provisions of as to eminent domain, 14.
- do not apply to the States, 11.
- jurisdiction of the courts of, 315.

USE OF THE PROPERTY TAKEN. (See RIGHTS IN THE PROPERTY CONDEMNED.)

VACANCIES,

- in the tribunal, effect of and how filled, 408.

VACATION,

- of streets, right of abutting owners to damages, 134.

VALUE. (See MARKET VALUE.)

VERPICT. (See REPORT OR VERDICT.)

VERIFICATION,

- of the petition, 345.

VENDOR'S LIEN,

- enforcing claim for damages as, 620, 621.

VENUE,

- of proceedings, 316.

VERMONT,

- constitutional provisions of, 49.

VIADUCTS. (See STREETS AND HIGHWAYS.)

- in streets, measure of damages for, 495.

VIBRATIONS,

- whether a recovery may be had for damages by, 230.

VIEW OF THE PREMISES,

- when granted and how conducted, 424.

- effect to be given thereto, 425.

VIEWERS. (See COMMISSIONERS.)

VILLAGES. (See MUNICIPAL CORPORATIONS.)

VIRGINIA,

- constitutional provisions of, 50.

WAIVER. (See ESTOPPEL.)

- of defective oath, 414.

- of defects in petition, 362.

- of notice by appearance or otherwise, 379.

- of plea in bar by tender of damages, 396.

- of objections by going to a hearing on the merits, 399.

- of objections to commissioners, jurors, etc., 407.

- of defective notice by taking an appeal, 541.

[THE REFERENCES ARE TO THE SECTIONS.]

WAR POWER,

- definition of, 8.
- distinguished from eminent domain, 8.

WARRANT,

- to summon commissioners or jury, 401.

WATER POWER. (See MILLS AND WATER POWER.)

WATER WORKS.

- pipes for, may be laid in streets without compensation, 128.

- a public use, 173.

- cannot occupy street for reservoir, 270.

- may be taken for other public uses, 272.

- transfer of property and franchises of, 594.

WATERS, (See LAKES AND PONDS, RIPARIAN RIGHTS, STREAMS, SURFACE WATERS, SUBTERRANEAN WATERS.)

- taking of, by percolation, 62.

- flooding with, is a taking, 67.

- rights of riparian owners in public, 79-88. (See RIPARIAN RIGHTS.)

- right to protection of natural barriers against overflow of, 91.

- injunction to prevent an interference with, 641. (See INJUNCTION.)

WAYS. (See CANALS, RAILROADS, STREETS, HIGHWAYS, TURNPIKES.)

WEST VIRGINIA,

- constitutional provisions of, 51.

WHARF,

- right to construct to navigable waters, 79, 80, 83.

- converting a private wharf into a public one held not a taking, 85.

WHAT CONSTITUTES A TAKING. (See TAKING.)

WHAT MAY BE TAKEN, (See APPROPRIATION OF PROPERTY.)

- under particular acts, 255, 256.

WIFE. (See HUSBAND AND WIFE.)

WISCONSIN,

- constitutional provisions of, 52.

WITNESSES, (See EVIDENCE.)

- competency of, generally, 433.

- who disqualified, 433.

- limiting number of, 434.

- opinions of, as to value, 435.

- as to amount of damages or benefits, 436.

- who competent to give such opinions, 437.

- may be asked how many times they have testified for the party calling them, 450.

WRIT,

- of ad quod damnum, 402.

WRIT OF CERTIORARI. (See CERTIORARI.)

WRIT OF ERROR,

- when it lies in condemnation proceedings, 554.

YARDS AND ENCLOSURES,

- construction of statutes prohibiting the taking of, 283, 284.

